

Newsletter

IP, TMT e Data Protection

IMPLEMENTATION IN ITALY OF DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 17 APRIL 2019 ON COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL SINGLE MARKET AND AMENDING DIRECTIVES 96/9/EC AND 2001/29/EC.

With Legislative Decree No. 177 of 8 November 2021, which entered into force on 22 December 2021, Italy has transposed EU Directive 2019/790 (the "Copyright Directive") into national law. This contribution will not examine in detail the contents of the Copyright Directive, but will instead focus on the changes made to Italian law to transpose such contents.

In particular, the transposition rules of the Copyright Directive affect several aspects of the Italian copyright law (Law no. 633/1941, the "LdA"), by modifying in particular: (i) the regime of online use of journalistic publications by content aggregators (e.g., Google News); (ii) the system of exceptions and limitations on copyright; (iii) the provision of online content sharing services (i.e., e.g., social networks); and, in general, (iv) the regime of protections for the benefit of content creators *vis a vis* their licensees and assignees.

(i) Online use of journalistic publications by information society service providers

An article (Article 43-bis) is introduced in the LdA granting publishers of journalistic publications exclusive reproduction and communication rights related to the online use of their publications by providers of online services. However, these rights may not be invoked to protect works whose autonomous protection has already expired, i.e. for which the relevant copyright has expired, and to prevent the publication of snippets of the content. As to the definition of a "snippet", Article 43-bis states that any portion of such publication that does not dispense with the need to consult the journalistic article in its entirety must be understood as such.

In other cases, the use of journalistic works by online service providers will be subject to the payment of fair compensation, to be negotiated with the publishers of the works according to criteria determined by a regulation to be adopted by the Authority for Communications Guarantees ("AGCOM"). A dedicated procedure at AGCOM will be created for determining fair compensation in the event that the service provider and the publisher are unable to reach an agreement.

(ii) Exceptions and limitations to copyright rules

The system of exceptions to copyright, i.e. the activities that can be carried out without infringing the exclusive right of the legitimate owner of a work, is extended through the insertion of Articles 70-bis to 70-sexies. In this respect, it should be noted in particular that:

- institutes for the protection of cultural heritage and research bodies are allowed to carry out the activities of extraction of parts of text and data (so-called text and data mining or 'TDM') of works and other protected materials, contained in networks or databases to which these entities have access, for scientific research purposes. The same right is also guaranteed to other persons, other than cultural heritage institutions and research bodies, who have legitimate access to the mined content, provided that this right has not been expressly reserved by the owner of the rights to the work being mined;

- A right is provided for publishers who are licensees or owners of a work, who may receive a share of no more than 50 per cent of the revenues accruing to the author of the work for uses of the work that occur in connection with any exception or limitation to the right transferred or granted.

(iii) Online content sharing services

Article 17 of the Copyright Directive, aimed at regulating the phenomenon of the activity carried out by the platforms which collect and distribute material uploaded directly by the users, is implemented in the LdA in Articles 102-bis to 102-sexies.

The platforms are made responsible for the contents published by their users and, in particular, they must make efforts to obtain an authorisation to publish the content from the owners of the intellectual property rights insisting on such content. This authorisation covers works protected by copyright even when the user submits these works to the platform for non-commercial purposes or this activity does not generate significant revenues.

In the absence of such authorisation, service providers must be held liable unless they can cumulatively prove that they have fulfilled three conditions:

- having made their best efforts to obtain the authorisation;
- having made their best efforts not to make the protected content available, having received the relevant information from the rightholders;
- having, upon receipt of a sufficiently reasoned notice from the rightholders, promptly disabled access to or removed from their websites the works or other subject matter of the notice and made best efforts to prevent their future uploading.

However, reproductions of a protected work for critical purposes or with parodic-caricature intentions are not subject to this regime and can be made without the authorization of the copyright holder.

Finally, platforms that make available user-uploaded content are required to have specific policies on complaints and removal of content, and generally grant the owners of such content the right to request the removal of the published contribution, upon reasoned request.

(iv) Fair remuneration and copyright negotiation

In order to transpose the provisions of the Directive aimed at protecting content creators, the LdA is amended in two main respects.

- Introduction of a new paragraph to Article 107, according to which authors and performers of a work protected by copyright are entitled to receive adequate remuneration proportionate to the potential or actual value of the economic rights over the work, as consideration for their licence or assignment. In particular, the revenues that are generated by the commercial exploitation of such works shall also be considered in the determination of such equitable remuneration.

- Introduction of Articles 110-ter to 110-septies. These provisions introduce a number of measures aimed at improving copyright negotiations. In particular, the possibility for the parties to avail themselves of the mediation of AGCOM in case of negotiations for the use of audiovisual works on video on-demand

services is provided for; moreover, a right of information is provided for the authors of the works to obtain information on the revenues deriving from the exploitation of these works, at least on a quarterly basis. Authors are also entitled to request an adjustment of the remuneration if the consideration received at the time of the transfer or licence is disproportionately low. Further, a pre-litigation mediation procedure at AGCOM is also provided for, which is not prejudicial to the right to refer the dispute to court. Finally, the mechanism allowing the termination of a licence or assignment agreement at the request of the author of a work if the transferee or licensee has not marketed it properly has also been transposed.

Contacts

Paolo Bertoni

Of Counsel - Chiomenti
T+39.02.72157.679
paolo.bertoni@chiomenti.net

Anna Gardini

Counsel - Chiomenti
T. +39.02.72157.758
anna.gardini@chiomenti.net

Sara Molina

Senior Associate - Chiomenti
T. +39. 02.7215.7476
sara.molina@chiomenti.net