

ITALY

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Italy should remain on the Watch List in 2011.

Executive Summary: The high level of physical, digital, and end-user piracy in Italy has grown far beyond the scope of what positive, but so far inadequate, efforts are being made by Italian law enforcement authorities. Meanwhile, regulatory and legislative proposals demonstrate hopeful breakthroughs in some areas, and cause for concern in others.

Online piracy rates in Italy are among the highest in the world, and remain an important concern for copyright sectors across the board. IIPA members will watch closely in 2011 for positive results from the December 2010 resolution of the Italian Communications Regulatory Authority (AGCOM), proposing a number of measures to open the online market to legitimate content and address online piracy. To fully address online piracy, however, further improvements in civil, administrative and criminal enforcement will be needed. The Data Protection Authority and Italy's civil courts have interpreted privacy laws in such a way as to immunize heavy online infringers against civil enforcement measures. Enforcement authorities continue to be generally cooperative in conducting raids, but raiding activity declined for most industries overall in 2010. Many factors have made it difficult for copyright owners to secure effective enforcement, including a lax attitude by the courts; insufficient resources for the civil IP specialized courts; reluctance to issue *ex parte* search orders in end-user software piracy cases (together with increasingly unrealistic threshold levels for evidence to be provided by the copyright holder to obtain such an order); generally non-deterrent penalties; and inadequate legislation. The Supreme Court recently held that self-employed professionals involved in software piracy would not be subject to criminal liability, making it virtually impossible to prosecute software pirates engaged in the professions. Legislative concerns remain in 2010, including a pending Bill ("*processo breve*") which, if adopted, could result in the dismissal of many criminal copyright cases.

PRIORITY RECOMMENDED ACTIONS FOR ITALY IN 2011:¹

- 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;
- Take additional criminal actions against P2P services that meet the criteria for injunctions and liability established in the PirateBay decision and order ISPs to block access to those services;
- Encourage government efforts to produce concrete plans for ISP cooperation and an effective remedies system, including finalizing and implementing the AGCOM proposal for addressing online piracy;
- Eliminate legal obstacles for rights holders to gather non-personally identifying IP addresses and, consistent with the European Court of Justice (ECJ) decision in the *Promusicae v. Telefonica* case, identities of infringers to take appropriate civil actions for the protection of their rights in the online environment;
- Effectively enforce the anti-camcording law to curb the increasing problem of theatrical camcord theft and theft of dubbed soundtracks;
- Eliminate the stickering requirement, at least with respect to business and entertainment software and recorded music;

¹For more details on Italy's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/rbc/2011/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2011 global issues, see our cover letter at <http://www.iipa.com/pdf/2011SPEC301COVERLETTER.pdf>.



- Clarify that professionals, like corporations, who infringe copyright on software in the framework of their activities are criminally liable under Art. 171bis of the Copyright Act.

COPYRIGHT PIRACY IN ITALY

Internet piracy generally: Internet piracy continues to grow in Italy, in a variety of forms. In fact, Italy may now have the most significant online piracy problem in the world. Where illicit peer-to-peer (P2P) filesharing once held the position as the single most damaging form of piracy online, sites linking to infringing content, including to foreign cyberlocker sites, now also are gaining in popularity. Mobile device piracy of music and videogames is also growing rapidly. Because enforcement activities to date have fallen woefully short of addressing such an abundance of illegal material, the country's market of 30 million Internet users – the fourth largest in the EU – is largely inaccessible to legitimate digital content providers.²

ISPs are still uncooperative in efforts to tackle illegal file sharing and other copyright infringements online. Some of the copyright sectors report that website operators were more responsive in the past year to takedown notices; still, the existing takedown process is too cumbersome to be completely effective against hosted piracy, and it addresses only a fraction of the Internet piracy problem. The initiative of Italy's Regulatory Communication Authority (AGCOM), launched in December 2010 and detailed below under "Reform for Cooperation on Internet Piracy," shows promise to address some of the escalating problems that rights holders face online, but does not appear poised to address problems related to P2P piracy directly.

Online piracy of music and sound recordings: The recording industry reports that, according to the Tera Consultants study, online music piracy accounts for losses of \$200 million in 2010—far higher than what the industry generated in legitimate sales. The local recording industry associations, FIMI and FPM, report that more than 7 million people were using P2P networks for illegal uploading and downloading of music files in 2010. While piracy of physical product still remains around 23% of the market, 95% of the global music downloads are unauthorized.

Online piracy of entertainment software: The Entertainment Software Association (ESA) reports that during 2010, ESA vendors detected 30.6 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through ISPs located in Italy, placing Italy number one in overall volume of detections in the world – as well as number one in detections per capita and number one in detections per Internet user.³ Connections through Italian ISPs comprise a staggering 21.15% of the total number of such connections globally during this period. Breakdowns by ISP show that Telecom Italia subscribers were responsible for approximately 51% of this activity occurring in Italy and more than 10% of global detections during 2010.

Online piracy of audiovisual works: The Motion Picture Association (MPA), through its local affiliate the Audiovisual Antipiracy Federation (FAPAV), reports that the overall incidence of audiovisual piracy in Italy grew by 5% over the previous year,⁴ much of this due to online piracy, for a total loss of €496 million (US\$670 million). Of the 106 million units of total legitimate sales lost in this sector in 2010, 50 million of it is attributable to online piracy. In 2010, the growth of illegal streaming or illegal downloading of TV series/shows was 13 % for series and 11% for shows, including sporting events. P2P piracy and forums directing users to illegal copies of movies continue to damage the industry, while cyberlocker sites and links to them have caused a dramatic worsening in online piracy of motion pictures in Italy. A phenomenon unique to the audiovisual industry is the illicit recording of Italian language audio tracks in theaters immediately following a film's release, which are then added to good quality pirate video found on the Internet. According to FAPAV's research, in 2010 an estimated 384 million total infringements took place, an increase of almost 30 million over the previous year. The highest incidence of piracy was attributable to

²There are an estimated 30 million Internet users in Italy as of June 2010, a 51.7% penetration rate. <http://www.internetworldstats.com/stats4.htm#europe>.

³These figures do not account for downloads that occur directly from hosted content, such as infringing games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

⁴According to the FAPAV/IPSOS research, Italy's piracy rate for 2010 was 37%.

males between the ages of 15 and 34. Video rentals have suffered the most significant damage, losing 48% (nearly 50 million rentals) to piracy in 2010, followed by digital television and satellite subscriptions. Theatrical sales suffered a loss of nearly 17 million tickets.

The independent segment of the film and television industry (IFTA) reports that Internet-based piracy has affected business in Italy and prevents the establishment of legitimate online distribution platforms and services for consumers, which independent producers may use to finance future productions. For independent producers who license content country-by-country, online piracy instantly exports troubled marketplaces and high piracy rates to other markets. The independent production sector is limited in its ability to shift to technology-enabled new business practices that might limit piracy. For example, worldwide same day releases (referred to as “day-and-date” releases) may prove an effective method to curb or delay piracy for major studios that control their own worldwide distribution, but for independents, whose national distributors release on their own schedule, this technique is impossible.

Online piracy of business software: The Internet is a growing source of unauthorized productivity software and contributes to this sector’s piracy losses. Cracked software, illegally downloaded using false codes or certificates of authenticity (COAs), is increasingly commonplace. Illegal software is available via infringing filesharing services, from illicit websites, and through infringing use of cyberlockers, and auction sites. The Internet is also a major source for manuals and packaging. Organizations dedicated to cybercrime exacerbate these problems as they continue to grow in technological sophistication.

Online piracy of books and journals: The publishing industry reports that online piracy of books and journals, affecting foreign and local publishers alike, continues to increase. Most infringing files are scanned copies of print editions, but publishers also report an alarming increase in the number of digital primary and supplementary materials made available online.

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 – increased to 50% of the market in 2010 and is the second highest in Western Europe, behind only Greece at 59%. According to a 2010 report prepared for BSA by market research firm 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 7,538 jobs, US\$5.2 billion in local industry revenues, and nearly US\$1.8 billion in additional tax revenues.⁵ The commercial value of pirated US-vendor software in Italy in 2010 was nearly US\$1.2 billion, based on preliminary data.⁶

Camcord Piracy: The level of camcord piracy in Italy rose again in 2010, which is particularly disappointing given that Italy was the first EU country to adopt an anti-camcording law. The problem in Italy is a lack of enforcement and the fact that it takes literally years to move a criminal complaint. Audio captures is the biggest problem in Italy; camcord thieves capture the Italian audio track and marry it to a video capture available online. In this way, the infringer can select the highest quality visual image and pair it with an Italian soundtrack; the product is then uploaded to the Internet and burned to discs to be sold through street vendors. In 2010, there were 71 audio captures and 4 video camcords sourced to Italy. There were no interdictions.

⁵The [Economic Benefits of Reducing PC Software Piracy](#), commissioned by BSA and conducted independently by International Data Corporation (IDC), released September 15, 2010, looks at the bottom-line economic benefits of reducing piracy in 42 countries that together account for 93 percent of the total packaged software market. It is available online at <http://www.bsa.org/idcstudy>.

⁶BSA’s 2010 statistics are preliminary, representing U.S. software publishers’ share of commercial value of pirated software in Italy. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2011 Special 301 submission at www.iipa.com/pdf/2011spec301methodology.pdf. BSA’s final piracy figures will be released in mid-May, and the updated US software publishers’ share of commercial value of pirated software will be available at www.iipa.com.

Piracy of physical product generally: Organized criminal syndicates remain heavily involved in the production and distribution of infringing product, particularly in Southern Italy.

Business software: As a fast-growing market for consumer PCs, Italy faces a new trend in the increasing reuse of old computers, which often contain pre-installed pirated software.

Entertainment software: Unauthorized copies of games downloaded from the Internet are of no use without circumvention devices, which enable users to play unauthorized copies on game systems as well as to make infringing copies of games. ESA reports that software-based circumvention of technological protection measures (TPMs) is increasingly a top issue for the industry. Meanwhile, Italian vendors continue to traffic in the circumvention devices that foster the high game piracy rate in Italy. Hard goods piracy of videogames is a significant ongoing problem in Southern Italy; elsewhere physical piracy is quickly being replaced by Internet piracy. Pirated goods are imported from Asia primarily into San Marino, destined not only for Italy but also other European markets.

Audiovisual works: MPA reports an increase in traditional physical piracy in Italy during 2010, up 3% from last year. Physical piracy still accounts for 24% of total infringements, the most problematic form being pirate DVD-Rs sold in fleas markets and by 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.

IFTA reports that physical piracy of DVDs remains a significant export constraint for independent film producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute film and television programming. These authorized distributors find it nearly impossible to compete with pirates and report that the Italian marketplace has been decimated by piracy. Producers and distributors confirm that DVD sales have been significantly impacted since pirated DVDs are readily available on the street, at kiosks and in shops throughout Italy. Unable to compete with free, legitimate distributors often cannot to commit to distribution agreements or they offer drastically reduced license fees, which are inadequate to assist in financing of independent productions. Piracy undermines and may permanently damage legitimate distribution networks essential to reaching consumers and leaves little confidence for investment in intellectual property in Italy.

Books and journals: Unauthorized and uncompensated photocopying continues to plague academic publishers. 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.

REFORM FOR COOPERATION ON INTERNET PIRACY

Italy adopted the "*Decreto Romani*" in 2010, assigning Italy's Regulatory Communication Authority (AGCOM) with the responsibility to establish rules for the protection of copyright over the Internet. In December 2010, AGCOM approved a resolution identifying several measures to address Internet piracy, primarily on hosted websites. Specifically, AGCOM put forth the following recommendations, which, in principle, have the support of the copyright industries, but are in need of fine-tuning:

- A four-step "notice and take down" procedure, applicable to websites hosted in Italy offering legal and illegal content, and foreign-hosted websites offering only illegal content: First, the rights holder contacts a website or

ISP to request removal of pirate product or links which could promote piracy (such as torrent search engines or indexes of infringing files available on other websites or cyberlockers). Second, if removal does not occur within 48 hours, the copyright owner notifies AGCOM. Third, AGCOM initiates communication with the website or ISP. Finally, upon a determination that infringement has occurred, AGCOM orders removal of the infringing content, subject to sanctions of up to €250,000 as set forth in Article 1, section 31, Law n. 249/1997.

- IIPA welcomes the adoption of a notice and take down framework, but remains concerned that the proposed procedures may not address sites that facilitate infringement by aggregating links to infringing material, and that they lack a means for encouraging ISPs to implement policies for addressing repeat infringers. Moreover, AGCOM's proposal would apply only to site operators, as opposed to hosting providers, creating a concern that rights holders will be left without remedy in the event that the site operator is not easily identifiable. The proposal should, therefore, also obligate hosting providers to remove infringing content upon notice from a rights holder.
- Establishment of a roundtable discussion held by AGCOM of the technical issues surrounding the implementation of the proposed measures.
 - The copyright industries look forward to continued engagement with AGCOM in this effort.
- A review of the Italian copyright law by the Government and Parliament.
 - The IIPA recommends that consideration of the data protection law be included as a crucial component to these initiatives, so that the momentum behind the AGCOM proposal may also drive the government and Parliament to establish either a firm basis in the law, or a specific process or authorization approved by the Italian Data Protection Authority, to address P2P piracy. Italian law currently does not incentivize ISPs to cooperate with rights holders with respect to material transiting their networks (the mere forwarding of infringement notices to potentially infringing subscribers is routinely refused), and has been interpreted by the Data Protection Authority and the courts so as to block rights holders even from identifying infringers for purposes of civil actions.
- Promotion of a broad legal offer of audiovisual content and removal of the current barriers to the legal offer of audiovisual content by favoring access to premium content and platform interoperability; and exploration of the adoption of extended collective licenses, experimental forms of legal consumption, and secure payment systems.
 - IIPA encourages Italy to open the market for legitimate content by moving forward with efforts to combat the pervasive online availability of pirate products in the country. The development of business models is best left to the market and does not require intervention.
- Development of educational and informational activities on copyright protection addressed to end users, and especially to young people.
 - IIPA members welcome efforts by AGCOM to promote campaigns for better awareness of the importance of copyright protection for the creative industries.

The resolution was the outcome of a series of informal stakeholder and public consultations, which were initiated by AGCOM in early 2010. Copyright industry representatives report good cooperation with national regulators in this effort. The recommendations will undergo formal public consultation in the first months of 2011, after which the proposals must be approved by the AGCOM governing body before they will go into effect. In addition to laying the groundwork for a more efficient notice-and-takedown procedure, adoption of the recommendations would be an important step in combating the common misperception in Italy that certain infringing activities, such as providing links to pirate content on foreign sites, are not illegal.

On a separate track, the Anti-Piracy Technical Committee established in early 2009 by the Italian Government (under the Office of the Presidency of the Council of Ministers and coordinated by Prof. Mauro Masi) resumed some sporadic activity in 2010. While previously ineffective, the Anti-Piracy Committee held a meeting at

the beginning of 2011 to affirm its interest in the AGCOM process. Local industry has recommended that the Committee develop supportive and complementary activities to the AGCOM initiative.

COPYRIGHT ENFORCEMENT IN ITALY

Some key Internet-specific enforcement obstacles remain in Italy. In addition, a number of weaknesses in the overall Italian enforcement system prevent the copyright industries from obtaining effective remedies and deterrent penalties against all forms of piracy, whether of physical goods, online, or by software end-users. While the Italian Supreme Court has confirmed that the criminal courts can order site blocking measures to deal with sites like the PirateBay, the civil courts have thus far misinterpreted Article 8.3 of the Copyright Directive and failed to provide for meaningful injunctive relief against service providers that allow access to rogue sites and facilitate copyright infringement on a massive scale. The dismissive attitudes of public prosecutors and judges represent a significant bottleneck to the forward progress of copyright enforcement cases. While police forces reportedly are cooperative in enforcement actions and some members of the judiciary have begun to demonstrate a better understanding of issues such as anti-circumvention laws and anti-piracy generally, certain recent court decisions stand out as disheartening setbacks for the copyright industries. A coordinated government approach is needed for an effective anti-piracy campaign in Italy.

Internet Piracy Enforcement: Several actions against Internet piracy in the past two years demonstrate that, in cases where rights holders take initiative and have a strong footing in the law, anti-piracy efforts have the support of law enforcement. Still, online enforcement in Italy's court system is severely hampered by (1) inadequate legislation and lack of judicial will and training for effective criminal actions, and (2) a lack of civil enforcement due to limitations on monitoring and collecting Internet piracy data, based on Italy's Privacy Code and the March 2008 ruling of the Data Protection Authority.

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. Italy thus joined Sweden, Denmark and the Netherlands in declaring PirateBay a criminal enterprise. The site operators were held criminally liable for distribution in Italy to Italian users, even though the site is located outside of the country. The court confirmed that precautionary measures (including the seizure of even a foreign-hosted website) to prohibit the continuation of the crime can be issued by courts on the merits, and that courts may order, by way of injunction, ISPs to block access to the site under the EU's E-Commerce Directive.

Italy has a known history of copyright cases being misrepresented by Internet/consumer groups and telecommunications-backed press. Propagation of distorted versions of the facts continues to be a problem. In fact, a 2009 IPSOS-FAPAV study on film piracy in Italy found that 63% percent of those interviewed deemed audiovisual piracy to be of little consequence. Equally disappointing, the study also found that 70% of those interviewed understood that piracy is a crime. Unfortunately, Italian press and organized "netizens" have launched a campaign against the AGCOM resolution, misrepresenting the recommendations and alleging that the implementation of the recommendations would be akin to "flat-lining" the Internet.⁷

Other Internet piracy enforcement efforts in the courts have been wholly unsuccessful, and civil courts to date have not granted injunctions. Civil enforcement against Internet piracy is severely hampered by the Rome High Court's interpretation of Italy's Privacy Code 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

⁷See <http://www.sitononraggiungibile.it>.

Privacy Code.⁸ Unless rights holders can obtain IP addresses and thereafter the names of subscribers via a civil court order, civil enforcement on Internet infringement will be as a practical matter impossible.

In another online piracy case, in 2009, FAPAV sent a cease and desist letter to Telecom Italia requesting the blockage of major infringing websites and for measures to 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. The Data Protection Authority joined the case to challenge the methodology FAPAV used for the piracy data it submitted to the court, but FAPAV demonstrated that no privacy rights had been infringed in the process. In April 2010, the Court rejected FAPAV's request that Telecom Italia block access to infringing websites, accepting the ISP's argument that such legal actions were only appropriate against the host providers of the websites in question. This was despite specific ECJ jurisprudence ruling that Article 8.3 injunctions were also available against access providers and the fact that the above cited Supreme Court ruling was directed at access providers as the key intermediaries for site blocking. However, the Rome Court also rejected allegations that FAPAV violated the Privacy Code, and ordered the provider and other ISPs to report complaints and cooperate with judicial and administrative authorities against piracy infringements. After this partial success, the case is now continuing on the merits but is expected to drag on for a number of years, demonstrating the elusiveness of swift and effective judicial action against Internet piracy.

End-user software piracy: In December 2009 the Italian Supreme Court issued a decision creating a major impediment to software piracy enforcement. The case held that unincorporated professionals (such as architects and engineers) 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, even for the same behavior that would render a company criminally liable under this provision. The decision limits criminal enforcement against non-corporate professionals, among whom the piracy rate is believed to be even higher than among companies.

Criminal enforcement: The recording, audiovisual, entertainment and business software industries all report continued good cooperation with the Italian police forces (including the Italian Fiscal Police (*Guardia di Finanza*, or GdF) and local police forces) during 2010. However, the problem of slow court processes and lack of deterrent penalties overall have limited the deterrent effect of police action and cooperation. Prosecutors are slow to bring criminal copyright cases. 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, often two to three years or more pass before final judgment, significantly reducing the deterrent value of the increased raiding activity undertaken by the police. Criminal sanctions in practice vary from four months to one year, including in cases of repeat infringers, for whom the law provides a minimum term of one year.

Few judges and prosecutors have expertise in copyright issues, a particular difficulty for cases brought under local jurisdiction. 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 provides amnesty for criminal convictions (including for piracy) with jail terms of less than three years. The law has reinforced the general perception in Italy that the probability of actually being punished is low, and 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

⁸The 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\$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.

cap the length of criminal trials would, if adopted, put an end to more than 90% of all copyright trials pending before the courts.

The business software industry reports that its relationship with enforcement authorities remains generally good, particularly with GdF, which is the primary agency responsible for software piracy enforcement. Prosecutors and judges continue to show a lack of interest with criminal enforcement of IPR violations. In 2010, 92 criminal raids were carried out against end-user piracy with the support of BSA, and an estimated 1000 pirate products were seized for a total value of approximately 1,500,000 Euro. The result is worse than last year, due to the fact that the industry bears the cost of providing technical expertise in police raids, a situation that is an increasing burden.

The entertainment software industry also reports a positive working relationship with the GdF. During 2010, ESA, through its local affiliate AESVI, reports having seen an increasing number of *ex officio* enforcement activities carried out by local police on videogames piracy, and supported the following activities: 51 raids; criminal charges brought against 59 individuals; and 301 modchips, 2,552 game copiers, 127 circumvented or counterfeit consoles, 459 counterfeit gaming peripherals, and 3,739 burned discs or pirated files seized. The industry faces delays, however, on the part of public prosecutors. Italy's statutes prohibit circumvention devices aimed at the technological protection measures (TPMs) utilized by the video game industry to prevent the unlawful copying and unauthorized playback of games. Courts have not been uniform in the application of these laws, but have begun to demonstrate greater sensitivity to the importance of TPMs to the industry. The Italian Supreme Court confirmed once again in 2010 that devices designed to circumvent TPMs in game consoles are proscribed under existing law. However, notwithstanding the unambiguous ruling from the Supreme Court, the Reviewing Court of Florence once again issued a contrary ruling in 2010, contributing to the perception among much of the public that mod chips and game copiers are legal. Indeed, legitimate retailers report that this misconception is so widespread that they routinely have to turn away customers who inquire about the availability of circumvention devices. Unfortunately, however, consumers in search of circumvention devices have no difficulty obtaining circumvention devices from online retailers or from Italy's many street vendors and markets.

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 is very positive and led to successful operations. In particular, major cases in 2010 included the seizure of Linkstreaming.com, the biggest streaming site in Italy for music and movies; the seizure of labia.net (the Italian version of Pirate Bay); the takedown of 10 major p2p hubs; the seizure and take down of 50 web networks for the streaming of musical videos and other copyright protected materials (movies, live sport events). Other criminal cases have been carried out against eBay illegal auctions. The notice & take down system is now up and running and led to the removal of 160,000 infringing links to illegal music files. Operations against neighboring rights evasion continued in 2010. Radio stations, web radio, discos, music providers, and gyms have been targeted and more than 70 criminal cases were started in 2010. The co-operation with FAPAV (local MPAA branch), AESVI (Italian Entertainment Software Association) – both now members of FPM – and SKY Tv Italy proved to be very successful in the effort to fight digital piracy.

MPA, through FAPAV, reports that the police continue to support FAPAV's efforts yet lack necessary resources. In 2010, the FAPAV and FPM, the local film and music industries, worked together with local police to close four of the most important streaming and downloading pirate sites in Italy. In 2010, law enforcement authorities worked with rights holders in the seizure of 170,000 audiovisual files, 6,000 illegal burned optical discs, criminal charges against four individuals, and sanctions totaling €23 million (US\$31 million). Operations marked the first application of Italian law against consumers of pirated content, pressing charges against 38 individuals identified from seized hard disk records. Italian authorities brought about the closure of the largest file streaming/downloading web site (linkstreaming.com) of unauthorized films, the most popular web-network for live streaming of sport events (calciolink.altervista.org), and two major sources of illegal streaming of audiovisual content (calcion.altervista.org and channeltv.altervista.org). In September, the IT Police of Genova brought to a successful conclusion the Operation "Vedogratis 2," and the GdF subsequently brought charges against a few dozen of its main subscribers for illicit

downloading. In 2010, the local film and music industries worked to remove an estimated 10,000 links to unauthorized content (including recent theatrical releases and TV series) hosted on websites and cyberlockers. As for other copyright industries, the primary bottleneck to effective enforcement is the dismissive attitude of the Italian judges towards piracy in general.

Moreover, the repeated instances of granting amnesty to criminal infringers, including in the 2006 “Pardon Law” mentioned above (and similar actions taken in prior 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. 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. 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: Specialized IP civil courts suffer from a lack of resources that can mean major delays in proceedings. For example, the Milan Court – which handles the vast majority of copyright cases in Italy – as of today only has 5 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 creating further delays in civil proceedings.

BSA continues to use the civil court system for enforcement against business users of unauthorized software. Civil raids undertaken by BSA in 2010 resulted in the seizure of illegal software valued at €580,000 (US\$800,000). BSA also reports that in some courts, including specialized IP courts, there has been an increasing reluctance to award *ex parte* search orders in a timely fashion or at all. There has also been a tendency to raise the threshold for evidence that must be provided by the copyright holder to obtain the order, creating a chicken-and-egg problem: Courts require direct evidence of infringement by private entities in order to issue a search order; but such information can only be obtained through execution of a search order. The reluctance of courts to issue search orders *ex parte*, and the tendency to impose evidentiary burdens that are impossible for right holders to meet, together make defending software IP rights a practical impossibility. The specialized IP courts still are responsible for 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

Data protection and online enforcement: 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 above).

Amendments to the copyright law: Past efforts to amend the Italian copyright law have included elements that would have weakened copyright protection and enforcement. While many of these particular proposals were not

adopted, some troubling elements did recently come into effect. An amendment to Article 70 of the copyright law allows the uploading to the Internet of images and sounds without permission or payment, so long as the resolution is low and the purpose is educational. This overbroad exception calls into question Italy's international treaty obligations. Another amendment was passed to Article 71^{septies} extending 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 and international norms with respect both to the reproduction and making available rights, and sought EU 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 law.

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.

Amend Article 171^{bis} of the Copyright Act: The Italian Supreme Court has held self-employed professionals are not within the scope of Article 171^{bis}, which requires that, for criminal liability to attach the infringing act had be carried out by corporate entities acting for commercial purposes. An amendment to Article 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.

Article 181^{bis} of the Copyright Law, providing for the stickering duty, conflicts with some basic principles of the EU Treaty (such as the "free flow of goods") as well as Directives 98/34 and 98/48, the TRIPS Agreement,⁹ and

⁹Article 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. (...continued)

the Italian Constitution. As a consequence, IIPA urges that Article 181*bis* be revised to exempt all software from the stickering requirement. 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. IIPA supports these calls.

Other deficiencies remain in the enforcement system and should be eliminated. The 2005 “Cirelli Law,” and the 2006 “Pecorella” and “Pardon” Laws¹⁰ all have taken their toll by undermining the deterrent effect of the enforcement system.

(...continued)

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.

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