



ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE

ALAI  
2021  
Madrid



**ALAI CONGRESS 2021, 29 Sept. – 1<sup>st</sup> Oct. 2021,  
Madrid**  
**COPYRIGHT, COMPETITION AND INNOVATION**  
**QUESTIONNAIRE – NATIONAL REPORT OF**  
**ITALY**  
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⋮

**THE FOLLOWING ANSWERS REFER ONLY TO THE LEGAL DEVELOPMENTS IN ITALY  
ALTHOUGH ITALIAN LEGAL SYSTEM IS STRONGLY AFFECTED BY THE EUROPEAN FRAMEWORK AS FAR AS COPYRIGHT, COMPETITION AND INNOVATION ARE CONCERNED, THE EUROPEAN LAW IS MENTIONED LIMITED TO ITS EFFECTS ON THE ITALIAN LEGISLATION AND JURISPRUDENCE.**

**1. INTERNAL ADJUSTMENTS IN COPYRIGHT LAWS**

*Identify and explain any specific instances where market competition and innovation concerns haven been specifically addressed by copyright law or caselaw in your country. This may include by means of:*

- 1.1.- Defining (or interpreting) the scope of exclusive rights to account for competition and innovation concerns.
- 1.2.- Defining (or interpreting) the scope of exempted uses (E&L) on account of competition and innovation concerns.
- 1.3.- Imposing licensing conditions (statutory licensing, compulsory licensing, compulsory collective management, ECL, etc) or “joint-tariffs”, “one-stop-shops” ... and explain their impact in the market
- 1.4.- Explain any relevant licensing practices existing in your country that favor market competition and innovation. Please refer to any copyright markets (i.e., software, publishing, news, audiovisual. ...)
- 1.5.- By any other means?

**The main cases brought before the Italian Competition authority (AGCM) have concerned the exercise of rights by means of collective management organizations. Those cases concern therefore the conducts of collective organization in dominant position toward users or towards members and not the substance of exclusive rights.**

**Case A48 – S.I.L.B./S.I.A.E. decision of July 21, 1995**



The proceeding was initiated following a complaint by the SILB-Italian Dance Club Syndicate against collective management organization SIAE to challenge the tariffs for music public performances. The Italian Competition Authority resolved that the SIAE- abused its dominant position failing to guarantee to authors, composers and music publishers the fair distribution of the copyright fees, making the tariffs performances in discos unjustly burdensome.

The Authority also held that the conduct of SIAE consisting in granting differentiated tariff reductions according to the size of the trade association to which the licensee adheres constitutes an abuse of a dominant position.

**Case 508 Sound Reef – Innovaetica /SIAE decision of September 25**

2018

The AGCM determined that SIAE abused of its dominant position in order to impose services that were not subject by law to the exclusivity dictated by the provisions in article 180 of the Copyright Law, in the wording in force until October 10, 2017. The appeal of SIAE against the decision was rejected by the Administrative Tribunal (TAR Lazio judgment n. 11330 of September 26, 2019). The case was closed after the AGCM accepted the commitments agreed between the parties.

**Case A489 Artisti 7607 Società Cooperativa- Itsright Srl/Nuovo IMAIE Decision of 22 March 2017**

After 2014, Nuovo IMAIE (the previous legal monopolist for the management of performers' related rights) have carried forward a complex exclusionary strategy to the detriment of new entrants, through: (i) discrimination against non-members; (ii) refusal of access to the general archive of works and artists; (iii) exclusionary conduct in the signing and implementation of agreements with foreign collective management organizations, as well as (iv) exclusionary conduct in the signing and implementation of agreements with important national users. AGCM closed the proceeding in 2017 by accepting a series of commitments regarding relations with new members and non-members of IMAIE, the agreements with foreign organizations and the access to its data base, as well as the renegotiations of license contracts with major users.

**2. A STUDY CASE: DATA ECONOMY**

*Data is called the “new oil” for our economy, as it is being used to develop new products and services. To the extent that this data includes copyrighted works, we want to identify how copyright laws and caselaw are addressing this issue and how different national solutions may have a different impact in the market. In the EU, this activity concerns the exceptions and limitations on Text & Data Mining as well as the regulation on Public Sector Information reuse (PSI)*



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*Notice: we are not only talking about corpuses specifically prepared for TDM purposes (i.e., electronic journals, databases, etc), but also about processing (machine reading) of works, in general, (texts, images, etc.) available either online, in digital form or in analogue form.*

2.1.- Is “machine reading” an act of reproduction? If so, is it being exempted (excluded) under an E&L or as fair use? Is it subject to licensing (if so, what kind of licensing)?

This question has never been raised in Italy. However, the phrasing of reproduction right in the Copyright Law is wide encompassing “the multiplication of copies of the work in all or in part, either direct or indirect, temporary or permanent, by any means or in any form”, It is deemed therefore that, apart from the case of transient reproduction in art. 5.1 of the Infosoc Directive of 2001, the reproduction right covers also machine reading.

2.2. - Please provide any examples (laws, caselaw, licensing) regarding the development of databases, search engines, apps, services, etc based on reusing data produced by the Public sector.

2.3.- Is there any evidence of how these measures (law, caselaw, licensing) are fostering or deterring the development of new services and products and of downstream markets?

There have not been cases or experiences concerning the relationship or the possible conflict between open data reuse and copyright. Here below, we outline the legal framework related to the public sector information (PSI) pointing out that the legislation is complex and only indirectly a few developments may affect copyright. This is mainly due to the fact that both EU and national laws are aimed at transparency and non-discriminatory availability of data as well as at preventing corruption.

Here below, we mention the main laws presently in force in Italy, concerning directly or indirectly the access to and the reuse of public data. The European Directives, the EU guidelines, recommendations and communications relevant to the PSI are expressly taken into account in the national laws on this subject, in particular, Directive 2003/98/EC, Directive 2013/37/EU, Directive 2019/1024/EU.

Legislative Decree 36/2006 implements directive 2003/98/EC (amended by directive 2013/37/EU) on the re-use of public sector information. The text presently in force contains the amendments by Legislative Decree 102/2015.

Decree Law 76/2020 (Part III, Chapter III, articles 33-34-35), concerns the strategy relevant to the management of the public information assets for institutional purposes.



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Legislative Decree 33/2013 contains, among other obligations on transparency in the public sector, the provision that all information concerning the organization and the activities of public entities must be published and made available to the public (article 2). Article 7 concerns "open data and re-use" and rules that documents, information and data subject to mandatory publication or available following citizens' access, must be published in open format, without any restrictions but under the obligation to indicate their source and maintain their integrity. It should be kept in mind this decree is mainly aimed to ensure transparency of the public sector and publicity of activities and structure of the public administration, as an essential tool to prevent corruption. Legislative Decree 97/2016 concerns the revision and simplification of the rules concerning the prevention of corruption, publicity and transparency.

The third three-year Plan for IT in the Public Sector was issued in 2020. It indicates the actions to be put in place in order to promote the digital transformation of the public sector and the enhancement of public information assets.

In Italy, AgID ([Agency for Digital Italy](#)) is in charge of managing the National Open Data Portal

The main provisions on the access and reuse of PSI for the development of knowledge and research and the creation of new products/content are found in the Code of Digital Administration CAD ([Codice dell'Amministrazione Digitale](#)), first issued in 2005 legislative decree 7 March 2005, n. 82, amended by legislative decree 22 August 2016 n. 179 and 13 December 2017 n. 217.

According to the CAD, the public sector includes the various branches and levels of the government, as well as public entities and cultural institutions such as libraries, museums and archives. It is expressly indicated that the use of PSI must be without prejudice to the protection of personal data. The CAD does not mention which rules should be applicable to copyright subject matters that are published as PSI.

To the best of our knowledge, no judiciary case or dispute has arisen in Italy on copyright and PSI.

A basic distinction must be made between software and other matters protected by copyright. Art. 69, paragraph 1, of the CAD provides that "public administrations that are owners of IT solutions and software created according to specific indications from the public client, are obliged to make available the source code, joint to the relevant documentation, under an open license, free for use by other public administrations or legal entities that intend to adapt them to their needs, unless there are justified reasons of public order and security, national defense and electoral consultations " It might be inferred that this provision creates a special limitation to the protection granted to software under the copyright law when the rightowner of the software is a public body.



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Legislation and practices are more complex concerning data and datasets.

According to CAD Article 1, paragraph 1, letters I-bis) (open format) and I-ter) (open data), open data must be defined on the basis of three elements:

- a. the data are available under the terms of a license or a regulatory provision that allows their use by anyone, including for commercial purposes, in a disaggregated format" (legal requirement);
- b. the data accessible through information and communication technologies, including public and private networks, in open formats they are suitable for automatic use by computer programs and are equipped with related metadata "(technical requirement);
- c. the data are made available free of charge through information and communication technologies, including public and private telematic networks, or are made available at the marginal costs incurred for their reproduction and dissemination (economic requirement).

Obviously, mere data as such are not protected by copyright and therefore no possible conflict can arise. In the following considerations, we assume that "data" include documents and other information or materials produced by the public sector that may theoretically claim copyright protection.

As to the copyright Law 633/1941, we can mention two articles dating back to the original text of the law as well as the provisions on data bases, deriving from the Acquis Communautaire.

One first reference may be Article 5 of the copyright law, in accordance to which copyright protection does not apply to the texts of official acts of the State or of public administrations, whether Italian or foreign. This definition includes judiciary decisions.

The exclusion of official acts solves but a small part of possible conflicts, when data are contained in or consist in copyright works.

Article 11 of the copyright law can also come into play. Pursuant to paragraph 1 "Copyright in works created and published under the name and at the expense of the State, the Provinces or the Municipalities shall belong to them." Despite no coordination with article 52 of the CAD, it can be argued that said materials (and not only the official acts) are subject to the rules on PSI (e.g. open data by default) and full availability for reuse and derivative works must be ensured.

The second paragraph of art. 11 of the copyright law can be more problematic, where it states that "**In the absence of agreement to the contrary with the authors of the works published** (emphasis added), the same right shall also belong to private legal entities of a non-profit-making character, as well as to the Academies and other public cultural organisations, in respect of records of their proceedings and their publications." In fact, for a number of entities that are obliged to publish their data as open data pursuant to the CAD, an assessment of the titularity and ownership of the copyright may be necessary. It could be also



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argued that the provisions of the CAD supersede article 11 of the Copyright law, meaning that all the entities belonging to the Public Sector are obliged to obtain contractually the full copyright when they publish or finance the publication of protected works or subject matters. In this respect see also the paragraph on open access, here below.

Some uncertainty exists about the relationship between the CAD and the Database Directive. On the one hand, public sector data bases (both protected by copyright or sui generis right) are subject to the rules on Open Data. On the other hand, however, when the public sector data base contains documents for which third parties hold intellectual property rights, it is not clear whether this allows public bodies to exclude applicability of the Open Data by default rule or on the contrary, it may create an obligation for the public bodies to ensure that public data bases, protected by copyright or by sui-generis right, can be produced directly or on commission by the public sector as defined by the CAD, only provided that possible IP rights of third parties are<sup>3</sup> duly cleared. There is, however, no obligation on the copyright owner to agree to the release of his or her intellectual property under open data rules.

It is also worth mentioning that a specific set of rules external to copyright law can be considered as a limitation to copyright. The provisions on Open Access to research results financed by public funds are in law 7 October 2013, n. 112, implementing EU Commission's Recommendation of 17 July 2012 on access to and preservation of scientific information.

A precisely defined Open Access rule applies to all research projects that are financed by public funds. Provided that the share of public funding is equal or higher than 50%, when the results are published in scientific periodicals, the publisher must ensure that, upon first publication, the article is freely accessible online. Subsequently, the article must be made available in no-profit electronic archives within 18 months if on medical and scientific subjects; or within 24 months if on social or human subjects. Open access rules do not apply to research resulting in patents.

### **Open Data Licenses**

Even in the absence of express coordination of open data rules with copyright law, there is evidence of the consideration of this relationship in the development of licenses applicable to materials controlled by the public sector and favoring the access to PSI.

According to the Guidelines published by AGID in 2017, Open Data must be made available on the web for free and indexed by search engines. It must therefore be possible for anyone with an internet connection to be able to identify and download the datasets (linked open data). Data and datasets can be considered open if they have certain specific characteristics aimed at encouraging their reuse.



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For Public Sector Information, it is considered appropriate and is recommended (but not mandatory) that a single open license is made available to the public; it should guarantee freedom of re-use and the attribution of the dataset source. Consequently, any license that contains “Non Commercial - NC” and / or “Non Derivatives - ND” clauses, or any other clause that limits the possibility of re-use, cannot be considered as a license for open data.

Not all information and data released by public administrations on their websites can be considered open data. However, art. 52, paragraph 2 of the CAD introduces the rule “open data by default”, which means that, when public data and documents are published by entities belonging to the public sector absent the express requirement of a license, they are treated as open data, except in cases where the publication concerns personal data.

### 3. EXTERNAL ADJUSTMENTS: ANTI-TRUST AND BEYOND

*Please provide examples (law, caselaw, market practices) of how anti-trust law, unfair competition or any other legal adjustments apply to copyright licensing markets (offline and online). For instance, provide examples regarding the following scenarios:*

- 3.1.- “Essential facilities” doctrines to foster the development of downstream markets
- 3.2.- Vertical integration of markets (producers/distributors); tying sales (e. g. exclusive sale of decoders by pay-TV platforms)?
- 3.3.- Bundling of rights/means of exploitation (cable, satellite, internet, cellphones): upstream and downstream competition issues.
- 3.4.- Licensing prices (also under collective licensing) deemed unfair, discriminatory, anti-competitive by courts; arbitration or mediation procedures to set prices; government price-setting ...

*See replies in Section 1 of this Questionnaire*

### 4. ONLINE MARKETS: “VALUE GAPS” (ONLINE PLATFORMS)

*Notice that complete and valuable information resulting from the stakeholders’ dialogue and written consultations currently launched by the EU Commission will be available at the time of the Congress.*

*[https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=68591](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=68591)*

*<https://ec.europa.eu/digital-single-market/en/news/directive-copyright-digital-single-market-commission-seeks-views-participants-stakeholder>*

*Please include only information that is specific to your country.*

4.1.- Is there any norms and/or relevant caselaw addressing the value gap issue, as applied to UGC platforms?

*If you are an EU country, have you addressed the transposition of Art.17 CDSM Directive?*

4.2.- Is there any norms and/or relevant caselaw or licensing addressing news aggregation?



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*If you are an EU country, have you addressed the transposition of Art.15 CDSM Directive?*

*4.3.- Is there any norms and/or relevant caselaw addressing other value gaps?*

*For instance, regarding cloud storage and compensation for private copying*

**In August 2021, the scheme of the Legislative Decree for the implementation of Directive 790/2019 has been submitted to the Parliament that must examine it and possibly propose amendment to the Government within 60 days. The Government is not bound to accept the proposals of the Parliament and it is predictable that the Decree will be issued and come into force in October 2021.**

**The implementation of the norms against the so-called value gap currently in the Project can be summarized as follows.**

#### **Article 15 of directive 790/2019**

An interesting precedent concerning the value gap in the making available of extracts from the press is the proceeding of the Competition Authority, A420 - AS787, against Google for its service Google News for abuse of dominant position. The proceeding was concluded by the authority acceptance of the commitments of Google on January 17, 2010.

As to the implementation of art. 15, the Italian project contains a new article 43-bis, whose 16 paragraphs contain various norms that differ from the short provision of the directive. In fact, the project does not qualify precisely the new exclusive right as a related right and inserts the new rules in the section concerning collective works.

The detailed regime in the project seems to outline a right to “equitable remuneration” (defined in Italian “equo compenso”) rather than a fully enforceable exclusive right, also taking into account that it provides that – in case of dispute (see the following paragraph) – the provider must not limit the “visibility” of the news.

Moreover, the new provisions provide an enforceable obligation to negotiate and to conclude a license contract. Online service providers including media monitoring and press review services. The short extracts are defined as: “any portion of said publication that does not substitute the consultation of the press article in its entirety”.

Very penetrating powers are conferred upon the Authority for Communications (AGCOM), that must issue a regulation defining the criteria for the “equitable remuneration” that the services must pay to press publishers. Pursuant to the project, said criteria should take into account among other elements, the number of the online views of the press article, the number of the activity years and the market relevance of the press publisher and the number of employed journalists, as well as the costs sustained for technological investments by both parties and the economic





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benefits deriving to both parties from the publication as to visibility and advertising revenues. Service providers must supply press publishers with all the information relevant to the licence; in case providers do not comply, AGCOM can impose a penalty up to 1% of the service annual turnover in the previous year.

Moreover, if negotiations are not finalized, each of the parties can appeal to Authority that has the power to decide if the proposal rejected by one of the parties is correct and must be accepted; the authority has also the power to define a different proposal; it is possible to appeal to the specialized sections of civil tribunals against the AGCOM decision.

The share of the remuneration to be paid by press publishers to journalists can vary between 2% and 5%.

### **Article 17**

Differently from article 15, article 17 is about to be transposed almost literally in a separate section of the Copyright law. The new exception for parody, caricature and pastiche is apparently limited to the usage by OCSSPs.

It is clearly stated that, pending the proceeding by which the uploader opposes to the removal of the content, such content remains disabled or removed.