

# ITALY

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR remove Italy from the Special 301 Watch List, in recognition of its adoption of Internet anti-piracy regulations that include a fast-track procedure to address large-scale piracy in 12 days or less. However, in light of the current scope of Internet piracy that still stifles the legitimate marketplace and the untested nature of the regulations, we suggest that USTR conduct an Out-of-Cycle Review of Italy to monitor for full implementation of the regulations and resolution of key enforcement challenges.<sup>1</sup>

**Executive Summary:** On December 12, 2013, the Italian Communications Regulatory Authority (AGCOM) adopted regulations that hopefully signal a radical step forward in Italy's fight against long-entrenched copyright piracy. The regulations provide notice and action procedures that incorporate due process safeguards, establish a 12-day mechanism for large-scale piracy, and allow rights holders to seek action from sites that host infringing works as well as those that provide links to infringing files. In 2013, rights holders reported a surge in anti-piracy actions by the Fiscal Police, resulting in the closure or removal of infringing material or links from sites including linking sites, torrent indexing and tracker sites (including *isohunt.com*), streaming services, and Italy-based cyberlockers. Yet overall, extremely high levels of piracy in the country persist. The situation signals a need for a handful of targeted reforms that can (a) respond quickly to constantly moving targets such as linking sites, (b) dedicate needed resources to enforcement officials, (c) enable the collection of evidence needed for civil enforcement against operators of infringing P2P services, (d) close legal loopholes that have resulted in a glut of professional workplaces that rely on illegal software, and (e) take action against theatrical camcord theft and theft of dubbed soundtracks.

#### **PRIORITY ACTIONS REQUESTED IN 2014**

- Upon entry into force of the AGCOM online copyright regulations, publish quarterly reports documenting:
  - (i) notifications that have resulted in removal of infringing material from hosted websites;
  - (ii) notifications that have resulted in removal of links to infringing material;
  - (iii) the number of cases resolved by expedited procedure; and
  - (iv) actions against repeat infringers.
- Coordinate government bodies at a high level, and encourage cooperation to continue important criminal actions and injunctions against illegal P2P and linking services.
- Provide the legal tools and resources for specialized judges and staff within the specialized corporate judiciary section toward more timely resolution of IP cases.
- Clarify that unincorporated professional partnerships that infringe copyright of software in the course of their business activities are criminally liable under Article 171*bis* of the Copyright Act.
- Effectively enforce the Anti-Camcording Law to curb the increasing problem of theatrical camcord theft and theft of dubbed soundtracks.
- 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.

<sup>1</sup>For more details on Italy's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Italy's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, *2014 Special 301 Submission*, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.



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

In accordance with the responsibility assigned to it under the “*Decreto Romani*” of 2010, the Italian Communications Regulatory Authority (AGCOM) worked to develop a solution to online piracy that could be both effective and efficient, while respecting due process. IIPA supports the resulting December 12, 2013 AGCOM regulations (the Regulations), which will enter into force on March 31, 2014. These notice and action measures are crucial to encouraging speedy responses to infringement notices and to promoting more robust cooperation between various actors in the online ecosystem. Italian law already provides rights holders with the ability to obtain a preventive attachment (seizure order) against foreign sites, and rights holders have done so, for example with respect to Pirate Bay and BTJunkie. But the process through the courts is lengthy and results are isolated, making the availability of rapid administrative procedures against both domestic and foreign infringement indispensable to an effective antipiracy program in Italy. Experience suggests that any effective response to Internet piracy must take place in Internet time, and expedited processes are therefore greatly welcomed.

The Regulations establish a procedure by which rights holders may submit complaints to an authority requesting removal of infringing activity online, which are passed on to the relevant ISPs and where possible, website managers and uploaders. (A website manager is a service provider that, “in the context of an Internet site, carries out the management of a space in which there are digital works or parts of same or *Hypertext links* (links or torrent) to same, even if uploaded by third parties.”) Unless the recipients comply with the request, the authority initiates, within seven days after submission of the complaint, a review of the case, which must be concluded within 35 days. If the authority determines the request is justified, it orders the hosting ISP to remove or disable access to the infringing files (or, if the files are hosted on a server outside of Italy, it orders ISPs to disable access to the website) within three days. Parties are permitted to put the process on hold for purposes of an appeal in a court of law. We highlight that this process is intended to operate alongside present notice-and-takedown arrangements, and is primarily aimed at sites that do not generally respond to notices. Cooperation between rights holders and intermediaries remains important to ensure the prompt removal of infringing materials. Reasonable takedowns are measured in hours, not days.

An expedited procedure lasting no more than 12 days is made available in Article 9 of the Regulations in serious cases of piracy, and is vital to the objective of establishing a rapid response to instances of Internet piracy, but it will only be effective if every effort is made to provide the authority with adequate resources so that it can review complaints and turn notices around for delivery to web administrators within hours, rather than weeks. The maximum deadlines allowed for review of complaints should be the exception, rather than the rule. The granting of extensions should be minimized, as they have the potential to delay action and unfairly harm the legitimate market for copyrighted materials, diminishing the deterrent effect of more expedited procedures.

IIPA strongly supports provisions in the Regulations providing rights holders with the ability to seek action from sites that provide links to infringing files. Although the Regulations do not directly address users engaged in illegal file sharing activity over P2P networks, this provision will assist in stemming the unauthorized activity over those networks and other sources such as cyberlockers.

In recent years, some major local ISPs and international ISPs with local offices have begun to cooperate with rights holders, but only on a reactive and limited basis. In the modern market, peak consumer demand for copyrighted works typically occurs within a matter of weeks after release, making this a crucial period of time for rights holders to generate revenue in an effort to recoup their considerable investment in creating, producing and distributing their works. IIPA welcomes the promise of improved cooperation through the adoption of the AGCOM Regulations. The copyright sector in the United States encourages USTR to monitor the implementation of the Regulations throughout 2014, particularly regarding adherence to the Article 9 expedited procedure, application of the procedures to linking sites, and actions against repeat infringers.

## **COPYRIGHT PIRACY IN ITALY**

The overall level of piracy remained steady in 2013 for all of IIPA's members, seemingly unaffected by several Internet enforcement actions during the year. This may be explained by the fact that the most prevalent forms of piracy in Italy today have arisen where the current legal regime has been unable to reach them. Small web sites providing links to illegal material (hosted on major cyberlockers in other jurisdictions) can nimbly relocate and proliferate before lengthy litigation can even be initiated against them. Meanwhile, the other "big fish" of the piracy food chain, operators of peer-to-peer (P2P) platforms dedicated to infringement, cannot be prosecuted without evidence of the underlying copyright infringements occurring at the user level, but that data is out of reach due to privacy laws. The large-scale importation of circumvention devices, contributing to Italy's status as having one of the world's worst videogame piracy rates, originates from the land-locked microstate of San Marino where adequate anti-circumvention laws are not in place. Finally, much of Italy's professional class, including architects and lawyers, use illegal software without the threat of prosecution due to a carve-out on their behalf in Italy's Copyright Act.

**Online and mobile device piracy:** All of IIPA's members are dramatically affected by online piracy in Italy, and for many of the copyright sectors the problem is most severe on websites that link to illegal files available either from P2P file-sharing networks or on cyberlockers. Increasingly, cyberlockers refuse to respond to rights holder requests to remove pirate material. The most popular torrent search engines among Italian users are located abroad, although many of these were blocked in 2013 by Italy's Fiscal Police. Mobile device piracy of music, films, and videogames is also growing rapidly via applications that share links to infringing content.

Internet-based piracy has grown in particular for the software industry, which in the past saw most of the end-user piracy in the country originating from offline sources. Piracy of books and journals is particularly acute via P2P networks, and the Association of American Publishers (AAP) reports that Italy ranks among the top five problem countries for some publishers. The Entertainment Software Association (ESA) reports that Internet piracy remains a serious problem for its members in Italy, which in 2013 once again placed third in the world in terms of the number of connections by peers participating in the unauthorized file-sharing of select ESA member titles on public P2P networks. Italy has ranked among the top three countries since ESA began measuring such data in 2009.<sup>2</sup> The local recording industry associations, FIMI and FPM, report that more than six million people were using P2P networks for illegal uploading and downloading of music files in 2013.

**Enterprise end-user piracy of software:** As of 2011, the software piracy rate in Italy stood at nearly 50%, well over the average among European countries, and representing a commercial value of unlicensed software of nearly US\$2 billion.<sup>3</sup> This includes widespread use of unlicensed software by enterprises and the pre-installation of pirated software on PCs. BSA has also become aware of activities in Italian companies involved in the importation of illegal software from China, which they then sell to customers located in other European countries.

**Camcord Piracy:** The level of camcord piracy in Italy remains unacceptably high. The problem in Italy is a lack of enforcement and the fact that it takes literally years to move a criminal complaint. Much of the illicit activity involves the 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 and sold through street vendors. Video captured in Italian theaters is also increasingly appearing in illegal copies online.

**Hard goods piracy:** Organized criminal syndicates remain heavily involved in the production and distribution of infringing product, particularly in southern Italy. DVD burning labs are located in Sicily, while street

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<sup>2</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.

<sup>3</sup>Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at [www.bsa.org/globalstudy](http://www.bsa.org/globalstudy). This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA | The Software Alliance (BSA) plans to release an updated study in the second quarter of 2014.

piracy of DVDs is spreading in the regions of Campania, Sicily, and Puglia. 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. The prevalence in Italy of circumvention devices such as videogame copiers is a severe problem for ESA members, which report that many of the devices originate from San Marino (where local law enforcement lacks the legal tools to address circumvention of technological protection measures, or TPMs) and facilitate much of the illegal videogame downloads in the country. Circumvention devices are found both in retail stores and on e-commerce sites. Because circumvention devices enable users to play pirated copies of games that are downloaded from the Internet, hard goods piracy of videogames themselves has continued to decline in 2013 in favor of online piracy.

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

In January 2013 the Senate adopted a bill that would have resulted in a decriminalization of various copyright infringement offenses. For instance, non-commercial copyright infringements (including illegal uploading of content) would no longer have been subject to criminal liability, but only to civil liability. Fortunately, copyright infringements were ultimately excluded from the draft that now has been transmitted to the Chamber of Deputies for the final parliamentary reading, with adoption expected in spring 2014. Rights holders welcome the exclusion of copyright infringements from this draft. *Legislative initiatives are needed to strengthen, rather than undermine, the ability for copyright owners to protect and enforce their rights in the following areas:*

**Evidentiary Hurdles in Internet Piracy Enforcement:** Action against Internet piracy is hampered by, among other things, 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 file-sharing of infringing content. Despite some advances that the local film industry has made in data privacy issues in its case against Telecom Italia,<sup>4</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 the use of tools to gather IP addresses of infringers would violate the Privacy Code.<sup>5</sup> Unless rights holders can obtain IP addresses and thereafter the names of subscribers via a civil court order, civil enforcement in P2P piracy cases will, as a practical matter, be impossible.

**Lack of ISP liability provision:** 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. On January 19, 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.

**Professionals exempted from liability for software piracy:** In December 2009, the Italian Supreme Court held that 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. The case held that unincorporated professionals (such as architects and engineers) and their partnerships 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. An

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<sup>4</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>5</sup>The Peppermint case is detailed most recently in IIPA's 2013 Special 301 filing, available at <http://www.iipa.com/rbc/2013/2013SPEC301ITALY.PDF>.

amendment to Article 171*bis* is needed to specify that the provision also criminalizes piracy carried out with a professional purpose for a profit.

## **COPYRIGHT ENFORCEMENT IN ITALY**

The *Guardia di Finanza* (Fiscal Police) have consistently been a bright spot in rights holders' relationships with enforcement authorities for most of the copyright sectors. In 2013, the Fiscal Police carried out a significant number of operations against websites hosting or linking to infringing material, including some very popular torrent sites, a trend that IIPA hopes will continue going forward. 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. Rights holders are also encouraged that a criminal proceeding is moving forward before the Court of Florence addressing circumvention devices, which is expected to conclude in early 2014 and could be an important milestone in the fight against the trafficking of these devices. For the average copyright infringement case, however, difficulties arise over the course of lengthy litigation; all of the concerns with Italy's court systems that IIPA has detailed in previous years remain true today.

**Criminal enforcement:** Enforcement actions related to Internet-based piracy increased in 2013, with improved coordination among enforcement authorities and rights holders. Rights holders report very good cooperation with the Fiscal Police for cases involving infringement of film, music, software and videogames, and in particular report very good cooperation with the "GAT" department, a special division dedicated to online fraud. In 2013, the "GAT" carried out some of the most effective and large-scale operations against online copyright infringements, with actions against some of most significant international illegal portals available in Italy, as well as investigations and seizures of some well-known Italian sites. Other successful actions taken by the Fiscal Police in 2013 include actions against Italian linking sites, illegal streaming services with movies and television program and cyberlockers sites. In 2013, BSA supported the Fiscal Police in 23 criminal raids for illegal software use (with 21 more in the pipeline at the time of reporting in late 2013), 21 of which resulted in the seizure of illegal software valued in total at more than US\$ 1.7 million (1.26 million euros).

Despite the *ex officio* actions of the Fiscal Police against hard goods piracy, in the most problematic region of southern Italy, police forces do not have a systemic, effective approach to the issue. Hard goods piracy activity is fragmented in nature and conducted by numerous small operators, making effective enforcement raids difficult to organize. Additional resources are needed to permit the Fiscal Police to develop a more consistent and comprehensive program for all varieties of copyright crimes.

It is when cases are brought before the court that severe obstacles emerge. Public prosecutors do not inform injured parties of pending criminal proceedings, and prosecutors and judges continue to show a lack of interest in criminal enforcement of IPR violations. Many of the Fiscal Police's high-profile online cases mentioned above resulted in success due to preliminary remedies. In some cases, however, preliminary *ex parte* searches are undermined by judges who fail to see the risk in alerting defendants of a scheduled raid. For cases that require full proceedings, the difficulties that IIPA has detailed in past years persist in Italy's criminal courts.<sup>6</sup> "Specialized" sections handle a variety of cases in practice, and are only "specialized" to the extent that a portion of their day is allotted to IPR crimes. In reality, these sections often fail to prioritize copyright cases. Criminal sanctions vary from four months to one year, including in cases of repeat infringers, for whom the law provides a minimum term of one year. Severe delays in the judiciary ultimately undermine effective enforcement.

**Civil Enforcement:** Italy's civil courts also 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

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<sup>6</sup>For more details about enforcement in Italy's courts, see IIPA's 2013 Special 301 filing, available at <http://www.iipa.com/rbc/2013/2013SPEC301ITALY.PDF>.

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. On a positive note, BSA | The Software Alliance (BSA) reports that many of its civil searches result in early settlements out of court, and 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 in cases of end-user software piracy.

## **TRAINING AND TECHNICAL ASSISTANCE**

During 2013, anti-piracy organizations took part in training programs planned with Fiscal Police offices in Cuneo, Alessandria, Sondrio, Imperia, and Piacenze that were attended by a total of about 200 officers. Topics concerned audiovisual, music, software, satellite TV and videogame piracy, with a primary focus on online piracy of copyrighted works.