

# ITALY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** Italy should remain on the Watch List in 2013.

**Executive Summary:**<sup>1</sup> In 2012, the Italian Communications Regulatory Authority (AGCOM) was to move forward with important regulations to address online infringement, but that program appears to have come to a halt. With new leadership at the helm of AGCOM, Italy should resume the momentum it gained during 2011 to establish effective measures against Internet piracy, as well as needed legal and enforcement improvements. Meanwhile, end-user piracy in Italy is second only to Greece among Western European countries in its levels of end-user piracy of business software. This is due in part to jurisprudence holding that self-employed professionals cannot be held criminally liable for software piracy, making it virtually impossible to prosecute software pirates engaged in the professions. IIPA expresses its appreciation for needed technical assistance efforts, such as the IPR Workshop organized in 2012 by the U.S. Embassy in Florence, which are important to raise awareness among high level representatives of the value of IPR protection and enforcement to Italy's economy.

The extremely high levels of piracy in Italy's market have not declined in the past year, despite another year of enforcement achievements against major online peer-to-peer (P2P) piracy hubs and torrent indexing and tracking sites. This can be explained by several gaps in the available enforcement mechanisms in Italy. First, in the absence of notice-and-takedown procedures similar to those contemplated by AGCOM in 2011, Italy's civil courts have neither the capacity to process the number of online piracy complaints rights holders need to submit for injunctions, nor the ability to respond to such complaints in a speedy manner. Civil remedies for IP cases in Italy need improvement, and it remains to be seen whether the recent absorption of the IP specialized courts into newly established corporate sections will allow more resources to be dedicated to rights holders or instead dilute what IP expertise previously existed. Second, repeated attempts to establish cooperation between rights holders and Internet service providers (ISPs) in recent years have reached no significant result. Italy's incorrect implementation of the e-Commerce Directive has created a favorable legal environment for local ISPs, such that they have no motivation to reach voluntary agreements to assist in anti-piracy actions. Third, due to Italy's jurisprudence in the area of privacy law, rights holders are unable to obtain the information necessary to bring civil cases against online piracy, and so are reliant upon criminal enforcement to keep major online piracy hubs at bay. The practical result is that to tackle Italy's pervasive Internet piracy, criminal actions are dependent on the cooperative but resource-poor assistance of the Fiscal Police, and often must then overcome prosecutorial indifference if they are to result in deterrent sentences. Stakeholders contributed heavily to AGCOM's consultation in developing effective procedures that would provide a more speedy and comprehensive response to online piracy while respecting due process, and IIPA encourages all concerned parties to resume these efforts in earnest in early 2013. A successful outcome could not only permit more legitimate investments to flourish in Italy, but could also ease what is currently a heavy burden on Italy's courts.

### **PRIORITY RECOMMENDED ACTIONS FOR ITALY IN 2013**

- Resume and complete efforts to adopt AGCOM's proposed regulations, establishing an effective system for the active cooperation of ISPs with rights holders against online infringement.
- Coordinate government bodies at a high level toward focused IP enforcement efforts and increased IP training for the police and the judiciary.

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<sup>1</sup>For more details on Italy's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2013SPEC301HISTORICALCHART.pdf>, as well as the previous years' reports, at <http://www.iipa.com/countryreports.html>. For a summary of IIPA's 2013 global issues, see our cover letter at <http://www.iipa.com/pdf/2013SPEC301COVERLETTER.pdf>.



- Continue with important criminal actions against P2P and link site services that meet the criteria for seizure orders and liability established in the PirateBay decision, and issue injunctions against access to those services.
- Increase dedicated IP resources, including judges and staff, within the specialized corporate judiciary section toward timely resolution of IP cases.
- Eliminate legal obstacles for rights holders to take appropriate civil actions for the protection of their rights in the online environment, including by gathering 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 establish underlying infringement in cases against major infringing web operators.
- Simplify private enforcement actions by eliminating unnecessary and formalistic steps under the procedural law (e.g., the need to serve the defendant with the deeds of the case in urgent cases within eight days)
- Effectively enforce the Anti-Camcording Law to curb the increasing problem of theatrical camcord theft and theft of dubbed soundtracks.
- Clarify that professionals, like corporations, who infringe copyright on software in the framework of their activities are criminally liable under Article 171bis of the Copyright Act.

## **COPYRIGHT PIRACY IN ITALY**

**Internet piracy generally:** The Italian public remains undeterred in its heavy engagement in Internet piracy, a problem that pervades the Italian market in a variety of forms. Again in 2012, authorities can boast some enforcement successes against major online piracy operations, but many forms of digital piracy continue to be unaffected and widespread. For many of IIPA's members, websites that link to illegal files available from P2P file sharing networks and cyberlockers have become the greatest concern in Italy. As authorities shut down major domestic sites, unaffected foreign sources and new domestic P2P networks and cyberlockers step in to keep a steady supply of infringing files available, and as a result, those forms of online piracy have not abated. In such a fluid environment, linking sites play the important role of ensuring that alternative sources of infringing material can persistently take root, more quickly than can be addressed with large-scale criminal cases. Mobile device piracy of music and videogames is also growing rapidly. As a result of this and enforcement deficiencies, the country's market of 35 million Internet users – the fourth largest in the EU – is far less accessible to legitimate digital content providers than it should be.<sup>2</sup> Furthermore, as one of the countries with the highest level of illegal online uploading and downloading activities, Italy can be considered a major exporter of infringing material.

**Online piracy of entertainment software:** The Entertainment Software Association (ESA) reports that Internet piracy remains a severe problem for its members in Italy, which in 2012 placed third in the world in the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks.<sup>3</sup> 2012 was also witness to a growth in sites specializing in the provision of links to infringing videogame content stored on third-party hosting platforms (i.e., "cyberlockers").

**Online piracy of books and journals:** The Association of American Publishers (AAP) reports high levels of piracy of books and journals on P2P networks, with Italy ranking among the top five problem countries for publishers.

**Online piracy of music and sound recordings:** In the last major third party report commissioned by the recording industry in 2010, according to the Tera Consultants study, online music piracy accounted 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

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<sup>2</sup>There are an estimated 35.8 million Internet users in Italy as of June 2012, a 58.4% penetration rate. <http://www.internetworldstats.com>.

<sup>3</sup>ESA's reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

and downloading of music files in 2010. While piracy of physical product was still around 23% of the market, 95% of the global music downloads were unauthorized. A recent survey issued by the CENSIS (one of the most important research institutes in Italy) estimates that the “fake market” of CDs, DVDs and software generates 1.8 billion euros. According to this study, the overall illegal market of counterfeiting and piracy costs the State 1.7 billion euros in lost fiscal taxes.

**Online piracy of audiovisual works:** New digital platforms entered the Italian market in 2012 to offer legitimate audiovisual content online, and the variety of legitimate e-commerce platforms increased. Still, P2P piracy and infringing cyberlocker websites, and the links and forums directing users to illegal copies of movies, continue to damage the film industry at a steady pace in Italy. The landscape for online piracy of audiovisual works has incorporated new forms of piracy in 2012, including a growing role for popular social platforms. Most of the indexing activities of illicit links are now shared on Facebook social communities (both open and closed), in connection with infringing files posted on Google/YouTube and applications downloadable on the iTunes App Store and Google Play. Illicit mobile applications have moved to the forefront of concerns for the Motion Picture Association (MPA) in Italy. In August 2012, rights holders sought and obtained the removal of the illicit application “Film Completi” from the Apple Store. This app optimized and indexed access to infringing links on YouTube for any Apple devices.

MPA, through its local affiliate the Audiovisual Antipiracy Federation (FAPAV), reports that the overall incidence of audiovisual piracy in Italy is growing. According to 2011 FAPAV-IPSOS research, 37% of consumers have used an illegal copy at least once during the period under review and an estimated 384 million total infringements took place, an increase of almost 30 million over the previous year. With regard to MPA members content, MPA notes that Peer Media Technologies reported that during 2011, users initiated over 90 million downloads/uploads of unauthorized copies of major U.S. movie titles via certain P2P protocols in Italy.<sup>4</sup> 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.

The independent segment of the film and television industry (IFTA) reports that Internet-based piracy has negatively affected business in Italy and prevents the establishment of legitimate online distribution services – harming consumers and rights holders alike. 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.

**Online piracy of software:** The Internet is a growing source of unauthorized 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 file sharing 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.

**Enterprise end-user piracy of software:** BSA | The Software Alliance (BSA) reports some improvement in the rate of software piracy in Italy thanks to increased frequency of audits and raids by the tax police in 2012. Still, the software piracy rate stands at nearly 50% with a commercial value of unlicensed software of nearly US\$2 billion.<sup>5</sup>

<sup>4</sup>A major U.S. movie is defined as a movie released in 1,000 or more theaters in the U.S., so these numbers reflect only a small subset of movie-related piracy activity (since it excludes non-major releases, including local titles, other peer-to-peer protocols, and non-peer-to-peer ones, such as websites, and streaming via other technologies). Also, since local language title versions for scanning are not always available from established sources, and access to foreign language BitTorrent sites may fluctuate, results in certain countries are likely underrepresented.

<sup>5</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Italy was 48%, representing a commercial value of unlicensed software of US\$1.95 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open (...continued)

This includes widespread use of licensed software by enterprises and loading of pirated pre-installed software on PCs. According to a 2010 report, 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 ten percentage points. This would create more than 7,500 jobs, US\$5.2 billion in local industry revenues, and nearly US\$1.8 billion in additional tax revenues.<sup>6</sup>

**Camcord Piracy:** The level of camcord piracy in Italy continues to be unacceptably high, rising yet again in 2011. This 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 2011, there were 81 audio captures and 12 video camcords sourced to Italy. Designed to target the Italian market, these illicit audio and video captures have an immediate and direct detrimental impact on the legitimate Italian marketplace.

**Piracy of physical product generally:** Organized criminal syndicates remain heavily involved in the production and distribution of infringing product, particularly in Southern Italy. Italy also serves as the receiving port of a great deal of counterfeit and pirate physical products, mainly originating from China, that is subsequently exported to other European countries.

**Audiovisual works:** MPA reports that physical piracy still hits the industry hard in Italy. According to a study conducted by Rome-based Censis in 2010, the value of seized pirate optical disks (including CDs and DVDs) was 1.785 billion euros, a level that continues in 2012, as confirmed by important seizures in the past year.

**IFTA:** IFTA reports that physical piracy 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 films 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. Independent producers and distributors confirm that DVD sales have been particularly 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 commit to distribution agreements, or alternatively, offer drastically reduced license fees, which are inadequate to support the financing of independent productions. As a result, piracy severely undermines and may permanently damage the legitimate distribution networks essential to reaching consumers and leaves little confidence for investment in intellectual property in Italy.

**Books and journals:** Unauthorized commercial photocopying continues to plague academic publishers. Copy shops are reportedly using increasingly sophisticated digital equipment in undertaking their activities — a growing trend that makes detection of unauthorized copying activities more difficult as scanned copies of reading materials are stored for printing on demand, rather than stockpiled.

**Entertainment software:** Pirated hard copies of video games have not disappeared from the Italian market, although online piracy is now the predominant problem facing the industry in Italy.

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source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>6</sup>The 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>.

## **REFORM FOR COOPERATION ON INTERNET PIRACY**

In the experience of IIPA's members, the Government of Italy has not established the needed incentives to encourage ISPs to proactively cooperate with efforts to tackle illegal file sharing and other copyright infringements online. Some of the copyright sectors report that some major local ISPs and international ISPs with local offices have begun to cooperate with rights holders, but only on a reactive basis. ISPs not physically located in Italy but that reach the Italian public continue to be reluctant to cooperate, and do not comply with requests from Italian judicial authorities, citing lack of jurisdiction.

Since Italy adopted the "*Decreto Romani*" in 2010, assigning AGCOM with the responsibility to establish rules for the protection of copyright over the Internet, AGCOM has undertaken extensive work to draft regulations with the goal of tackling some of the most blatant and damaging forms of online piracy that plague the Italian market. The copyright industries are very supportive of the efforts of AGCOM to seek broad-based support for this initiative, and had hopes that the initiative could address some of the escalating piracy problems in Italy. But over the course of consultations, the initiative lost key elements that might have provided more efficient remedies against foreign online sources of infringing content or addressed problems related to P2P piracy directly. In 2012, AGCOM's draft regulation suffered from a further setback as the terms of the previous Authority's Chairman and Board expired in May 2012, and the Italian Parliament failed to clearly define the role of AGCOM going forward.

In June of 2012, the Chamber of Deputies and the Senate appointed the new Chairman and Board of AGCOM, for a seven year term. In a recent hearing before the Parliamentary Committee of Inquiry on Counterfeiting and Piracy in the Commercial Field, the new AGCOM Chairman, Angelo Cardani, announced that the Authority will renew its work on the issue in 2013 with the aim to adopt a regulation against digital piracy by the end of June 2013.

At the heart and purpose of AGCOM's work under the 2010 *Decreto Romani* was the need for a solution to online piracy that is effective and efficient, while respecting due process. When new copyrighted works are released, rights holders frequently have just a matter of weeks to recoup their considerable investment before consumer interest begins to wane. If copyright owners must compete with free unauthorized copies, that opportunity is lost. Central to the AGCOM draft regulations was a multi-step "notice-and-takedown" procedure that would have applied to hosts or uploaders of infringing content. IIPA encourages AGCOM to ensure that such a notice-and-takedown process incorporates speedy procedures that incentivize parties to cooperate with authorities and rights holders. AGCOM should also eliminate loopholes for infringing sites that are anonymous or fail to provide contact points for receipt of infringement notices, and it should provide swift due process, avoiding the current judicial review system that can take years to conclude. Finally, IIPA recommends that AGCOM incorporate mechanisms to address repeat infringers, sites that facilitate infringement by aggregating links to infringing material (including such sites that may be based overseas), and operators that promote certain sites.

On a separate track, in fall 2012, the Parliamentary Committee of Inquiry on Counterfeiting and Piracy in the Commercial Field started a series of hearings on the subject of digital piracy. By the end of the current legislature, the Committee expects to draft a final report summarizing all the contributions received on the issue and identifying some possible solutions. However, the contents of this report will not be binding. Parliamentarians have attempted to adopt more decisive rules, proposing two amendments in 2012, signed by Deputy Giovanni Fava (Lega Nord Padania), Chairman of the above mentioned Parliamentary Committee of Inquiry on Counterfeiting and Piracy in the Commercial Field, with the goal of defining the responsibility of the operators of hosting services in the event that illegal content is stored on their servers. The proposals also provided that in some cases the judicial or administrative authority could require the hosting provider to monitor the content posted by users of their service. Unfortunately, Parliamentarians shot down both proposals. The Committee has, however, approved a final report, explaining the dangerousness of digital piracy and the need to address illegal platforms, including through more active cooperation from search engines and ISPs.

IIPA encourages all parties to work toward the following initiatives:

- Establishment of a roundtable discussion held by AGCOM of the technical issues surrounding the implementation of proposed measures. The copyright industries look forward to continued engagement with AGCOM in this effort.
- 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.

Adoption of these 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 serious violations of the law. The Government of Italy should strive for a high-level, coordinated effort to ensure that matters such as Internet cooperation and other enforcement efforts move forward efficiently and expeditiously.

## **COPYRIGHT ENFORCEMENT IN ITALY**

IIPA members report that enforcement actions related to Internet-based piracy have increased in 2012, but generally at the initiative and with the technical assistance of local rights organizations. Criminal copyright infringement in hard goods falls under the competency of the Fiscal Police, which do carry effective IPR related *ex officio* enforcement actions. (The Telecommunications Police have jurisdiction over online crimes, but their efforts to date have focused on areas such as child pornography and cyber attacks.) Coordination that would permit more effective action against Internet piracy is at a standstill, and will remain on hold unless and until Italy, perhaps under AGCOM's authority, succeeds in developing a national strategy for anti-piracy over the Internet. Rights holders report very good cooperation on the part of enforcement authorities, including the Fiscal Police at the local and national level and with the Fiscal Police's "GAT" department, a special division dedicated to online fraud. However, the Fiscal Police should develop more competences and dedicate more resources over Internet-based piracy. To the extent Italian customs authorities have competence (i.e., outside of intra-European imports), they operate with general efficiency and take on many *ex officio* actions.

As in the past, specialized forces – particularly prosecutors – are resistant to the idea that copyright crimes are serious offenses and fail to prioritize copyright cases. The absorption of specialized IP courts into the corporate court sections leaves many questions as to how needed resources will be allocated in IP cases in the future. To date, some courts have specialized sections that in practice handle a variety of cases, and are only "specialized" to the extent that a portion of their day is allotted to IP crimes. Procedural obstacles also prevent prosecutors from bringing actions against professionals for end-user piracy of software, creating a major gap in enforcement from a large sector of the software market.

Overall, due to lingering weaknesses in the overall Italian enforcement system including severe delays in the judiciary, the copyright industries still face difficulties obtaining effective remedies and deterrent penalties against all forms of piracy, whether physical, online, or by software end-users. A coordinated government approach is needed for an effective anti-piracy campaign in Italy.

**Internet Piracy Enforcement:** As in recent years, several actions in 2012 against Internet piracy 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. Major piratical hubs have been successfully brought to justice in Italy. Still, online enforcement in Italy's court system is hampered by (1) jurisdictional challenges to orders and information requests from Italian authorities against foreign ISPs, which can severely stall enforcement actions for Internet piracy facilitated abroad, (2) inconsistent holdings as to ISP responsibilities in cases of online piracy, and (3) limitations on monitoring and collecting Internet piracy data, based on Italy's Privacy Code and the March 2008 ruling of the Data Protection Authority, resulting in a lack of civil enforcement against filesharing. For the Fiscal Police to take actions against infringing websites, there must be clear evidence of infringement on a commercial scale for a demonstrated

purpose of gain (for example, beyond downloading from file-sharing networks). Detailed reports must be submitted to local police offices to initiate any meaningful cooperation and investigation. Because the Fiscal Police lacks a specific department dedicated to online piracy, the timing from submission of reports to the closure of the operation can be quite long.

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. 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.

Since the PirateBay case, authorities have successfully shut down or ordered injunctions against other major sites involved in illegal file sharing, streaming, and downloading; however, these efforts involved significant resources and compliance with time-consuming procedures on the part of the private sector. Website seizures and blocks against foreign illicit domains are among the important operations Italian authorities achieved to combat online piracy in 2012. Specific to the video game industry, in 2012, Italian courts placed injunctions on three local linking sites and three foreign torrent indexing/tracker sites. For the film industry, two years after the popular infringing website "linkstreaming" was shut down, the case against the site's administrators continues to move forward, although its outcome will be heavily dependent on the participation of Italy's public prosecutors.

Despite some advances that FAPAV made in data privacy issues in its case against Telecom Italia,<sup>7</sup> Italian jurisprudence still appears to limit the ability of rights holders to use collected data in actions against individual infringers. Civil enforcement against P2P piracy has been severely hampered by the Rome High Court's interpretation of Italy's Privacy Code in the famous Peppermint cases, and by a March 2008 ruling of the Data Protection Authority to the effect that use of tools to gather IP addresses of infringers would violate the Privacy Code.<sup>8</sup> Unless rights holders can obtain IP addresses and thereafter the names of subscribers via a civil court order, civil enforcement against infringing users will, as a practical matter, be impossible.

**Enterprise 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 171bis 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 software industries all report continued good cooperation with the Italian police forces in 2011, including the Italian Fiscal Police (*Guardia di Finanza*, or GdF) and local police forces. Police and customs authorities continue to take *ex officio* actions with the assistance of copyright holders, in the form of preliminary information and technical assistance. However, the

<sup>7</sup>The history of FAPAV's case against Telecom Italia is detailed further in IIPA's 2012 Special 301 filing, available at <http://www.iipa.com/rbc/2012/2012SPEC301ITALY.PDF>.

<sup>8</sup>The Peppermint case was brought by the German 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.

problem of slow court processes, lack of judges and prosecutors who have expertise in copyright issues, and lack of deterrent penalties overall have limited the deterrent effect of police action and cooperation. Prosecutors are slow to bring criminal copyright cases, sometimes delaying enforcement of a seizure or raid by months or even years from the time a complaint is brought. In the rapid distribution world of electronic communications, even a delay in terms of days and weeks is enough to create enormous harm, let alone years. 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. There are no specialized IP criminal courts. The 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. In 2012, BSA supported authorities in 64 criminal raids, 32 of which resulted in the seizure of illegal software valued in total at more than US\$ 1 million (763,000 euros). However, when cases are put before the court, public prosecutors do not inform injured parties of pending criminal proceedings, and prosecutors and judges continue to show a lack of interest with criminal enforcement of IPR violations.

AESVI, the Italian association representing the entertainment software industry, also reports that its positive working relationship with law enforcement continued to strengthen in 2012, in particular with the Fiscal Police General Command. AESVI provides technical and legal support on *ex officio* activities carried out by GdF, and has continued its collaboration with the Italian Customs Agency Bureau. AESVI supported law enforcement efforts that led to the closure of three local websites and three foreign sites engaged in the piracy of videogame content. With respect to litigation against the importers and distributors of devices that the circumvention of technical protection measures (TPMs), a key anti-piracy tool for the video game industry, two criminal courts (Pordenone and Turin) in 2012 convicted a total of 12 individuals for the sale of video game circumvention devices.

The recording industry, as represented by its local anti-piracy organization, FPM, reports that the 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 2012 included injunctions against three major international BT portals; *Kickasstorrent*, *Torrentreactor*, *Torrents.net*. Four Italian sites have also been shut down: *DDuniverse.net*, *Italia-film.com*, *mp3basi.com*, *ilfilm.net*. Other criminal cases have been carried out against uploaders of pre-releases. The cyberlocker site's notice-and-takedown system led to the removal of more than 500,000 infringing music files. Operations in violation of the rights of broadcasting or other communication to the public (i.e., public performance) also continued to be problematic in 2012. Radio stations, web radio, discos, music providers and commercial premises using unlicensed music have been identified, and more than 300 criminal cases were initiated in 2012.

The motion picture industry reports that the police continue to support FAPAV's efforts yet lack necessary resources. FAPAV reports that although the Italian enforcement authorities continue to conduct raids, little information is made available to rights holders. Hard goods piracy activity is fragmented in nature and conducted by numerous small operators, making effective enforcement raids difficult to organize. As is the case for other copyright industries, ultimately effective enforcement is bottlenecked by insufficient judicial resources and the dismissive attitude of the Italian judges towards piracy in general.

**Civil Enforcement:** Italy's civil courts suffer from a lack of resources that can mean major delays in proceedings. As it stands in Italy, injunctions are among the few effective measures in the civil arena, but given the evidentiary obstacles to civil enforcement posed by Italy's privacy laws, injunctions are of no use to rights holders against online piracy. It is extremely important that new competent judges are allocated to the specialized courts with jurisdiction over IP, to avoid creating further delays in civil proceedings. This is all the more important now that IP

specialized sections have been transformed into company law specialized sections. If there is no allocation of new judges, IP proceedings will suffer badly from this development. Furthermore, rights holders face evidentiary obstacles due to an interpretation of the law by the Data Protection Authority in 2008, described in detail below under Law Reform.

BSA continues to use the civil court system for enforcement against business users of unauthorized software. While many of BSA's civil searches result in early settlements out of court, in rare cases the actions are resolved in court. In these cases, BSA reports a positive degree of understanding among the courts of both the nature of the claim and of damages.

However, BSA reports a need to clarify in some courts that the search order procedure does not require a hearing for the confirmation of the order (as was the case in the past). Courts set hearings after search orders are executed based on rules for other interim measures such as seizures and injunctions, which are not required by law and create unnecessary burdens, risks, and costs for the copyright holder. The process has never resulted in a revocation of the order in question, and as a result serves only to delay the judicial process.

## **COPYRIGHT LAW REFORM AND RELATED ISSUES**

**Implementation of the EU E-Commerce Directive:** Italy's laws do not yet firmly establish fundamental liability when an ISP fails to take action in response to a notice of infringement provided by a relevant rights holder. In its implementation of the E-Commerce Directive (in Legislative Decree No. 70 of 2003), Italy appears to require takedown procedures to be available only upon application to, and order from, the "relevant authorities." This apparent requirement for the intervention of 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 provides that an ISP may be liable merely when it is informed that an infringement over its facilities exists, triggering the obligation to take down the infringing content. A recent initiative was taken by the Italian Parliament that aimed to bring Italy into compliance with this provision of the E-Commerce Directive. On January 19th, 2012, the Italian Parliament Commission of EU Affairs approved an amendment to a bill for the European Community Law, referring to Articles 16 and 17 of the Italian Decree implementing the E-Commerce Directive. The draft amendment would have confirmed the existence of an ISP's duty of care when it becomes aware of an infringement based on information provided by rights holders, and of an ISP's responsibility to take actions to remove or to disable access "upon request of [i.e., notice from] the competent authorities or any interested person." While the introduction of these provisions was an important step forward, they were, unfortunately, withdrawn from consideration in early 2012, and future work still remains uncertain.

**Legislative efforts in 2012:** The Italian Parliament recently passed a law containing several provisions related to the implementation of the Italian Digital Agenda and to the promotion of the competitiveness of the country. Among the main changes included are completion of the National Broadband Plan, next generation networks (NGN), electronic payment, e-Health, digital school and many more. The Italian Government and Parliament are also in the process of discussing a Development Decree that would aim to promote growth among startups and small- and medium-enterprises (SMEs), with an emphasis on the use of intellectual property for competitive advantage. During the parliamentary discussion, an amendment was approved that provides a tax credit of 5 million euro for each year in 2013, 2014 and 2015 for the development of new online platforms. The objective is to support the digital content market.

**Court of Companies:** The so called "Liberalization decree" (law no. 27, dated March 24, 2012) among other things, established the Court of Companies and the Simplified Limited Liability Company, Section 2 introduced in courts and courts of appeal located in the capital of each region a "special" department in order to manage disputes on commercial and corporate matters. These amendments did not provide for new specialized civil departments, as was hoped, but instead extended the competencies of the existing departments from industrial and intellectual property matters to include disputes concerning antitrust, corporate matters, shareholders' agreements,

etc. The reform is unwelcome as it will place a heavier burden on judges and force them to deprioritize IPR cases, most likely diluting any existing IPR expertise.

**Amend Article 171bis of the Copyright Act:** The Italian Supreme Court has held self-employed professionals are not within the scope of Article 171bis, 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 171bis should therefore be enacted to specify that the provision also criminalizes infringements carried out with a professional purpose for a profit.

**Eliminate the SIAE sticker requirement for software and music recordings:** This problem remains a major concern for the software industries and, more recently, also for the recording industry. Specifically, Article 181bis 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 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 online 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 181bis of the Copyright Law, providing for the stickering duty, conflicts with some basic principles of the EU Treaty (such as the "free flow of goods") as well as Directives 98/34 and 98/48, the TRIPS Agreement,<sup>9</sup> and the Italian Constitution. As a consequence, IIPA urges that Article 181bis be revised to exempt all software from the stickering requirement. Article 171bis 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.

## **TRAINING AND TECHNICAL ASSISTANCE**

During 2012, FAPAV, together with other Anti-piracy Organizations, took part in training programs planned with Fiscal Police General Headquarters that were held around Italy and were attended by almost 2,000 officers. Topics concern audiovisual, music, software, satellite TV and video game piracy, with a primary focus on digital piracy of copyrighted works. FAPAV reports a modest growth in familiarity with more cutting edge forms of piracy among the officers that participated.

BSA provides regular training to police forces, and in 2012 conducted ten such training programs. BSA also provides technical assistance or support for a number of raids (64 in 2012).

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<sup>9</sup>Article 9 of TRIPS requires compliance with the provisions of the Berne Convention, including Article 5(2), which prohibits countries from subjecting the "enjoyment and the exercise" of copyright rights to any formality. Italy's stickering, associated fee and declaration requirements represent prohibited formalities. The burden imposed by the requirement makes criminal enforcement unnecessarily complicated and costly, and creates a barrier to legitimate trade, contrary to the requirements of TRIPS Article 41.