

ITALY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Italy should remain on the Watch List in 2010.

Executive Summary: There was little improvement in the piracy situation in Italy in 2009 and Italy remains a country with a very high level of both physical, digital and end-user piracy. The continued growth of Internet piracy in Italy continues as a top concern for most of the copyright industries and recent studies show that digital piracy in Italy has reached 23%, well beyond the EU average. At the same time, hard goods piracy and end-user piracy of software remains among the highest in Western Europe. Enforcement authorities continue to be generally cooperative in conducting raids, but raiding activity declined for most industries overall in 2009. Furthermore, a lax attitude by the courts, insufficient resources for the civil IP specialized 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. A recent decision by the Supreme Court concerning the software industry held that non-corporate professionals involved in software piracy would not be subject to the criminal provisions of Article 171*bis* which it said applied only to commercial companies. This would make it virtually impossible to obtain criminal enforcement against software pirates engaged in the professions. The reluctance of the courts to issue *ex parte* search orders in end-user software piracy cases must be remedied by a reaffirmation that this must be the primary means to deal with this type of piracy.

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 Data Protection Authority's uncompromising opposition reflected by 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 (including in the EU, for example in the Czech Republic) and against major uploaders in the filesharing (P2P) environment. Action hoped-for in 2009 by a special government-sponsored steering committee to deal with P2P piracy stalled in early 2009 although has resumed in February 2010. No additional cooperation between ISPs and rights holders has been agreed. In one welcome development, though, an Italian court held that the notorious PirateBay P2P service engaged in criminal conduct under Italian law by participating in the making available of unauthorized content to persons in Italy and that the criminal authorities could order ISPs to block access to the site. It was also positive the law on corporate liability for the violation of copyrights was extended.

Legislative concerns are also continuing, including a pending Bill ("processo breve") which, if adopted, could result in the dismissal of many criminal copyright cases.

Priority actions to be taken in 2010: 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 additional criminal actions against P2P services that meet the criteria for injunctions/liability established in the PirateBay decision and order ISPs to block access to those services;
- Encourage the government's anti-piracy steering committee to conclude its discussions and propose an effective remedies system;



- Invigorate a nationwide anti-piracy campaign which focuses on commercial scale piracy controlled by organized criminal syndicates, on end-user piracy of business software, appropriately covers all types of Internet piracy, and also includes unauthorized commercial photocopying of academic materials;
- 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;
- Clarify and confirm 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);
- 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;
- Develop positive messaging on the value and importance of copyright, including in the online environment, and of intellectual property as a whole;
- Continue the process of 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 like the bill proposing to limit the length of the judicial process. If adopted, for offences carrying a sentence of ten years, the law would limit judicial proceedings to six years in total, from the first verdict through two rounds of appeals. All cases involving copyright violations would fall within this provision;
- Amend the copyright law to remove "remote videorecording systems" from the levy system, providing exclusive rights.
- Repeal the 2005 Cirelli Law and the 2006 Pecorella Law;
- Eliminate the stickering requirement, at least with respect to business and entertainment software, and recorded music;
- Clarify that professionals who infringe copyright on software in the framework of their activities are criminally liable under Art. 171 *bis* Copyright Act as companies are.

UPDATE ON COPYRIGHT PIRACY IN ITALY

Internet piracy generally: All copyright industries report an increase in Internet piracy in 2009, making this issue a continuing critical priority for U.S. bilateral engagement in 2010. Broadband penetration continues to grow¹ and the lack of cooperation by ISPs and inadequate legislation and enforcement have combined to make the online piracy situation even worse than in 2008. While uploading of infringing content is illegal under the 2004 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 recording and motion picture industries.

¹ There are an estimated 30 million Internet users in Italy as of September 2009, almost a 51.7% penetration rate. <http://www.internetworldstats.com/stats4.htm#europe>. Broadband subscribers are 11.8 million, the 8th largest in the world. <http://www.a4aapl.com/2010/01/netherlands-tops-list-of-countries-with.html>

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 were less cooperative in 2009 with respect to takedown requests for websites and auction sites hosting infringing material, but the takedown process is cumbersome as the Italian law is unclear and it has been interpreted by some to require that takedown procedures be subject to a prior order from a "judicial or administrative" body.

It is dramatically different with respect to P2P piracy since Italian law appears to provide no incentive for ISPs to cooperate with rights holders with respect to material transiting their networks. Even the mere forwarding of notices of infringement to potentially infringing subscribers is routinely refused.

The overall legal environment in Italy makes private sector online 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. Because this results in the practical absence of civil remedies, Internet piracy enforcement necessarily falls to the criminal authorities. While criminal enforcement has been quite difficult, the recent PirateBay court decision should significantly improve the situation (see discussion below).

ISP cooperation is essential to effectively addressing P2P piracy. Although private sector negotiations have been ongoing, progress appears slow and it is unlikely that a cooperative solution or agreement will be in place any time soon in the absence of a government presence that compels a reasonable and effective result. In any case, the PirateBay decision confirms that the judge can require an ISP to block access to an infringing site, even if located abroad. Negotiations with ISPs ought to proceed in the context of this case.

Online piracy of music and sound recordings: The recording industry reports that online music piracy still accounts for losses far higher than it generates in legitimate sales -- or losses of over **\$300 million** in 2009. Last year, the local recording industry associations, FIMI and FPM reported that more than 7 million people were using P2P networks for illegal uploading and downloading of music files. These numbers also are confirmed for 2009. 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.

Online piracy of entertainment software: The Entertainment Software Association (ESA) reports that in 2009 Italy ranks as the global leader in terms of the incidence of infringing downloads of ESA member titles. BitTorrent and eDonkey continue to be the top two P2P protocols in Italy. ESA estimates there have been approximately 1.95 million infringing copies² made of select member titles through P2P file sharing by ISP subscribers in Italy during December, 2009. This comprises a staggering 20.3% of the total number of illegal copies made by P2P users globally during this period. These figures place Italy as number one in highest overall volume of P2P game downloads, and number one in highest volume of P2P game downloads per capita during the study period. Breakdowns by ISP show that Telecom Italia subscribers were responsible for approximately 54.8% of this activity occurring in Italy -- more than 1 million downloads during the one-month period. These figures do not account for downloads that occur directly from hosted content, such as

² This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

games found on “cyberlockers” or “one-click” hosting sites which continue to account each year for progressively greater volumes of infringing downloads.

The industry’s online piracy problem is exacerbated by the widespread availability of circumvention devices, which enable people to make infringing copies of games, and to play unauthorized copies on game systems. Although Italy’s statutes prohibit circumvention devices, courts have not been uniform in the application of these laws. For example, a court decision in Bolzano, Italy, had held that mod chips were not illegal under Italian legislation implementing the EU Copyright Directive. Fortunately, in 2006 the Supreme Court reversed this court decision and found that circumvention devices are illegal under Italian law,³ but the damage was done and continues. Rights holders report lingering misconceptions about the status of circumvention devices, particularly those used to circumvent technological protection measure (TPMs) utilized by the video game industry to prevent the unlawful copying of games as well as the playback of unauthorized games. Indeed, since December 2009, judges in two separate proceedings of the same case have ruled that mod chips do not run afoul of Italy’s TPM provisions. ESA is pleased to learn that Italian prosecutors will appeal these decisions to Italy’s Supreme Court, and remains hopeful that the case will ultimately result confirm the earlier Supreme Court precedent that TPMs utilized by the game industry are covered by existing statutes. Unfortunately, while we wait for the Supreme Court’s review, vendors continue to traffic in the circumvention devices that foster the high game piracy rate in Italy. ESA believes that a more regimented approach to the enforcement of Italy’s TPM provisions could result in a significant reduction in the level of online piracy of entertainment software.

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. P2P piracy and forums directing users to illegal copies of movies also are very damaging. The Motion Picture Association (MPA) reports that the video market in Italy declined by 17%⁴, much of this due to online piracy. The industry faces a particular problem -- the illicit recording of the Italian 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. FAPAV estimates that 78% of the films released theatrically in Italy can be found in the Italian language on the Internet within two days of that release.

In 2009, FAPAV sent a cease and desist letter to Telecom Italia requesting the blockage of major infringing websites and that measures be put in place to prevent the widespread piracy of motion pictures over the Telecom Italia network. Telecom Italia’s response was negative on all fronts. As a result, FAPAV filed a request for an injunction against Telecom Italia before the Rome Court’s specialized section on intellectual property. At the time of writing the Court has not yet issued a decision, however the case was widely publicized in the press on the basis of Telecom Italia’s objections and allegations, clearly following the negative press strategy of the latter. Due to misleading allegations of privacy right violations in the press, the Data Protection Authority joined the case and requested FAPAV to provide clarifications on the methodology used for the piracy infringement data it submitted in the filing. Despite clear evidence provided by FAPAV demonstrating that no privacy rights had been infringed in the process, the Data Protection Authority has thus far shown no willingness to cooperate as part of the solution to the problem. This case is a clear example of the misrepresentation of the problem vis-à-vis the public, the lack of will to reach a solution following a ‘fair balance of the rights and interests in play’ principle and the refusal of the major telecommunications operator in Italy to engage in any voluntary and meaningful cooperation with rights holders.

In 2009, FAPAV conducted a study on film piracy in Italy. The study found that 32% of Italians had acquired and/or watched pirate movies over the prior 12 months. It estimated the total losses due to physical and online film piracy in Italy at €530 million (US\$721,846); the infringers had viewed an average of 21 pirate titles in the prior year; that the losses due to physical piracy were estimated to be €332 million (US\$452 million); and that 70% of those surveyed who engaged in infringement would be willing to acquire or view films legally in the absence of the availability illegally. The study illustrates that film piracy is pervasive in this market.

³ *Corte di Cassazione*, Judgment no. 1602 General Register No. 35598/2006.

⁴ 2009 Univideo Report.

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 a significant increase in online piracy of books and journals in 2009, 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, without concerted action by authorities and cooperation of relevant parties.

End-user piracy of 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 at **49%** of the market and is the second highest in Western Europe, behind only Greece at 59%. 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 Preliminary estimated U.S. trade losses in Italy due to business software piracy in 2009 were **\$1.138 billion**.

Piracy of physical product generally: Italy continues to have the highest level of piracy of physical 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: Business software is locally burned onto CD-Rs or imported, often from China, and sold in Italy or transhipped 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.

Entertainment software: Hard goods piracy appears to be on the 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.

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>.

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.

Audiovisual works: MPA also reports no major improvements in the overall piracy situation in Italy during 2009. Physical piracy still accounts for 17% of losses with pirate DVD-Rs sold in fleas markets and by street vendors most problematic. 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 three 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^o encryption system.

Books and journals: Unauthorized and uncompensated photocopying continued to plague academic publishers during 2009. 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.

UPDATE ON 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 online piracy, end-user piracy of software and hard goods piracy, mainly at the retail level. In past years, the responsibility for enforcement is split among at least 19 offices and successive government reorganizations have kept enforcement fragmented. However, in the spring of 2009, the government established a new General Directorate for Intellectual Property, with responsibility to oversee all anti-counterfeiting/anti-piracy activities in the country, propose legislation and build awareness. Two working groups were set up, one to liaise with the rest of the government and one with the private sector.

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 limitations on monitoring and collecting data on Internet infringements resulting from Italy's Privacy Code and the 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 2009. 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. 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. In addition, the recent legislative proposal ("processo breve") to cap the length of criminal trials would, if adopted, put an end to more than 90% of all copyright trials pending before the courts.

On December 23, 2009, the Italian Supreme Court, in a landmark decision, held that the PirateBay P2P filesharing service was engaged in criminal conduct through the unauthorized distribution of pirate content for profit through advertising on the site. Through the categorization and tracking process, the site operators were held liable for participating in a crime. This is the case even though the site is located outside of Italy because distribution occurred in Italy to Italian users. The court confirmed that precautionary measures to prohibit the continuation of the crime can be issued by courts on the merits, which could consist in the seizure of the web site (even if located in a foreign country) and that as an accessory measure courts may order, by way of injunction, that ISPs block access to the site under the EU's E-Commerce Directive. It is too early to tell what the full implications of this decision will be in Italy. Italy has joined Sweden, Denmark and the Netherlands in declaring PirateBay a criminal enterprise.

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 the GdF (Guardia di Finanza) is very positive and led to successful operations. In particular, major cases in 2009 include a P2P operation where three people living in Rome and Milan have been identified by Italian Fiscal Police (GdF) as the original illegal uploaders of the charity single Domani 21/04/09 recorded by 52 leading Italian artists, including Bocelli, Pausini and Zuccherò, to raise funds for the victims of the earthquake that struck the city of L'Aquila in April 2009 with devastating effect. The track was made available on the internet for free through the DirectConnect network and free file-hosting services such as Rapidshare as soon as it was available from legitimate online music stores. The GdF worked with the local industry anti-piracy unit of FPM to trace the original uploaders of the track. This investigation led to raids in Rome and Milan, which prompted the seizure of hard disks containing more than 1,300 gigabytes of music files. More P2P cases were carried out by the Fiscal police from Desenzano, Venice and Cuneo. A total of 91 uploaders were referred to the judicial authority in 2009.

On the physical piracy side, the GdF police raided a factory that manufactured counterfeit optical discs intended for export around Europe. That raid produced unlicensed box sets that contained music, film and television programs. The raid followed industry investigations in countries across Europe into the sale of the 12-disc unlicensed box set Masterbox, which contained music by international artists such as Bob Dylan, Depeche Mode, Eminem, Katy Perry, Lady Gaga and Tiziano Ferro. Masterbox box sets had previously been manufactured in Poland, but the operation moved to Italy following raids by Polish police in February 2009. At that point, nine million copyright infringing albums in total were estimated to have been distributed around Europe, with an estimated trade value of around €19 million (over US\$25 million) being put on the previous 15 editions of the box set series produced in the plant.

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 reports again that the priority given to software piracy enforcement in 2008 and 2009 diminished somewhat and it describes its relationship with prosecutors as mixed. Judges remain not particularly concerned with criminal enforcement of IPR violations. In 2009, BSA supported 120 actions carried out by the GdF. Seventy-six of these raids were successful and involved the seizure of 1399 units of pirate software with an estimate value of €3.5 million (US\$ 4.76 Million).

In December 2009 the Italian Supreme court issued a decision which will have a very negative development on software enforcement. The case held that unincorporated professionals using illegal software in the carrying out of their activities cannot be held liable under the criminal provision of Article 171 *bis* of the Copyright Act for the mere fact of being a professional (there are no doubts that the same behavior carried out by a company would incur criminal liability under this

provision). This conclusion would unjustly limit criminal enforcement against non-corporate professionals where the piracy rate is believed to be even higher than among companies.

The entertainment software industry also reports a positive working relationship with the GdF. In 2009, the GdF participated in 60 criminal raids on targets engaged in the sale of infringing software and circumvention devices.

MPA, through FAPAV, reports that the police are generally supportive of FAPAV's efforts yet lack necessary resources. In 2009, FAPAV supported law enforcement authorities on 67 raids, seizing 52,603 CD-Rs and DVD-Rs. Working with FPM cooperatively on online activities, 3,600 links to audiovisual content were taken down. 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 2007⁶ 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. This was misrepresented in the press as "P2P is legal" – a clear misrepresentation of a case which had been dismissed on the grounds that it targeted a particular technology or system rather than the infringer and infringements. MPA and the recording industry sought to clarify the decision in the public's mind but the problem lingers to today. In fact, a 2009 IPSOS study on film piracy in Italy found that 100 percent of those interviewed deemed audiovisual piracy to be of little consequence.

Moreover, the repeated instances of granting amnesty to criminal infringers, including in the 2006 "Pardon" law mentioned in previous submissions (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. This problem could be exacerbated, with disastrous consequences, if the Bill ("processo breve") now pending in the Italian Senate is ultimately adopted. This Bill would amend criminal procedure rules to provide that all criminal proceeding which last more than two years would result in case dismissal, with a few exceptions for serious crimes of which piracy is not one. These kinds of bills, which are periodically introduced to speed up and reform the court system, continue to have a negative effect on prosecutors and their interest in commencing cases for piracy crimes.

Civil Enforcement: As noted above, rights holders are worried that a general lack of resources on the civil IP specialized courts could result in major delays in proceedings (to make an example, the Milan Court – which is dealing with the vast majority of copyright cases in Italy – as of today only has 4 judges, while the minimum provided for by the law would be 6, and still would be insufficient). It is extremely important that new competent judges are allocated to the IP specialized courts, to avoid disrupting further delays in civil proceedings.

Also as indicated 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.⁷ This has severely limited the ability of rights holders to bring civil Internet cases and unless there is a clear legal

⁶ Sentence No. 1872 of January 9, 2007.

⁷ 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

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. There were expectations that the government would take action through the Antipiracy Committee formed in January 2009 (and discussed further below) to introduce legislation or take other actions to remedy this problem, but to date no action has been taken.

In a promising development, amendments to the Civil Procedure Code, designed to speed up civil proceeding, were adopted in Law 69/2009.

BSA continues to use the civil court system for enforcement against business users of unauthorized software. Six civil raids were undertaken by BSA in 2009 which resulted in the seizure of illegal software valued at €225,000. (US\$306,303). BSA also reports that in some courts, including specialized IP courts, there has been an increasing reluctance to award *ex parte* search orders or to award such orders in a timely fashion. These specialized IP 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 court requires a Court Expert report and the plaintiff requests an injunction or similar remedies). This seriously hampers efforts to take civil action against software infringers. It is therefore extremely important to reaffirm the need to easily and timely grant *ex parte* search orders in all cases of software infringements carried out by end-users.

COPYRIGHT LAW REFORM AND RELATED ISSUES

In earlier submissions, IIPA has reported on efforts to amend the Italian copyright law. In early 2007, for example, proposals were being considered which would have:

- Required government approval to apply digital rights management;
- De-criminalized P2P file sharing;
- Provided for a “global license” for file sharing (in effect, a form of compulsory licensing for Internet distribution);
- Provided for a number of overbroad exceptions to protection (which would violate of the range of permissible exceptions and limitations of copyright protection).

While these particular proposals were not adopted, they are illustrative of a general negative attitude toward effective copyright protection, particularly online protection.⁸

An amendment was passed to Article 71 *septies* which extended 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. The EU Commission intervened, directing the Italian government to change its law. This has not yet happened. However, the Government has also not yet implemented the

identified infringers with a settlement proposal of €330.00 (US\$452), 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.

⁸An amendment did pass, however, to Article 70 of the copyright 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.

law.

Internet piracy and ISP responsibility: On January 14, 2009, the Italian Government announced the establishment of an Antipiracy Committee (Comitato Technico 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 held hearings with the content sector, consumer organizations and telecommunications operators with the intention drafting a bill and/or propose specific antipiracy initiatives. Unfortunately, this process went dormant in the fall. There have been some official statements that work may restart in 2010.

Implementation of the EU E-Commerce Directive: In its implementation of the E-Commerce Directive (in Legislative Decree No. 70 of 2003) Italy appears to require take-down procedures to be available only upon application to, and order from, the "relevant authorities." This apparent 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 (usually through a right holder notice) 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 in 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. The Antipiracy Committee was going to revisit and reverse this decision so that civil enforcement would become effectively available to rights holders. It has yet to happen.

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\$2,810). 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*ter*, anyone who commits such acts for "financial benefit" is liable to a fine of some €15,000 (US\$20,412) and a sentence of 4 years' imprisonment.

Amend Art. 171*bis* of the Copyright Act: As reported above, the Italian Supreme Court has held that Article 171*bis* requires that, for criminal liability to attach the infringing act had be carried out by corporate entities acting for commercial purposes. A professional purpose was held not to be expressly contemplated in the law, with the consequence that professionals would not be criminally liable for the use and detention of illegal software in their business. An amendment to Art 171*bis* should therefore be enacted to specify that the provision also criminalizes infringements carried out with a professional purpose.

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 Agreement⁹ 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 decision by the EU Court of Justice (issued November 8, 2007, in case C-20/05) has already 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 the government finally decided to retain the rule. Notwithstanding a promise to subsequently discuss and possibly reconsider the issue, nothing has happened so far.

Other deficiencies remain in the enforcement system and should be eliminated. The 2005 "Cirelli Law," and the 2006 "Pecorella" and "Pardon" Law¹⁰ all have taken their toll by undermining the deterrent effect of the enforcement system.

⁹ 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.

¹⁰ A description of these laws is contained in IIPA's 2008 Special 301 submission at <http://www.iipa.com/rbc/2008/2008SPEC301ITALY.pdf>.