

ITALY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Italy should remain on the Watch List in 2009.

Executive Summary: The continued growth of Internet piracy in Italy has become the top concern for most of the copyright industries in Italy in 2008. At the same time, hard goods piracy remains among the highest in Western Europe. End user piracy of business software remains a major issue as well. Enforcement authorities continue to be generally cooperative in conducting raids, but a lax attitude by the courts, generally non-deterrent penalties, and inadequate legislation have made it difficult for copyright owners to secure effective enforcement and to lower piracy rates and losses. Enforcement deficiencies are particularly acute in the fight against Internet piracy, with right owners having to rely almost completely on a few criminal actions taken by non-technically trained law enforcement. Civil enforcement by rights holders against direct P2P infringers is rendered virtually impossible due to the government's restrictive interpretation of privacy laws and the civil courts' refusal to order the release by ISPs of the identity of their subscribers engaged in significant infringing activity. While ISPs are generally cooperative in taking down the few pirate websites located in Italy, rarely is action taken against foreign websites and against major uploaders in the filesharing (P2P) environment. There is some hope offered by recent reports that a government-sponsored steering committee will initiate hearings in 2009 on P2P piracy with a possible bill to follow requiring ISPs to forward rights holder notices and to suspend and even terminate subscriber accounts of repeat infringers. This could, of course, be supplemented by additional, voluntary cooperation between ISPs and rights holders.

Priority actions to be taken in 2009: IIPA requests the following actions by the government of Italy, which, if taken, would result in the most significant commercial benefits to the copyright industries:

Enforcement

- Take steps to encourage the active cooperation of Internet service providers with rights holders to prevent the use of proprietary networks for the commission of infringing acts, including but not limited to requiring the termination of accounts of repeat infringers.
- 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 and end user piracy of business software.
- 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.
- Clarify the ability of rights holders to gather non-personally identifying IP addresses through appropriate tools, and consistent with the European Court of Justice (ECJ) decision in the *Promusicae v. Telefonica* case, provide appropriate mechanisms to facilitate the ability of rights holders to obtain the necessary information related to such IP addresses in order to take appropriate civil actions to protect their rights in the online environment (which may necessitate legislative reform).
- 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, including streamlining procedures for calling of witnesses, etc.

Legislation

- Discourage legislative proposals that may undercut copyright protection.
- Repeal the 2005 Cirelli Law and the 2006 Pecorella Law.
- Amend the copyright law to remove "remote videorecording systems" from the levy system, providing exclusive rights.
- Eliminate the stickering requirement, at least with respect to business and entertainment software, and recorded music.



- Amend the copyright law to eliminate the need for “relevant authorities” to order ISP takedowns and implement the EU E-Commerce Directive Article 14 requirement providing that ISPs are immune from liability only if they do not know or have reason to know that they are dealing with infringing content.

ITALY
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2004-2008¹

INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level								
Business Software ²	1,242.0	49%	1,067.0	49%	729.0	51%	812.0	53%	779.0	50%
Entertainment Software ³	NA	NA	817.0	64%	647.7	40%	639.2	30%	NA	34%
Sound Recordings & Musical Compositions ⁴	350.0	25%	45.0	23%	48.0	27%	40.0	20%	45.0	23%
Books	NA	NA	20.0	NA	20.0	NA	20.0	NA	23.0	NA
Motion Pictures ⁵	NA	NA	NA	NA	NA	NA	161.0	22%	160.0	15%
TOTALS	1,592.0		1,949.0		1,444.7		1,672.2		1,007.0	

COPYRIGHT PIRACY IN ITALY

Internet piracy generally: All copyright industries report an increase in Internet piracy in 2008, making this issue a critical priority for US bilateral engagement in 2009. Broadband penetration continues to grow⁶ and the lack of cooperation by ISPs (discussed in the Enforcement section below) and inadequate legislation/enforcement have combined to make the online piracy situation worse than in 2007. While uploading of infringing content is illegal under the 2004-5 Urbani law, it is a common misperception that downloading is not infringing and that it is not harmful to the creative community. There is a similar misperception that it is not an infringement to provide links to infringing content on foreign pirate sites. Linking of this kind is indeed illegal under recent case law; nevertheless there has also been significant growth in such linking sites, which are particularly damaging to the music and movie industries.

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. For information on the history of Italy under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2009SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.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 2008 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Italy, and follow the methodology compiled in the BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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.

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 The piracy rate for 2008 -- 25% -- reflects the market for physical piracy only. The rate of digital (Internet and mobile) piracy is conservatively estimated at over 95% of the digital market. The loss figure represents losses due to both digital and physical piracy.

⁵ MPAA's trade losses and piracy levels for 2006, 2007 and 2008 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.

⁶ There are an estimated 34.7 million Internet users in Italy, almost a 60% penetration rate. <http://www.internetworldstats.com/stats4.htm#europe>. Broadband subscribers are 11.8 million as of 3Q 2008, the 8th largest in the world. <http://point-topic.com/cgi-bin/showdocument.asp?Doc=dslanalysis/bbaq308.htm>

Most, if not all, copyright industries agree that the largest Internet piracy problem is illegal P2P filesharing, but that the number of linking sites to mainly foreign cyberlocker sites is mushrooming, enabling fast downloads of large files. Mobile device piracy, particularly for music and videogames, is also growing rapidly.

State of ISP cooperation. Major ISPs have generally been cooperative with respect to take down requests for websites and auction sites hosting infringing material. But the take down process is cumbersome as Italian law may be interpreted as requiring that takedown procedures be subject to a prior order from a "judicial or administrative" body.

It is a dramatically different proposition with respect to P2P piracy as ISPs have no incentive to cooperate with rights holders with respect to material transiting their networks. Even the mere passing forward to notices of infringement to potentially infringing subscribers is routinely refused. Such an environment makes private sector enforcement efforts particularly difficult, if not impossible in light of a 2008 decision rendered by the Garante per la Protezione dei Dati Personali (Data Protection Authority). In conjunction with the so-called Peppermint Case, the Data Protection Authority ruled that systematic monitoring of P2P users, and the collection of their IP addresses is an illegal activity under Italy's law on the protection of personal data despite the fact that IP addresses do not personally identify the individual. In the absence of civil remedies (i.e., the ability of rights holders to undertake actions on their own behalf), Internet piracy enforcement necessary falls to the criminal authorities. Unfortunately, criminal authorities do not possess the necessary technical expertise or experience to successfully and efficiently pursue online piracy investigations.

ISP cooperation is, thus, essential to effectively addressing P2P piracy. Although private sector negotiations are ongoing, progress appears slow and it is unlikely that a cooperative solution/agreement will be in place any time soon in the absence of a government presence that compels a reasonable and effective result.

Online piracy of music and sound recordings: The recording industry reports that online music piracy accounts for losses far higher than it generates in legitimate sales -- or losses of over \$300 million in 2008. Last year, the local recording industry associations, FIMI and FPM reported that more than 7 million people use 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. While piracy of physical product still remains around 25% of the market, the level of Internet piracy is estimated to be 95%. FPM studies show there was a further decrease of the legitimate market of about 36% due to online piracy. The estimated losses due to music piracy, both of physical product and on the Internet, were \$350 million in 2008

Online piracy of entertainment software: Entertainment software publishers reported in 2008 that Italy, along with Spain and France, consistently remains among the top five countries in which infringement of videogames occurs. BitTorrent and eDonkey continue to be the top two P2P protocols in Italy. In industry studies of infringing P2P activity for 13 top video game titles over a 4-week period, Italy placed number one in overall game download volume, and file sharers in Italy accounted for 17.2% of global game downloads made during the study period (more than 1,100,000 copies). For a popular AAA racing title alone, Italy had close to 590,000 downloads. Telecom Italia's networks were implicated in 11.6% of the completed downloads observed globally, making it the world's most heavily utilized ISP in the course of the industry's study. (Another Italian ISP, IUNet, was the sixth most heavily utilized ISP) It was also found that with greater incidence of video game piracy through P2P networks, there appeared to be a corresponding and dramatic decrease in legitimate sales of entertainment software. Individual member company online monitoring confirms these trends.

The industry is also plagued by the easy availability online of circumvention devices, such as mod chips. This situation was exacerbated by a court decision in Bolzano, Italy, holding that mod chips were not illegal under Italian legislation implementing the EU Copyright Directive. Fortunately, the Supreme Court in 2006 reversed this court decision and found that circumvention devices are illegal under Italian law,⁷ but the damage was done and continues.

Online piracy of audiovisual works: Cyberlocker sites like MEGAVIDEO and links to them have caused a dramatic worsening in online piracy of motion pictures in Italy. The Motion Picture Association (MPA) reports that the video market in Italy declined by 20%, much of this due to online piracy. The industry faces a particular problem -- the illicit recording of the Italian

⁷ *Corte di Cassazione*, Judgment no. 1602 General Register No. 35598/2006.

language audio track in theaters immediately following a film's release. The audio track is then added to good quality pirate video found on the Internet. The local video association, FAPAV, estimates that 80% of the films released theatrically in Italy can be found in the Italian language on the Internet within two days of that release.

Online piracy of business software: The Internet is contributing significantly to the software industry largest source of piracy losses -- unauthorized use of software in business -- by becoming a growing source for those businesses obtaining illegal copies of productivity software. Such software is available via illegal filesharing and from websites, cyberlockers and auction sites. The Internet is also a major source for fake certificates of authenticity (COAs), manuals and packaging.

Online piracy of books and journals: The publishing industry reports significant increases in online piracy of books and journals in 2008, affecting foreign and local publishers alike. Most infringing files are scans of paper originals, but publishers also report an alarming increase in the number of digital primary and supplementary materials made available on P2P networks, offering CD-ROMS that come with dictionaries as a prime example. This surge is likely to continue in 2009, without concerted action by authorities and cooperation of relevant parties.

Piracy of physical product generally: Italy continues to have the highest level of piracy of physical (or hard) goods in all of Western Europe. Organized criminal groups (mainly in southern Italy) dominate the hard goods market for movies, recorded music, entertainment software and counterfeit copies of business software, from production to distribution, often using illegal immigrant networks to sell their products. For example, 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. Pirate and counterfeit 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.

Business software: The level of piracy of business applications software by corporate end-users—the major cause of losses to the business software industry in Italy—remains among the highest in Europe. 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.⁸ In addition, business software is locally burned onto CD-Rs or imported, often from China, and sold in Italy or transshipped to other EU countries. The sale of counterfeit software products by street vendors continues, often involving people coming from China and from Arab nations who are exploited by criminal organizations to market pirate product. Preliminary estimated U.S. trade losses in Italy due to business software piracy in 2008 rose to \$1.24 billion, with a piracy level of 49%.

Entertainment software: Hard goods piracy appears to be in decline, except in Southern Italy where it still remains a significant problem. The decline, however, appears to be due to the alarming increase in Internet piracy, as noted above, rather than increased law enforcement efforts. Pirated goods still continue to be imported from Asia, destined not only for Italy but also other European markets. The prevalence of circumvention devices, however, remains a critical problem in the country. Unfortunately, law enforcement authorities have done little to address it. These devices appear to be imported primarily from San Marino, considered to be the most active exporter in the region. ESA member companies continue to pursue vendors of such devices and circumvention services civilly, but criminal prosecutions against those engaged in the trafficking of circumvention devices and provision of circumvention services should be undertaken to serve as a better deterrent.

Music and sound recordings: In southern Italy, physical piracy of music and sound recordings remains particularly 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 music on optical discs. Also, the failure to pay for broadcasting and public performance rights for music still remains unacceptably high.

⁸ 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>.

Audiovisual works: MPA also reports no major improvements in the overall piracy situation in Italy during 2008. The problem of sale of pirate DVD-Rs in flea markets and by street vendors continues. Camcording continues as a huge problem (including the illicit taping of audio tracks in theaters to combine them with video sourced primarily off the Internet). In 2006, Italy adopted the first anti-camcording legislation in Europe. 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. 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.

Books and journals: Unauthorized and uncompensated photocopying continued to plague academic publishers during 2008. 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 less consistency with copy shops, which continue unauthorized activities with too little interference. 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.

COPYRIGHT ENFORCEMENT IN ITALY

The overall enforcement system in Italy remains weak and myriad deficiencies have resulted in the inability to obtain effective remedies and deterrent penalties against -- in particular -- online but also hard goods piracy, mainly at the retail level. The responsibility for enforcement is split among at least 19 offices and successive government reorganizations have kept enforcement fragmented. For example, in July 2008 the Office of the High Commissioner for Anti-Piracy was abolished in an efficiency move and its functions transferred to the Trademark Department at the Economic Development Ministry which was then merged with the Communications Ministry. However, its jurisdiction and powers are not yet fully defined. While that restructuring is due to be addressed by the government, it is hoped that one agency will be given overall responsibility for copyright matters. Fortunately the Secretary General in the Office of the Presidency (essentially Chief of Staff), Mauro Masi, is a strong ally and it is hoped that he will be able to be effective in strengthening and rationalizing enforcement in Italy.

Enforcement against Internet piracy: Internet piracy enforcement is severely hampered by (a) lack of cooperation from ISPs due to inadequacies in legislation; (b) difficulties in securing criminal enforcement due again to inadequate legislation and lack of will and training, and (c) the practical unavailability of civil enforcement due to the inability to obtain names of infringers from ISPs resulting from Italy's Privacy Code and March 2008 ruling of the Data Protection Authority. Many of these deficiencies also affect enforcement against hard goods piracy.

Criminal enforcement: The recording, audiovisual, entertainment and business software industries all report continued good cooperation with the Italian police forces (including the Guardia di Finanza (GdF) and the Polizia Postale) during 2008. However, the problem of slow court processes and lack of deterrent penalties overall have limited the deterrent effect of police action and cooperation. Courts regularly underestimate the seriousness of copyright violations and, in some cases, issue unclear or not well reasoned decisions which have disruptive consequences on enforcement generally. It can still take months between a raid and the filing of charges to commence a criminal case in court. Once the case is filed, they often take two to three years or more before final judgment, significantly reducing the deterrent value of increased raiding activity undertaken by the police.⁹ Many Italian judges remain reluctant to impose deterrent sentencing on individuals charged with copyright infringement, especially where a large corporation owns the copyright. This 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. There are no specialized IP criminal courts.

Furthermore, there is a need for more transparency in the investigative and prosecutorial process. Police do not take many *ex officio* actions but when they do, rights holders frequently remain uninformed about the status of the proceedings.

⁹ An entertainment software publisher notes that it has several cases which have been pending with the courts since 2000.

The recording industry, as represented by its local anti-piracy organization, FPM, reports that coordination with Italian enforcement agencies continued on a positive basis. The relationship with local enforcement authorities has gotten better following a specific agreement that was entered into with the Milan and Rome Municipal Police. There were a number of major criminal actions by the GdF to close down major online pirate operations. For example, in July 2008, the GdF closed down Italy's version of ThePirateBay (Sweden's infamous pirate operation), Colombo-BT.org, the largest BitTorrent tracker site in the country. This site helped to make available more than 390,000 music files and 500,000 movie files, including numerous pre-release titles. The site had more than 400,000 registered users and 800,000 unique users access each month. Three men were arrested and charged with criminal copyright infringement. They accepted online "donations" from subscribers. Several computers were seized and two bank accounts frozen. Also in July, the GdF shut down Downrevolution.net, one of the largest pirate music forum sites in Italy, linking 30,000 subscribers. Content was being made available from cyberlocker sites such as Rapidshare.com and Megaupload.com, responsible for 500,000 downloads. Four people were arrested; they were generating revenue from banner advertising. In October 2008, Operation "Music Box" was undertaken by the GdF and involved the arrest of 46 people for unloading infringing MP3 files through P2P services like eMule and Direct Connect++ (15,000 burned CDs were also seized). The raids were conducted in 13 different provinces and 52 desktop computers, two laptops, and 150 hard drives were seized.

Raids also continued against organized crime targets engaged in hard goods music piracy. In March 2008 the Catania, Sicily GdF seized 63 CD burners from an organized crime operation. Two persons were arrested and criminally charged. In May 2008, twelve people from an organized gang were arrested in Naples and Milan and the raids uncovered six pirate factories, using 350 CD burners. More than 70,000 CDs and DVDs were seized, along with 100,000 counterfeit inlay cards.

Inroads were also made against public performance piracy. In April 2008, 11 arrests of nightclub owners and bar managers that failed to pay performance rights fees were made in Florence, Bergamo and other northern Alpine towns. Criminal charges for copyright infringement, tax evasion and health and safety violations were filed. Dozens of computers and more than 50,000 music files were seized.

The total number of anti-piracy raids (for both online and physical piracy) in the music sector was 210, with the seizure of more than 750,000 CD-Rs/DVD-Rs and 845 CD burners. The police also arrested more than 360 individuals.

The business software industry also reports that its relationship with the enforcement authorities remains generally good, particularly with the GdF, which is the primary agency responsible for software piracy enforcement. However, the industry's sense is that the priority given to software piracy enforcement in 2008 diminished somewhat and it describes its relationship with prosecutors as mixed. Judges remain not particularly concerned with criminal enforcement of IPR violations. In 2008, BSA supported two raids against Internet vendors of pirate software seizing 3,490 illegal products worth over \$2.6 million. BSA provided technical assistance to 144 GdF raids on businesses, 97% of which were successful, involving 5,331 unauthorized software products with an appraised value of \$5.5 million. Other raids were carried out by police forces without BSA support or knowledge, though *ex officio* actions tend to be few.

The motion picture industry, through its local anti-piracy organization FAPAV, reports that the police are generally supportive of FAPAV's efforts. Like for other copyright industries, the primary bottleneck to effective is the dismissive attitude of the Italian judges towards piracy in general.

The legal environment and criminal enforcement: Court cases and inadequacies in the underlying statutory law have also undermined effective criminal enforcement, particularly against Internet piracy. For example, the fallout from a Court of Cassation case in 2007¹⁰ continues to affect attitudes toward Internet piracy. The court ruled that the unauthorized uploading of copyrighted movies, music and video games was not a crime if the accused does not obtain a financial gain from his or her act. The Court applied the law that was in effect at the time the uploading was carried out. The law was subsequently changed, and now punishes uploading even if carried out without any financial gain.¹¹ This was misrepresented in the press as "P2P is legal." Industry sought to clarify the decision in the public's mind but the problem lingers to today.

¹⁰ Sentence No. 1872 of January 9, 2007

¹¹ In April 2002, the Court of Turin sentenced two men to respectively four and five years in jail 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

As discussed in the section on legislation below, the 2006 "Pardon" law (and similar actions taken in prior years), granting amnesty for criminal convictions (including for piracy) with jail terms of less than three years, has reinforced the general perception in Italy that the probability of actually being punished is low.

Civil Enforcement: As noted above, civil enforcement against Internet piracy is severely hampered by an interpretation of Italy's Privacy Code made by a Rome High Court in the famous Peppermint cases and a March 2008 ruling of the Data Protection Authority to the effect that use of search tools to gather IP addresses of infringers would violate the Privacy Code.¹² This has severely limited the ability of rights holders to bring civil Internet cases and unless there is a clear legal way to secure such addresses and thereafter the names of subscribers via a civil court order, civil enforcement will be as a practical matter unavailable, since the names of subscribers were not permitted to be made available. Local efforts to reverse this have so far not borne fruit.

BSA continues to use the civil court system for enforcement against business users of unauthorized software. Four civil cases were brought at the end of 2008 resulting in damages of more than \$258,000 in the two cases where the businesses had no licenses whatsoever. BSA also reports that there has been an increasing reluctance of courts to award *ex parte* search orders or to award such orders in a timely fashion. This seriously hampers efforts to take civil action against software infringers.

Specialized civil IPR courts: In late 2002, a law was adopted which would create 12 specialized IPR civil courts. BSA continues to report that some specialized IP Courts do not appear to be keen on receiving software search order requests; and, as noted above, timing to obtain the orders is longer. These 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 (as when the infringement needs the completion of a Court Expert report and the plaintiff requests an injunction or similar remedies).

COPYRIGHT LAW REFORM AND RELATED ISSUES

In early 2007, before the April elections, the Italian Government was considering a number of proposals to reform the copyright law. The various proposals it was considering included:

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

These proposals have stalled or been withdrawn but they show a growing negative attitude toward effect copyright protection, particularly online protection. Amendments that did pass were to Article 70 and to Article 71 *septies* of the copyright

January 2007, a Supreme Court judge overturned the sentence completely, saying their acts were not criminal under the law in effect at the time the act of uploading was carried out, because there was no financial gain to the defendants. This ruling was distorted in certain press accounts, which failed to note that the law had changed. Unfortunately this has added to the already problematic misconception of the public that unauthorized downloading and file-sharing are not illegal.

¹² The Peppermint case was brought by the Germany music publisher Peppermint Jam Records GmbH, and has created a domino effect, on the controversial issue of monitoring P2P networks to acquire IP addresses of infringers. 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 of Italian Internet customers/infringers. The case was based on the use of anti-piracy software managed by the Swiss company, Logistep, on behalf of Peppermint, and the data collected consisted essentially of IP addresses of 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\$424), in exchange for a pledge to refrain from turning the names over to the criminal authorities. There were a number of other similar proceedings brought by Peppermint and a Polish videogame publisher, Techland. While the Rome Court initially sided with the rights holders, in a later injunction proceeding, after intervention by the Data Protection Authority, the court reversed its ruling and denied the rights holders' requests. This eventually led to the March 2008 rule by the Authority that use of such software violated the Italian Privacy Code and the EU privacy directive and the resulting names could not be disclosed.

law. The first provided for the possibility of uploading to the Internet images and sounds without permission or payment, so long as the resolution was low and the purpose was educational. This overbroad exception calls into question Italy's international treaty obligations.

The amendment to Article 71 *septies* extends the private copy levy to "remote videorecording systems" wherein a cable, satellite or other provider of such a service could reproduce audiovisual works on a remote server (presumably at the request of its customer) and then transmit such copy to the customer upon its request for viewing. MPA views this amendment as incompatible with the EU Copyright Directive with respect both to the reproduction and making available right and has sought commission intervention.

Implementation of the EU E-Commerce Directive: In its implementation of the E-Commerce Directive (in Legislative Decree No. 70 of 2003) Italy requires take-down procedures to be available only upon application to, and order from, the "relevant authorities." This requirement for the intervention by an undefined judicial or administrative authority is contrary to Article 14 of the E-Commerce Directive and is hampering cooperation from ISPs in taking down infringing files. Article 14 requires only that the ISP know or have reason to know that an infringement over its facilities exists to be obligated to takedown the infringing content. The anti-piracy associations continue to seek any opportunity to address and amend this crippling deficiency in the law. In the meantime, Internet piracy continues to grow.

Implementation of the EU Enforcement Directive: Italy's implementation of the EU Enforcement Directive provides a number of benefits for civil actions against piracy. These include the right to obtain the names of infringers in civil cases from ISPs upon court order. However, as discussed above, Italy's interpretation of the EU's and its own privacy laws have created a major obstacle by preventing rights holders from using search software to acquire IP addresses of P2P uploaders. Italy should revisit and reverse this decision so that civil enforcement becomes effectively available to rights holders.

Internet Piracy and the Urbani Law Decree (2005): In 2005, Italy amended the Urbani Law Decree of 2004 creating liability for the making available or posting of protected content over the Internet. Specifically, Article 171 of the Copyright Act imposes 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." This covers P2P uploaders who infringe even without purpose of financial gain but the maximum penalty is only €2,065 (US\$2,685). Despite the low penalty, the criminal nature of the violation is preserved, allowing for investigation by the police. Commercial Internet pirates are dealt with more harshly. Under Article 171, anyone who commits such acts for "financial benefit" is liable to a fine of some €15,000 (US\$19,291) and a sentence of 4 years' imprisonment.

Internet piracy and ISP responsibility: On January 14, 2009, the Italian Government announced the establishment of an Antipiracy Committee (Comitato Tecnico Antipirateria) to tackle Internet piracy. This Anti-Piracy Committee comprises mainly heads of cabinets of various Italian ministries and is coordinated by Prof. Mauro Masi (Secretary General of the Presidency of Council of Ministers/PM's Cabinet) with Salvatore Nastasi, Head of the Culture Ministry's cabinet, as the Deputy Coordinator. The content industry is represented on the Committee. The AP Committee is to coordinate of antipiracy activities; research and draft legislative proposals; and, consider and develop non-legislative initiatives, such as voluntary codes of conduct and self-regulation. The AP Committee will shortly initiate hearings with all interested parties, to be scheduled over a period of a couple of months, and subsequently draft a bill and/or propose specific antipiracy initiatives.

Eliminate the SIAE sticker requirement for business and entertainment software and music recordings: This problem remains a major concern for the business and entertainment software industries and, more recently, also for the recording industry. Specifically, Article 181*bis* of Italy's Anti-Piracy law contains an extremely burdensome (and unnecessary, since software is not subject to collective administration of rights) requirement that requires 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.

For the recording industry, the SIAE sticker represents an additional and burdensome level of bureaucracy and extra costs for the commercialization of physical music carriers. The sticker system is not useful in the fight against on-line piracy, which represents around 90% of music consumption today. The sticker is also limiting the free circulation of musical recordings within the EU and puts the recording industry in Italy at a competitive disadvantage with respect to other countries.

BSA has asserted that 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 with a sticker or declared to SIAE. An amendment to Article 171*bis* of the Copyright Law which deals with criminal penalties for software must also be amended if stickering is eliminated for software. The recording industry calls for the complete exclusion of physical carriers of recorded music from the stickering obligation. Entertainment software publishers have also raised concerns with the SIAE labeling requirement, and have similarly requested that the stickering requirement not be made applicable to video game software.

A recent decision by the EU Court of Justice (issued November 8, 2007, in case C-20/05) held that the stickering rule violates EU rules on transparency. In response, the EU Commission requested further clarification on the SIAE labeling requirement from the government. Hearings on the matter were held by the Ministry of Culture, but its response has not yet been issued. It is reported that the government will likely retain the rule but has promised to subsequently discuss and possibly reconsider it. This is an opportunity to eliminate this requirement and it should be taken.

Other deficiencies remain in the enforcement system and should be eliminated. The 2005 “Cirelli Law,” and the 2006 “Pecorella” and “Pardon” Law¹⁴ all have taken their toll by undermining the deterrent effect of the enforcement system.

IPR TRAINING AND PUBLIC AWARENESS

Industry representatives are active in training Italian enforcement officers. The Italian Federation against Music Piracy (FPM) and the local motion picture association, FAPAV conducted a number of trainings in 2008. 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 2008, BSA held a total of 13 trainings. AESVI, the Italian video game publishers’ association, conducted seven anti-piracy training seminars for the Guardia di Finanza in 2008, training approximately 300 law enforcement personnel in seven critical regions in the country. More training efforts are planned for 2009.

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.

¹⁴ A description of these laws is contained in IIPA’s 2008 Special 301 submission at <http://www.iipa.com/rbc/2008/2008SPEC301ITALY.pdf>.