Italy

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Sources of Law

In Italy the main law regulating copyright is Law n. 633 of April 22, 1941 (Italian Copyright Law - ICL) on the protection of copyright and other rights related to its exercise, which has been amended and supplemented by some subsequent legislative interventions.
Other provisions are contained in the Italian Civil Code at the articles 2575 – 2853.
Furthermore, being Italy a member of the European Union, its legislation is aligned with the provisions of the EU legislation, in particular by some directives covering the copyright field, which have been implemented in Italy.
In addition, Italy is a member of some international treaties concerning copyright law, which set common rules granting a minimum standard of protection, among which:

- Berne Convention for the Protection of literary and artistic works of 1971;
- International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organization of 1961;
- WIPO Copyright Treaty of 1996;
- WIPO Performances and Phonograms Treaty of 1996;
- Universal Copyright Convention of 1952-1971.

1. Triple test provision

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Article 13 of the TRIPS Agreements stipulates that Contracting States may introduce exceptions and limitations to copyright only: (a) in certain special cases, provided that: (b) such limitations do not conflict with normal exploitation of the work; and (c) do not lead to an unjustified prejudice to the legitimate interests of the holder.
Article 5.5 of Directive 2001/29/CE transposed the "Three-step-test" from the requirements of the national legislators to the rules of interpretation to be applied to the detailed catalogue of free uses regulated in this law.

With article 71-*nonies* of the Italian Copyright Act, introduced by the Legislative Decree 68/03 in implementation of article 5.5 of Directive 2001/29/CE, the national legislator has transposed the "Three-step-test" in its internal order, leaving margins of flexibility in defining the exceptions for interactive communication, introducing a provision applicable to all the goods used and protected materials made available to the public. The major Italian doctrine has interpreted the introduction of the "Three-step-test" in the sense of giving greater emphasis to the balancing and weighting of the interests of all social economic actors, and not only to a part of them.

In particular, article 71-*nonies* provides that: *"The exceptions and limitations in this Chapter and in any other provision in this Law, when applied to protected works or other subject-matter made available to the public in such a way that members of the public may access them in a time and from a place individually chosen by them, shall (must) not conflict with the normal exploitation of the work or of the other subject-matter and not unreasonably prejudice the right holders"*.

So, in statute procedure, it can definitely represent a general interpretative standard for limitations and exceptions of copyright, but, in law, it is principally connected to and put in practice with regard to new technologies. Thus, the judicial practical application of the "Three-step-test" is not particularly widespread outside the scope of private copying disputes.

In addition, it should be noted that some exceptions and limitations, confirmed or introduced by Legislative Decree no. 68 of 2003, contain the main requirement of the eligibility test, in particular those which provide that the restriction of the rights does not compete with the normal economic exploitation of the work or the protected material, such as reprography (see article 68, paragraph 6) or citations (see article 70, paragraph 1).

2. Exceptions to the copyright protection

In order to balance the author's rights in his works with the public's general right to freely access them, the Italian law provides for a number of limitations to the author's rights. Indeed, reproduction of copyright protected content does not lead to a copyright infringement, if the act of copying is justified by legitimate reasons.

The "Exceptions and limitations", provided by Chapter V of the ICL, are the following:
- article 65, par. 1 relates to articles of current interest of an economic, political or religious character, published in magazines or newspapers, may be freely reproduced in other magazines or newspapers, or may be broadcast, unless such reproduction is expressly reserved, provided mention is made of the magazine or newspaper from which they are taken, the date and the issue of the magazine or newspaper and, in the case of a signed article, the name of the author;
- article 65, paragraph 2 provides that the reproduction or public communication of protected works or material used in current events is permitted as part of freedom of speech and provided it has an informative aim, as long as, unless impossible, the source, including the name of the author, is reported;
- according to article 66, the speeches upon matters of political or administrative interest given in public assemblies or in any other public manner may be freely reproduced in magazines or newspapers, or broadcast, provided the source is mentioned, together with the name of the author and the date and place in which the speech was given;

- article 67 states that the works or portions of works may be reproduced for use in judicial or administrative proceedings, provided the source or the name of the author is mentioned;
- article 68, paragraph 1 relates to the reproduction of single works or of portions of works for the personal use of the reader, when made by hand or by a means of reproduction unsuitable for marketing or disseminating the work in public, shall be permitted;
- according to article 68, paragraph 2, the permission is given for the free photocopying of works found in public and scholastic libraries, public museums and public archives, undertaken by these said bodies for their own duties, without any direct or indirect economic or commercial gain;
- article 68, paragraph 3 concerns that while the reproduction of sheet music and musical parts remains prohibited, the reproduction for personal use of an intellectual work by means of a photocopier or similar machine, is permitted, up to a limit of 15% of each volume or book, excluding advertising;
- article 68-*bis* states that the except for the legal responsibilities of internet service providers set out in e-commerce law, exemption from the right of reproduction is granted to acts of temporary non-commercial reproduction of a transitory or accessory nature and an integral and essential part of a technological procedure, carried out with the sole aim of allowing the network transmission between third parties by use of an intermediary, or the legal use of an intellectual work or material;
- article 69, paragraph 1 relates to loans from libraries and record libraries belonging to the State or to public authorities, made exclusively for purposes of cultural promotion and personal study, shall not require authorization by the right holder, to whom no remuneration shall be due, and shall exclusively concern: (a) printed copies of the works, except for music scores; (b) phonograms and videograms containing cinematographic or audio-visual works or sequences of moving images, with or without sound, provided that at least 18 months have elapsed since the first exercise of the right of distribution or, where the right of distribution has not been exercised, provided that at least 24 months have elapsed since the making of the said works and sequences of moving images;

- article 69, paragraph 2 regards the departments of the libraries and record libraries belonging to the State or to public authorities shall be permitted to reproduce a single copy of the phonograms and videograms containing cinematographic or audio-visual works or sequences of moving images, with or without sound, which are held by those same State libraries and record libraries and by the public authorities;
- article 70, paragraph 1 concerns the abridgment, quotation or reproduction of fragments or parts of a work for the purpose of criticism or discussion, or for instructional purposes, shall be permitted within the limits justified for such purposes, provided such acts do not conflict with the commercial exploitation of the work; if they are carried out for educational or research purposes their use must be illustrative and not for commercial ends;
- article 70, paragraph 1-*bis* provides that the permission is granted for the free publication on the internet, without restriction, of images and music of low or degraded quality, for educational or scientific use and only if there is no commercial gain;
- ex article 71, the bands of the armed forces of the State may perform musical pieces or portions of musical works in public without payment of any fees in respect of copyright, provided the performance is not made for profit;
- article 71-*bis* relates to the permission is granted for disabled people to reproduce, for their own personal use, protected works or material or their public transmission, as long as this reproduction is directly connected to their handicap, has no commercial ends and is limited to a use necessitated by the handicap;
- article 71-*ter* refers to the permission is granted for the communication or availability to the individual user, for research or private study, on dedicated terminals situated in public libraries, educational establishments, museums and archives, of the works and other material contained in their collection and not subject to binding transfer or licence agreements;
- according to article 71-*quarter*, the reproduction of television broadcasts carried out by public hospitals and penitentiary institutions, solely for internal use, provided that the rights holder receives the fee laid out in a decree of the Ministry for Arts and Culture, is permitted;

- ex article 71-*quinquies*, technical protection measures must be removed, by public authority request, for public security or to allow the correct course of administrative, parliamentary or legal proceedings, as well as to allow the exercise of the exceptions provided by the law;
-Lastly, articles 71-*sexies*/71-*octies* concerns the private reproduction and personal use, which consists of "*private reproduction of phonograms and videograms on any equipment, carried out by an individual exclusively for personal use, provided there is no direct or indirect commercial gain"*. As general "closing" regulation on the subject of exceptions and restrictions, article 71-*nonies* provides that all the exceptions/limitations to author's rights *"must be interpreted in a way as to not impinge upon the normal use of the work or other material, nor cause an unjustifiable prejudice to the interests of the rights holders"*.

In addition to the exceptions and restrictions laid out in Chapter V of law no. 633/1941, further exceptions are regulated in other parts of the copyright law: in particular, regarding databases, the following activities are not subject to the authorization of the rights holder: *"access to or consultation of the database for purely teaching or scientific research purposes outside the framework of a company, as long as the source is mentioned and to the extent justified by the non-commercial purpose to be achieved; in the case of access or consultation, however, the permanent reproduction of all or a substantial part of the contents on another medium shall be subject to authorization by the owner of the rights" and "use of a database for public security purposes or for the purposes of an administrative or judicial procedure*" (article 64-*sexies*).

Moreover, article 15-bis, paragraph 1 relates to the performance or recitation of works, which takes place on the premises of officially constituted assistance centers or institutions, or benevolent associations, on condition that they are intended solely for members and guests and that they are not carried out with gainful intent, while article 51 concerns the performance of radio works by the broadcasting body and the performances of radio works in public. Finally, article 91 contemplates the exception regarding the reproduction of

photographs in anthologies intended for school use and, in general, in scientific or didactic works, and the reproduction of photographs published in newspapers or other periodicals, and which concern persons or current events or matters of any public interest.

The Italian law, according to the international and community line, outlined the free uses as limited and specific derogations to the *ius excludendi alios* of the author, aligning with the tradition of the civil law countries and departing from the Anglo-Saxon countries as that conceive the exception provisions as general clauses. This is an expression of a general principle of balance between the author's private interests of the exclusive and the public interest in the dissemination of the results of creative activity.

In the light of the above, we can affirm that the structure of user rights in Italian Law seems mainly well-balanced, with a series of important exceptions to the exclusive rights of the author, which however do not undermine the overall body of law in any significant way. It should be considered that Italian judges, used to making judgements in terms exceptions to holders' rights rather than users' rights, class these provisions as exceptional and tend to interpret them in a very restrictive manner.

3. The relation between fundamental rights and the exceptions to the copyright protection

Free uses aim to balance the author's and community's interests. It follows that the constitutional foundations of the exceptions and limitations can be found in the constitutional provisions that protect these interests.

According to Italian doctrine, the same rules of free usage explicitly contain a reference to constitutional principles. Namely, the right to information (article 21 of the Constitution and article 65 of the ICL); health (article 32 of the Constitution and articles 71a and 71c of the ICL); the freedom of research and the promotion of the development of culture and teaching (articles 9 and 33 of the Constitution and 71 and 68 of the ICL); of the defence (article 24 of the Constitution and

67 of the ICL). Therefore, it seems that, in compliance with the Italian Constitution, the fundamental rights or objectives appear not be overlooked or unduly minimized by the current list and its interpretation.

The primary motivation of the exceptions and limitations to the copyright protection arises, therefore, from the requirement that the copyright imply, in addition to the compensatory award function, the incentive function through the encouragement and the promotion of the cultural heritage. It is implicitly recognized that the combination of knowledge and the expression of creativity depend not only on individual talent or remuneration, but also, to a significant and ineradicable extent, by the circulation and the availability of knowledge and ideas as indispensable *humus* for the development of new works.

Restrictions on rights, motivated by reason of public interest, are accompanied by exceptions and limitations based on motivations related to the effects of technology and the functioning of the market, which make necessary and acceptable the substitution in certain cases of the exclusive rights of the owner with the compensation for the author that will be discussed in point 11 below.

Alongside the exceptions determined by what can be defined, in the broad sense, "the public interest" there are increasingly relevant cases where the limitation of rights is generated by the so-called market failure. Especially when the impossibility of ensuring the extension of theoretically recognized rights stems from the development of uncontrollable forms of exploitation. The most common examples of these types of rights restrictions relate to uses in the private sphere, such as reprography and private copy of phonograms and videograms.

4. Interpretation of the exceptions to copyright protection

One of the major legal issues related to the rules concerning the exceptions to copyright protection is the possibility of an analogy or extensive application. In particular, with regard to the analogous application of the rules on free use, or whether the exceptions can be

applied beyond the cases expressly mentioned, Italian doctrine and jurisprudence have regard to the legal nature of the rules, and in particular if this rules must be considered exceptional or not. According to the majority opinion, article 65 ss. of the ICL provides that the list of exception is exceptional from the general principle that reserves the author's economic exploitation rights for his work. The above mentioned provisions must therefore only apply to cases expressly provided and are legitimate only insofar as they are justified by legally constitutionally guaranteed interests of equal or greater rank than those which derogate from them.

These rules, given that they are of an exceptional nature and, in particular, derogations from the general principle which reserve the right to use the work of the author, should be taken to be strictly interpretive and must therefore be excluded from the possibility of giving the words a meaning other than the literal meaning.

The balance of interests underlying the introduction of exceptions and limitations cannot ignore the orientation expressed by the Constitutional Court, nor can it depart from the principles contained in the International Agreements signed by Italy and in the relevant Community Directives, which provide a framework for the application and interpretation of the exceptions themselves. Due to their nature of special rules, the provisions relating to exceptions and limitations cannot give rise to analogous and extensive interpretations and must only be applied to cases expressly provided for.

For the purposes of determining the principles applicable to copyright restrictions and related rights, attention should be paid to the statement of the Constitutional Court in a number of judgments[2] made on various aspects of law no. 633 of 1941. The Constitutional Court reiterated that the function of the protection of works through the assignment of exclusive rights governed by law should also be referred to the implementation of certain constitutional principles. For these reasons, the Constitutional Court ruled that the copyright

[2]Corte di Cassazione, Section I, 07/03/1997, no. 2089, Il Diritto Industriale 1997, p. 812; and Giurisprudenza Italiana 1998, p. 1191

was prevalent in relation to the economically relevant interests of those who use the intellectual works, in strictly correlation with the interest of the whole community in the promotion of culture and its diffusion, which can only be achieved through the adequate protection and remuneration of those who create the works.

5. Nature and extension of the exceptions to copyright protection

It is important to emphasize in this context that the Italian doctrine distinguishes between exceptions and limitations: exceptions refer to acts which, while falling within the powers attributed to the author under certain circumstances and conditions, are exempt of the protection conferred to the author's rights and thus give rise to such free use. Exceptions are generally indicated by the Italian Copyright Act, but may also result from the application of rules intended to regulate other sectors. On the other hand, limitations relate to restrictions of rights which derive from different provisions, such as freedom of speech, the free circulation of information and competition.

The difference between limits and exceptions presents a connection to the legitimacy of contractual clauses containing restrictions on the rights provided for by law. There are doubts as to the validity of contractual agreements in derogation of limitations (for example, the agreements on the assignment of rights are void if they regard products that lack originality and are of public domain). Instead, the contractual waiver may be eligible for an exception, with the effect only relevant to the parties, not being possible therefore to enforce the latter against third parties.

The question of ruling out the exceptions laid down in the law relies, on one side, on the nature of the rules on copyright and on the grounds on which the exceptions are based, and on the other side, on the provisions relating to the formation of the will of the parties. In general, with reference to the possibility that copyright or related rights contracts contain waiver clauses to legally-defined exceptions, the answer seems positive for general and particular reasons. With Legislative Decree no. 68 of 2003 was introduced a further explicit admission of exception derogations concerning works and materials

made available to the public in interactive services. Also article 71-*ter* of Law no. 663 of 1941 can be related to the effect of the contract on the exceptions. This article refers, in particular, to the transmission to the public for private research or study activities through terminals having such a single function, located in library premises, instructional studios, museums and archives.

The derogation of certain exceptions is, however, excluded in cases where the nature of the provisions is mandatory. For example, the freedom of parody – admissible, as distinguishable from the simple drafting of consolidated case-law interpretation in accordance with article 21 of the Constitution – cannot be excluded from contractual agreements. Other exceptions are made for reasons of public interest in relation to fundamental freedoms enshrined in the Constitution and therefore these exceptions cannot be ruled out from the will of the parties, as in the case of quotation for criticism and discussion or use in the exercise of the right of chronicle. Also the exceptions for reasons of public order cannot be excluded from contractual agreements (see, for example, article 67 of Law no. 633 of 1941, which refers to the copyright exception on uses for public security purposes or during a judicial, administrative or parliamentary proceedings).

6. Exceptions relating to "reproduction right" and "right of communication to the public"

The Italian legal system provides for a list of exceptions that refers both to the right of communication to the public and to the right of reproduction.

With regard to the right of communication to the public, the main exceptions refer to: "*Articles on current interest of an economic, political or religious character, published in magazines or newspapers, as well as articles broadcast or made available to the public, and other subject-matters of the same character shall be freely reproduced or communicated to the public in other magazines or newspapers also in broadcast news programs, unless such reproduction or utilization is expressly reserved, provided the source, the*

date and the author's name, if quoted, are indicated" (see article 65, paragraph 1 of the Italian Copyright Act).

In addition, the Italian Copyright Act provides that "*Speeches on matters of political or administrative interest delivered in public assemblies or in any other public manner, as well as extracts of public lectures, shall be freely reproduced or communicated to the public, to the extent 17 justified by the informatory purpose, in magazines or in newspapers, also if broadcast or in electronic format, provided that the source, the author's name, the date and the place where the speech was delivered, are indicated*" (see article 66 of the Italian Copyright Act).

In relation to the reproduction right exception for private use, with the Directive n. 2001/29/CE, Italy has implemented a systematic and substantial reorganization of private copying regulations. The article 71-*sexies* explicitly limits the exclusive right of reproduction to certain acts, fixing the conditions and limits within which private reproduction falls within the exemption and is therefore lawful. The first condition applies to those eligible for the exemption, which are exclusively natural persons in compliance with the technological measures referred in article 102-*quater*. The application of the provisions on private copying to protected materials other than phonograms and videograms is excluded; The only copy of the reserve reserved for the computer programs is allowed for the purposes of article 64-*ter*.

The conditions for limiting the right of reproduction and the limits within which the limitation is applicable are defined in detail by article 71-*sexies*, although compliance with these limits remains to a large extent entrusted to good individual faith, since the application is in practice uncontrollable.
Reproduction for private use must be made directly by the natural person who is using it. Paragraph 1 of article 71-*sexies* reiterates that such copies must not be for profit and must be without direct or indirect commercial purpose. Personal use does not include copies made on behalf of third parties, thus excluding reproductions made to give it to friends, familiars, etc.

7. Exceptions and moral rights of the author

Exceptions and limitations apply only to the exploitation rights of the author's work with the exclusion, therefore, of moral rights which are not restricted and which the legislature has been careful to guarantee also in relation to free usage. The paternity right is always protected by the so-called mention of use: in any case the title of the work and the name of the author always have to be mentioned. The free use, however carried out, is always accompanied by some indications concerning the paternity of the work. The above mentioned indications are different depending on the type of free use considered: ex article 65 of the Italian Copyright Act the reproduction or communication to the public must always be indicated, "*unless this is impossible, the source, including the author's name, if reported*"; ex article 66 in addition to the source and the name of the author, the date and place where the speech was held must be specified, and so on.

The right to integrity cannot be compromised by free use as such does not include any elaboration or adaptation of the work itself; the work may in some cases be reproduced or communicated to the public, but certainly without any modification. The only problem relates to causality (way, place, time) of reproduction, communication or citation. Ex article 20 of the Italian Copyright Act in fact, the damage may also derive from any other act of damage to the work, which, as confirmed by doctrine and jurisprudence, allows the author to propose opposition even in the absence of alterations to the internal or external form of the work, that is, a real modification in the physical sense of the same, but in consideration of the ways of presenting to the public the work imagined and desired by the author. It follows, therefore, that the violation of the right to integrity could, for example, result from the fact that reproduction of works, public disclosure or quotation is in such a manner as to affect the author's honour and reputation.

8. Technological protection measures

According to article 71-*quinquies* of the Italian Copyright Act, technical protection measures must be removed, by public authority request, for public security or to allow the correct course of administrative, parliamentary or legal proceedings, as well as to allow the exercise of the exceptions provided by the law.

Regarding the relationship between technical protection measures and statutory user rights, the reform of the statutory law introduced in the Italian system a specific mechanism of balance of interests between right holders and third parties. Specifically, the right holders can use technical protection measures to prohibit or to limit non authorized copying or reproduction of the work. However, right holders are compelled to adopt suitable measures, also by specific agreement with a third party's representative associations or trade unions, to enable the exercise of exceptions and limitations granted by law. In that case, third parties must have come into lawful possession of works or protected material and, if provided, must pay a fair remuneration.

Moreover, article 71-*sexies* establishes permission for private copying of sound and video recordings on any media support, done by a physical person for personal use only, without profit or (directly or indirectly) commercial purpose. To compensate the rights holders for this private copying, article 71-*septies* states that a fee must be paid to them, determined as a proportion of the sales price of suitable equipment to record audio or video. This fee is fixed by a decree of the Ministry of Culture and it is paid to SIAE (Società Italiana Autori ed Editori – Italian Society of Authors and Editors) by manufacturers or importers of the said equipment.

9. "Catch all" exceptions

The Italian legal system, like other European legal systems, does not have anything equivalent to the doctrine of fair use developed by courts in the United States and adopted in several common law jurisdictions. U.S. law limits the subject matter of copyright in a pragmatic way by applying open and flexible evaluation criteria for the judicial definition of unauthorized uses. On the contrary, Italian

law strictly defines and limits the extent of free and unauthorized uses.

Consequently, there are no binding or specific rules to prohibit the undermining of statutory user rights, as long as the Italian system does not provide for statutory user rights. In this regard, few provisions, mainly regarding software and databases, explicitly protect the user's position, establishing that any possible agreements with the right holder to exclude or restrict that position are invalid.
In these cases, therefore, the protection guaranteed to the users is consolidated contractually by disability measures, restricting the private autonomous relationship between the parties.

10. Abstractions of the copyright exceptions

As already mentioned, the Italian Copyright Act provides for a list of exceptions which is limited, specific and mandatory. Furthermore, the Italian judges classify the exceptions and limitations to copyright as exceptional and tend to interpret them in a very restrictive manner.

For these reasons, it can be said that the Italian legal system is not inclined to create an abstraction of the copyright exceptions for the purposes of fundamental rights, since the latter are the foundations of the exceptions and limitations that can be found in the Italian Copyright Act.

In fact, as stated in point n. 3 above, the provisions of free usage explicitly contain a reference to constitutional principles. Namely, the right to information (article 21 of the Constitution and article 65 of the ICL); health (article 32 of the Constitution and articles 71a and 71c of the ICL); the freedom of research and the promotion of the development of culture and teaching (articles 9 and 33 of the Constitution and 71 and 68 of the ICL); of the defence (articles 24 of the Constitution and 67 of the ICL).

11. Compensation for the exceptions to the copyright protection

Section V of the ICL (articles 65 to 71-*nonies*) - "Exceptions and Limitations" - provides for a list of exceptions to the rights of the owner in the sense that some of the exclusive rights granted to the owner are limited by reasons of public interest and non-profit use, which are regarded as prevailing on the author's rights.
In particular, article 68 of the ICL, as amended by the Legislative Decree n. 68/2003, implementing article 5 of the EC directive n. 29/2001 provides for a list of exceptions, which can be summarized as follows:

- the reproduction of single works or part of them for personal use, made by hands or without means intended for the public spread of the work;
- the reproduction, for personal use, of books or periodical dossiers within the limit of 15% of their content;

in this latter case, a compensation for the author will be due by the owner of the reproduction centre and the amount of the compensation will be calculated on the ground of a private agreement between the trade associations and SIAE. In case of lack of such agreement, the amount of the compensation and the way to calculate it, are decided by decree of the Prime Minister, after having heard the trade associations and the Authors Society (SIAE) and having collected the opinion of the Copyright Permanent Advisory Committee established according to article 190 of the ICL.
In addition, article 71-*quater* provides that the reproduction of TV programs made by public hospitals and / or prisons for a mere internal use, are allowed on condition that the copyright owner are paid an equitable compensation calculated by the Ministry for the Cultural Activities.
Any reproduction made which means apt to compete with the copyright of the author is strictly forbidden.

12. Exceptions for temporary acts of reproduction.

Article 68-*bis*, which has been implemented according to the provision of the Legislative Decree n. 68/2003, expressly provides that "*Apart from what is stated with respect to the responsibility of the intermediaries in the field of electronic commerce, no right of reproduction is due for the acts of temporary reproduction having no*

*economic value which are transient or subsidiary and essential part of a technological procedure, made with the only aim to allow the transmission in the net among third parties with the intervention of an intermediary, or a legitimate use of a work or other materia*l".
The present article has been introduced in accordance with the provisions of article 5 of the EU Directive 29/2001, which provides for an hypothesis of mandatory free utilization. According to the EU regulations, this provision states that an act of reproduction is free, namely does not fall within the scope of the copyright protection on condition that it is (i) temporary, (ii) subsidiary, (iii) essential part of a technological procedure, (iv) executed with the only aim to allow the transmission in the net among third parties with the intervention of an intermediary or a legitimate use of a work or other material, (v) devoid of an economic value. In this respect the European Court of Justice (16.7.2009) has stated that "*the temporariness requisite exists only when its duration is limited to the needs of a good performance of the technical procedure being intended that said procedure must be automatized in such a way to cancel said act in an automatic way, without any human intervention, when the function aimed to realize such a procedure is exhausted*".
According to part of the authors, the *ratio* of this exemption must be found in the fact that the acts of reproduction mentioned herein are devoid of any economic value and therefore do not compete with the exclusive right of the owner.

13. The freedom of expression.

Freedom of expression is expressly ruled by article 70 of the ICL, which provides as follows:
"*The summary, quotation, or reproduction of works or part of works and their communication to the public are free if made for purpose of criticism or discussion, within the limits justified by said purposes and on condition that they do not compete with the economical use of the work; if made for teaching purposes or of scientific research their use must be made for explanatory purposes and for non-commercial aims*".
The exception of freedom of expression has the purpose to find a balance between the rights of the owner and the right to the freedom

of expression, which - as previously told - is expressly recognized by article 21 of the Constitution. Needless to say that the exception cannot be granted if the use of the work has any economical purpose.
According to the authors, the list of purposes of purpose of criticism, or discussion, teaching and scientific research not aimed at a commercial use is peremptory, while the summary, quotation or reproduction must be finalized to the criticism or quotation made by the user (in this sense, Tribunal of Milan, 13.12.2007 and Tribunal of Palermo, 9.5.2003).

In accordance with this principle, the reproduction of a newspaper article in a press review has been regarded as non-admissible (Tribunal of Milano, 13.7.2000; Court of Appeal of Milano, 26.3.2002).

In any case, a lawful quotation must never compete with the rights of the author of the original work, independently on the purposes of the user; in order to appreciate the existence of a competition between the quotation and the original work, it is necessary to consider the impact of the quotation on the economic life of the original work (Supreme Court n. 2089/1987; Court of Appeal of Milano, 25.1.2002; Tribunal of Milano, 2.4.2003).

14. Political and news reporting exceptions – Other exception justified by reasons of public interest.

14.1 According to article 65 of the ICL (as amended by the Legislative Decree n. 68/2003) "*The news articles having an economic, political or religious content, published in magazines or newspapers, or broadcasted or made available to the public, as well as other material of the same character may be freely reproduced or communicated to the public in other magazines or newspapers, or broadcasted even by radio or television, provided that the reproduction has not been expressly reserved and on condition that the source, the date of publication and the author's name are mentioned.*

The reproduction or communication to the public of protected works or material which are used during public events is allowed for pub-

lic information purposes, on condition that the source and the author's name – if known – are mentioned".

14.2 The free use provided for by the above article is an exemption justified by the public use and interest, namely, by the character of the reproduced work in the hypothesis of the first paragraph and by informative purpose pursued by the reproduction, with respect to paragraph 2. The exemption provided for in paragraph 1 expressly refers to works which (i) have been already published with the consent of the author; (ii) whose reproduction is conforming to the original and (iii) on condition that the magazine / newspaper, the date and place of publication and the name of the author are mentioned. According to the case law, the reproduction of an article non authorised by the author or without mentioning his name, the source or the fact that it has already been published in another newspaper is unlawful (Tribunal of Napoli, 21.3.1994; Pretura of Roma, 19.9.1998 and 3.10,.1998).

On the other side, with respect to the works mentioned in paragraph 2, their reproduction or communication to the public is made on condition that (i) the materials have been used on the occasion of current events, (II) their use is justified by the exercise of the right of information and (iii) within the limit of said purpose.
The Italian Courts have denied the existence of this justification when the events did not have an actual interest or when their reproduction was not made during the same factual or time context (Court of Appeal of Milano, 26.3.2002; Tribunal of Roma, 22.4.2008; Tribunal of Milano 17.7.2009).

14.3 Article 65.1 provides the right of the author to expressly reserve the right of reproduction or use of his works by adding a reservation clause ("*Riproduzione riservata*") which limits the scope of the exception with respect to one or more of their works in order to avoid any possible use by the competitors and protect the economic value of the work.

14.4 The subsequent article 66 (as amended by the Legislative Decree n. 68/2003) provides that " *The speeches having a political or*

administrative content made in a public assembly, or even publicly made, as well as the extracts of conferences open to the public, can be freely reproduced or communicated to the public, within the limits of the informative purposes, in magazines, newspapers, even via radio or television as well as by telematics means, provided that the name of the author, the date and the place of the speech are mentioned".
The *ratio* of the rule is to protect the higher interest of the public information and of its circulation; its limit is in fact determined by the informative purpose and cannot be applied by analogy.

14.5 Finally, article 67 (as amended by the Legislative Decree n. 68/2003) of the ICL provides for an exception which the most part of the authors consider as strictly connected with the right of self-defence provided by article 24 of the Constitution, allowing the use of works (or part of them) whenever it is necessary in the course of a judicial procedure.

The rule expressly states that: "*Works or part of them may be reproduced for purposes of public security, during parliamentary, judiciary or administrative procedures, on condition that the source and – if possible – the name of the author are mentioned*".

According to the authors the word "*reproduction*" is used in a non-technical meaning being referred to any possible form of use of the work aimed to achieve the purposes of the rule; in the same sense, the word "*procedures*" must be red in an extensive sense, including not only those which take place in front of judicial authorities, but also in from of any kind of administrative court and /or authority.

15. Exception for purpose of education

15.1 The exception for education purposes are provided by article 70 (as amended by the Legislative Decree n. 68/2003) whose paragraphs are reported here below:

"*1-bis. It is allowed the publication in internet for free of images and music at low resolution or downgraded, for teaching or scientific*

purposes and only in case of non-lucrative purposes. By decree of the Ministry for Cultural Activities, after having heard the Ministry for Instruction and the Ministry for the University and Research, after the opinion of the competent parliamentary Commissions, the limits of the teaching and scientific use are defined.
2. In the anthologies for scholastic use, the reproduction cannot exceed the measure provided for by the regulation, which provides for the fair compensation.
3. The summary, quotation, or reproduction must be always accompanied by the mention of the title of the work, of works, the names of the author, of the editor and, if case of translation, of the translator, if said indications appear on the reproduced work".

As it can be easily derived from the above, all the exceptions are justified by purposes or teaching and / or research and can be applied not only to works published in internet but also to works which can be accessed by users of universal services of telecommunication, even when said access is subject to subscription or registration procedures, being excluded only the nets which are not open to all the users, and subject to access protocols.

15.2 The free use is subject to some objective conditions, which can be summarised as follows: i) the teaching / research purpose; ii) the absence of any lucrative purpose; iii) the deterioration of the published works; iv) the nature of the published works and v) the gratuitousness of the publication.

15.3 With regard to the anthologies for scholastic use provided for by paragraph 2, the rules mention a fair compensation in favour of the right owner and said compensation must be paid by the editor of the anthology; the reproduction is not allowed if the anthology is not intended to have an exclusive scholastic destination. There are no limits with respect to the works which may be reproduced in an anthology: literary works, music, photographs and movies, within the limits provided for by article 22 of the implementing regulation; the fair compensation due to the rights owner is determined by the Prime Minister with the agreement of the Ministry for the Public

Education, upon proposal of the permanent committee for the copyright.

15.4 Free uses must respect the moral rights of the author; quotations must report the title of the work, the name of the author, of the editor and of the translator (if mentioned on the original work). The author cannot require additional indications, but the violation of this provision implies a violation of the moral right of the author and may lead to a reimbursement of the damages (Court of Appeal of Milan, 25 January 2002; Tribunal of Milan, 8 July 2009).

16. Exception supporting big data related activities

16.1 Data bank protection is provided for by article 64-*quinquies* and 64-*sexies* as well as by Title 2-*bis* of the ICL, which have been respectively added by articles 4 and 5 of the Legislative Decree n. 169 of May 6, 1999, in compliance with the provisions of the EC Directive n. 9/1996 of March 11, 1996.
Data bank are protected on condition that they are characterised by a sufficient degree of "creativity" and is the result of the investments borne to create the database.
The right owner, as any other author, enjoys the exclusive right to perform any activity connected with the right, as well as to authorize the total or partial, temporary or permanent reproduction, the translation or any other modifications, as well as any form of distribution or reproduction.

16.2 According to article 64-*sexies*, no authorization is required to access or consult the data bank in case of exclusive purpose of teaching or carrying out scientific research on condition that said activities are not performed by a commercial company and within the limits of the said activity, not connected to any commercial purpose. Permanent or temporary reproduction of a substantial portion of the content on a different support is in any case subject to the authorization of the right owner. The use of the data bank for purposes of public security or in case of a judicial or administrative procedure is also free. All the activities reserved to the right owner, as described above, do not require the authorization if performed by a "lawful us-

er", if said activities are required to access the content of the data bank or for its normal use; if the "lawful user" access is limited to a portion of the data bank, the "lawful use" is limited to said portion only.

According to the authors must be regarded as a "lawful user" anyone who has acquired the data bank whose first circulation has been made with the consent of the right owner. In any case the "lawful user" will have the right to copy the data bank totally or partially, temporarily or permanently on any media, as well as its translation, adjustment or any other modifications as long as they are required to maintain the usefulness of the bank in the time.

17. Copyright exhaustion

In Italy the principle of exhaustion is provided by article 5 of the Industrial Property Code (Legislative Decree no. 30 of 10 February 2005), which states: *"1. The exclusive rights attributed by this Code to the owner of an industrial property right are exhausted once the products protected by an industrial property right have been put on the market by the owner or with his consent in the territory of the Country or in the territory of a Member State of the European Union or the European Economic Area.*
2. This limitation on the powers of the owner does not however apply when there are legitimate grounds for
the owner himself to oppose further marketing of the goods, in particular when the condition of the same has been modified or altered after being put on the market. ..."

Moreover, article 17 of the Copyright Law specifies that *"1. The exclusive right of distribution concerns the right to market, place in circulation or make available to the public, by whatever means and for whatever purpose a work or copies thereof and also includes the exclusive right to introduce into the territory of the countries of European Community, for distribution, copies of a work made in countries not members of the European Community.*
2. The distribution right shall not be exhausted within the European Community in respect of the original or copies of the work, except

where the first sale or other transfer of ownership in the Community is made by the right holder or with his consent.
3. What is provided for under paragraph 2, shall not apply to the making available to the public of a work in such a way that members of the public may access it from a place and at a time individually chosen by them, even when the making of copies of the work is permitted.
4. For the purposes of exhaustion under paragraph 2, the free delivery of copies of a work for promotional purposes or for teaching or scientific research, when carried out or authorized by the right holder, shall not be deemed to be exercise of the exclusive right of distribution."

In the light of the above, the principle of exhaustion, in Italian law, is closely related to the right of distribution of the protected work, which concerns the distribution of the original work and includes the exclusive right of introducing it into a territory. This right runs out, as we have seen above, when the work or the product has been marketed within the territory by the author or by third parties with the consent of the author.

As for the material copies of the work, which are realized by incorporating the work on physical supports that allow it to be used directly or indirectly by means of special technical tools, these, once entered into the distribution network within the European Community by the right holder or with his consent, will no longer be subject to control by the author in respect of the subsequent passages of ownership. In essence, in the latter case, the distribution right is exhausted by the first act of sale or transfer of title to another person in any of the member countries of the Community made directly by the right holder. Exhaustion of the right means that the subsequent transfer or lease of specific copies of the work will no longer be subject to the authorization by the right holder.

Prior to the legislative amendment of 2003, article 17 of the ICL did not propose the special provision contained in the third paragraph, which was made necessary by the emergence of digital technologies

as a channel of diffusion of alternative content, often preponderant, compared to the traditional one.

With reference to copies originated by downloading the work in digital format, instead, the rights to public communication and reproduction must be taken into account. In this case, circulation of the copies made by transferring the work in digital format to a storage media is subject to the right holder's authorization, because their transmission through digital channels does not exhaust, as already stated, the distribution right.

18. Panorama-exception

The ICL contains no panorama-exception to photographs taken in public places. Therefore, freedom of panorama is not foreseen within the Italian law. However, it is necessary to keep in mind the provisions of the Code of Cultural Property and Landscape (Legislative Decree no. 42 of 22 January 2004), in particular articles 107 (instrumental and precarious use and reproduction of cultural goods), 108 (concession, reproduction fees, bail), and 109 (catalogue of photographic images and shooting of cultural goods). Such goods may be reproduced in accordance with and subject to the limits set forth in the aforementioned articles (authorization by the issuing authority and payment of a fee, unless reproductions are requested for personal or educational purposes or non-commercial purposes).

In relation to public goods in public domain located indoors, the Code of Cultural Heritage and Landscape provides for the possibility of fixing fees and a consideration in case of commercial use of the photograph that portrays the work while it is free use for strictly personal or study purposes.

On the other hand, and in regard to the public domain goods located outdoors, the Italian system suffers from a real lacuna. In 2009, a parliamentary question was submitted, in response to which the competent Ministry clarified that freedom of the landscape "*is recognized in Italy for the well-known principle that behaviour that is not expressly prohibited by a norm must be considered legitimate*."

19. Private copies

A further important regulation in the field of user rights granted for payment, is that concerning the right of private copying: article 71-*sexies* establishes an exception to the exclusive reproduction right in respect of reproductions, on any medium, made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that right holders receive a fair compensation. The payment for this right is, in the case of machines exclusively made for the analogue or digital recording of phonograms or videograms, a proportion of the price paid by the final purchaser to the retailer; in the case of audio and video recording devices, analogue or digital, and fixed or transferable memory recording devices, the payment is proportionate to the amount of memory offered by the device. For distance video recording the payment is made by the individual offering the service and is proportionate to the monies earned for the said service (article 71-*septies*).

Compensation takes therefore the form of a private copying levy for equipment, devices and media suitable for copying protected works and other material. This levy applies to mobile phones, computers and other equipment, even though these devices are not designed specifically for the reproduction, recording and storage of content and is aimed at compensating the opportunity to use these devices to make copies of works protected by copyright. The levy was conceived to allow the digital device owner to make a copy of any copyrightable work it already legitimately possessed.
There is no *ex ante* exemption to the levy for any equipment acquired for purposes unrelated to private copying and a request for reimbursement of a levy may only be made by the end user and is subject to private negotiation with SIAE.

The Italian copyright levies system provides for, on one side, individually negotiated agreements – the so called application protocols- by which SIAE may grant objective and subjective exemptions to manufacturers and importers of certain media and devices and, on the other side, for a reimbursement procedure for copyright levies

unduly paid by final purchasers of the relevant media and devices, who are not natural persons.

On 22 September 2016 the Court of Justice of the European Union ruled on Case C-110/15 regarding the private copying exception in article 5.2 b of Directive 2001/29/EC (the 'InfoSoc Directive'), stating that a national framework that leaved the exemption from payment of the private copying levy for devices and media intended for use clearly unrelated to private copying to the free negotiation of agreements between a collecting society and those liable to pay compensation, or their trade associations, was not consistent with article 5.2 b of Directive 2001/29.

According to the Court, consequently, the ICL and the Decree does not contain generally applicable exemptions, since it only promotes exemption agreements between SIAE and the producers/distributors, and therefore is not consistent with the principle of equal treatment. In the light of the above, the private copying levy system in Italy will be likely subject to some adjustments in order to meet the requisites of the exclusions for professional use.

20. Conclusion

In conclusion, we can affirm that the structure of user rights in Italian Law seems mainly well-balanced, with a series of important exceptions to the exclusive rights of the author, which however do not undermine the overall body of law in any significant way. There are not therefore important imbalances within the national legislation in respect of the EU Directives in the matter.

Nevertheless, some adjustments would be necessary -as stated above- in relation to the panorama exception, which is likely to be in the future subject of further regulation. In the same way, the recent rulings of the Court of Justice may have an incidence on the private copying levy system in Italy, which would need to be adjusted in order to meet the requisites of the exclusions for professional use and the principle of equal treatment.