ITALY
Report 2012

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Some of the oustanding legal developments in Italy during 2012 were presented on the occasion of the Kyoto ALAI Congress. I thought it useful to include them in this summary only for good order's sake.

In addition to the decision of the Administrative Tribunal about private copy remuneration on March 2, 2012 and in addition to law changes on the competence of the Specialize IP Section (already presented in the report for Kyoto), I summarize here the the new rules on the collective management of performing artists' neighbouring rights and some new provisions in the journalistic field.

Amendments to the competence of the Specialized IP Sections

Legislative Decree June 27, 2003 n. 168 instituted the specialized judiciary "Sections" with competence on matters of industrial and intellectual property, with the objective of ensuring an effective, adequate and timely definition of the judicial proceedings in such field. Their competence originally covered national, international, and EU trademarks, patents, plant varieties, utility models, designs, and copyright as well as unfair competition interfering with the protection of industrial and intellectual property. The Law of March 27, 2012, enacted into law Decree-Law of January 24, 2012, n. 1, transforms the specialized Sections for Intellectual Property into the so-called Specialized Sections for matters related to Companies. Their competence is extended to controversies related to corporations, limited liability companies, cooperatives and insurance companies, including antitrust proceedings, except for consumers' class actions. The enlargement of the competence of the Specialized Sections may contradict the aim of efficiency proclaimed in the Legislative Decree of 2003.

Copyright in Press Reviews

In the Italian Copyright Law there is an exception for reporting on current events. There is on the contrary no exceptions for the reproduction or the communication to the public of articles and news published in newspapers, magazines, or circulated by press agencies. In addition, even when applicable in the case of articles, the mentioned exception can be excluded by the news publishers by introducing the wording "reproduction prohibited" at the end of the published article. The legal framework is fully clear on the fact that the public dissemination of published articles in press reviews is subject to copyright. This notwithstanding, the supply and commercialization of press reviews containing copies of whole articles has increased in the last decades. Digital reproduction technology and the Internet have given a strong impulse to this trend.

Recently, news publishers instituted the so called "Repertorio Promopress" , aiming at the management of copyright for the exploitation in press reviews. Promopress is an initiative open to

other publishers. The major magazines and newspapers collaborate in the project. In July 2012, the the publishers' new organization and some press review services (Mimesi, Dailyou, Kikloi Pressline, Presstoday, SKL Communication, Euregio e Buon Vento) signed the first license agreements. Such agreements concern the secondary exploitation of information and editorial contents.

The first step to enforce more effectively copyright related to journalistic production is directed to the customers of press review services, to increase their awareness about the copyright compliance of the services they buy. Promopress awareness campaign should induce the customers of press review services to ask warranties that copyright was cleared by their service providers. Web sites that publish the articles in the repertory of Promopress are notified that unauthorized publication must be stopped.

New provisions for equitable remuneration of free lance journalists

Law December 31, 2012 n. 233 introduced into Italian legal system new provisions concerning a mandatory "equitable remuneration" in the journalistic field. The aim of the Law is the support of salary fairness for free lance professional journalists who work for newspapers and magazines, on paper and/or on-line, for press agencies and for broadcasters.

Apparently such provisions pertain to labour regulations rather than to copyright remuneration, although the terminology used "equitable remuneration" is not usually referred to salary and wages, but is typical in copyright compensation. The explicit reference in the Law is generally article 36 of the Italian Constitution, concerning the adequateness of salary for workers. All agreements contrary to the provisions on the equitable remuneration shall be null and void.

When the necessary implementing regulation is issued by the Presidency of the Council of Ministers, it will be possible to understand if and how the equitable remuneration is related to the assignment of copyright in journalistic works.

A committee for the assessment of such equitable remuneration is formed in the Department of Information and Publishing of the Presidency of the Council of Ministers. Publishers and broadcasters who do not comply with the indications of the Committee on the level of the equitable remuneration shall be excluded from public benefits and from subsidies granted to publishing industries.

Collective Management of Performers' neighbouring rights

Some remarkable developments are to be noted in the field of performers neighbouring rights. As a background, it is useful to remind that in Italy a unique organization for both audiovisual and music performing artists has existed since 1992, i.e. IMAIE **(**Istituto Mutualistico Artisti Interpreti ed Esecutori), founded by the main trade unions of the two categories of artists.

Law 93/1992 was interpreted as conferring on IMAIE the representation *ex lege* of some of the rights granted to performing artists, i.e the equitable remuneration paid to them for the public communications and broadcasting of their recorded performances under articles 73 and 73-bis of the Copyright Law, as well as the performers' shares of the remuneration for private copying. The equitable remuneration to be paid to audiovisual artists for their main performances or supporting parts in cinematographic or audiovisual works is negotiated and collected by IMAIE according to art. 84 of the Copyright Law.

In 2009, the public authority decided on the liquidation of IMAIE (Decree of the Prefetto of Rome of April 30, 2009), due to its failure to achieve its institutional task of distributing the revenues from the equitable remuneration for performers' public performing and broadcasting rights. This decision was confirmed by the competent administrative tribunal (TAR Lazio). Subsequently, by Art. 7 of Decree Law 30 April 2010, n. 64 (enacted in Law 29 June 2010, n. 100) the so-called Nuovo IMAIE has been instituted to resume the tasks of the entity under liquidation. "Nuovo IMAIE" is a private association, regulated by the Civil Code, but it operates under the joint supervision of the Presidency of the Council of Ministers, of the Ministry of Culture and of the Ministry of Welfare, that are empowered to approve its Statute and any subsequent modification and its voting regulations. Nuovo Imaie has therefore been considered as the successor in law of the terminated IMAIE, including for the tasks related to promotional initiatives financed according to art. 7 of Law 93/1992 and art. 71-octies ?? of the copyright law.

Law of March 25, 2012, n. 27, annex, (modifying Decree Law of January 24, n. 1, containing urgent provisions for competition, development of infrastructure and competitivity) introduces by its Art. 39.2 the principle that "the administration of neighbouring rights is free". It is also expressly stated that the aims of the provision is the creation of more enterprises for collective management of such rights. These provisions deleted *de facto* the monopoly of IMAIE.

The President of the Council of Ministers has issued the Decree defining the minimal requirements to act as intermediary in the management of neighbouring rights, opening therefore the possibility to have competing organizations in this field. The regulations – necessary to implement the mentioned principle of Law 27/2012 – was revised by the Italian antitrust Authority before its enactment.

Private copying remuneration

Ministerial Decree December 30, 2009 replaced the provisional determination of the remuneration fees for private copying contained in art. 39 of Legislative Decree n. 68/2008 (implementation of the European Directive on copyright and related rights in the Information Society).

Eight claims presented by the plaintiffs asked for the cancellation of the Ministerial Decree and all were rejected in the decisions issued by the Administrative Tribunal of Lazio (TAR) on March 2, 2012.

One claim stated that the Decree infringed Article 23 of the Constitution because the amount of the remuneration, being an "imposed levy" and must therefore be established by a law and not by a mere ministerial regulation. Such claim was rejected on the ground that, according the Constitution, the amount is established "on the basis of the law", not necessarily "by the Law" and Article 71-septies, par. 2, of the Italian Copyright Law contains a reference to a ministerial provision, while indicating the criteria to determine its content and the proceeding for its adoption.

Two claims concerned the application of the remuneration to multifunctional devices such as mobile phones and PCs, usable for the reproduction of phonograms or videograms, though not being expressly manufactured for this purpose. The two claims were rejected on the ground that neither the definition of multifunctional device nor the amount of the levy contained in the Ministerial Decree conflicts with the provision of Article 71-septies of the Law, provided that it is proportional to the secondary recording function[1]. The TAR's decision recalls the decision of the European Court of Justice in the Padawan Case[2], where it clarifies that it is to be assumed that natural persons benefit from all the functions allowed by the device, including the recording functions. The mere ability of such devices to make copies is sufficient, therefore, to justify the private copy remuneration. According to the interpretation of Recital 35 of the Information Society Directive 2001/29/EC by the European Court, the criterion to apply is the "possible harm", not the actual one. The TAR refers to the Padawan decision also for the concept of "minimal prejudice" and states, though indirectly, that only a single private use, individually considered, could qualify as "minimal prejudice", which is not the case when the phenomenon is widespread or repeated and there are multiple private uses (para. 46).

The claims concerning the concept of "importer" were rejected on the ground that the importer – as a person acting on a commercial basis – is intended to be the addressee in Italy of the device or media. In the case of a commercial business operated by residents abroad towards an end user in Italy, the "importer" is the seller or the person who offers the products to the public. This concept is consistent with the Judgment of the Court of Justice in the case C-462/09 of June 16, 2011[3] (par. 39), where it is stated that the national legislation identifies the person responsible for the payment in order to guarantee "the recovery of that compensation from the seller who contributed to the importation of those media by making them available to the final users".

TAR rejected the claim that the Decree conflicted with the European legislation and the request to submit the issues to the European Court of Justice on the ground that the Padawan decision was clear on the issues disputed in the case.

The TAR's decisions have been appealed to the *Consiglio di Stato*.

[1] The amount of the remuneration on mobile phones (0.90 euros) is deemed equitable because it is equivalent to the usual price of a download of a single track.
[2] European Court of Justice, decision of December 7, 2006, Case C-306/05, SGAE, Racc. P. I-11519, pr. 43 and 44.
[3] Judgment of the European Court of Justice, June 16, 2011, Case C-462/09, Stichting de Thuiskopie v Opus Supplies Deutschland GmbH and Others.