

MALTA

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR actively monitor developments in Malta during 2013 with respect to the issues discussed in this Special Mention report.

Executive Summary: The rate of software piracy in Malta is far above the average in Western Europe, and the local software industry reports mounting difficulties in enforcement that undermine efforts to keep this form of piracy at bay. Criminal cases of software piracy are not initiated by Malta's overburdened police, preventing these cases from working their way through the court system to deterrent sentencing. Further, Malta's legislative framework requires a few relatively minor, though crucial, revisions in civil and criminal law provisions to permit rights holders and police to carry out effective cases against software copyright infringements. Strong governmental support and collaboration is needed to raise awareness in the country on the importance of respecting intellectual property rights. According to BSA | The Software Alliance's (BSA) 2012 Global Software Piracy Study, in 2011, the piracy rate in Malta was 43% (while the average in Western Europe was 32%), and the commercial value of pirated software was US\$7 million.¹

Enforcement: The Economic Crimes Unit of the Police force is responsible for enforcement against crimes related to fraud and intellectual property infringement, including copyright violations. However, the few police inspectors and support personnel who make up the Unit are overburdened by their current workload. The vast majority of criminal prosecutions taken to court are those involving ordinary business fraud, such as misappropriation of money. Police inspectors and their staff are not sensitized to the economic and security risks involved in software piracy, and their failure to bring criminal cases in this field has prevented any meaningful progress in tackling this serious problem. The police force in Malta should establish a dedicated IP Unit, charged with the enforcement of the IP-related provisions that are found in the Maltese Criminal Code. Such a Unit could be set up in a similar manner to the Police Cyber Crime Unit (which has been very successful since its creation a few years ago) and the IPR Unit within the Enforcement division of Maltese Customs.

Police are also unable to take *ex officio* actions in cases of criminal copyright piracy in Malta, including situations when unlicensed software is loaded on the hard drive of a PC offered for sale (known as hard disk loading), due to a procedural requirement in the law that investigations may only commence at the initiation of the copyright owner, who must file a complaint in writing with the Police, addressing the violation in question and demanding Police intervention. As a result, police are unable to respond to leads regarding copyright cases, further weakening their effectiveness in this problem area.

IP Awareness: BSA has made several proposals to the Maltese Government in 2012 for programs to raise awareness among the general public and government officials of the need to acquire and make use of legitimate software licenses. While government officials have been receptive to the ideas raised in several meetings with BSA, to date the Government of Malta has taken no formal action to implement a much needed awareness campaign on this topic.

¹BSA | 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 Malta was 43%, representing a commercial value of unlicensed software of US\$7 million. 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 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>.



Legislation: The Criminal Code of Malta contains a number of deficiencies that inhibit effective enforcement of copyright for the software sector. The provision in the Criminal Code that applies to copyright infringement (Article 298B) is unclear as to whether it may be invoked in situations of end-user piracy of software committed by companies in their business activities. Although the provision has been successfully invoked over the years in a small number of criminal prosecutions concerning piracy that took place in the ordinary channel of trade (such as hard disk loading cases), Article 298B of the Criminal Code has never been tested in cases of business end-user copyright violations, in particular, due to its vague language. Revisions are needed to provide more certainty on this issue. Further, Malta's law does not properly implement its obligation under the WTO TRIPS Agreement to provide a commercial scale threshold for intellectual property infringements in its domestic law. There is also a need to revise and increase the existing penalties available under Article 298B to bring these on par with the penalties available for other intellectual property crimes, such as criminal trademark or design infringement. BSA has made a number of proposals to the Maltese Government to address these and other deficiencies in the Criminal Code.

From a civil law point of view, the Maltese Copyright Act allows the owner of copyright, in situations of copyright infringement, to enter a demand for the payment of damages, or of lost profits, together with additional damages in situations of flagrant infringement of copyright. However, there is a problematic deficiency in Malta's Copyright Act, as it fails to provide for civil *ex parte* searches. This long-standing legal deficiency has made it extremely difficult for software companies to preserve the required evidence of copies of infringing software in the possession of the infringing party, without which a successful action cannot be instituted in a court of law. Article 50(2) of the TRIPS Agreement requires WTO members to ensure that their national courts are authorized to take provisional measures, when appropriate, without having to hear the defendant (such as *ex parte* searches), in particular where any delay would cause irreparable harm to the rights holder. This obligation is also incorporated into the EU IPR Enforcement Directive, but Malta failed to adopt civil *ex parte* search warrants or similar procedures during its implementation of that Directive. Instead, the procedural remedies currently available under the Maltese Code of Organisation and Civil Procedure are outdated and insufficient to allow for effective gathering of evidence in software piracy cases. The present remedies also require rights holders to deposit substantial fees in the form of guarantees to initiate enforcement activities, which can in practice prevent right holders from taking action in Court.

These civil and criminal law gaps, though few, have created real obstacles to proper enforcement in cases of software piracy in Malta, and should be revised to ensure that rights holders have the needed tools to address growing concerns with the piracy rate in the country.