**Italy**

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In Italy, the responsibility and obligations of online platforms regarding infringements by their users, particularly in the areas of Intellectual Property (IP) and unfair competition, are shaped by a combination of EU directives (primarily the e-Commerce Directive and the Copyright Directive, and more recently the Digital Services Act - DSA) and Italian national law and jurisprudence.

Here's a breakdown of the key aspects:

**Intellectual Property Infringement (especially related to the Copyright law):**

The liability of online platforms for IP infringement, in particularly copyright, largely depends on their role and the level of "active" involvement they have with the content uploaded by users.

**"Passive" Hosting Providers (Safe Harbour Exemption):**

Under the e-Commerce Directive (2000/31/EC), transposed into Italian law (Legislative Decree 70/2003), a "passive" hosting provider generally benefits from a "safe harbour" exemption from liability for illegal content stored at the request of a user. This exemption applies if the provider:

-does not have actual knowledge of the illegal activity or information;

-is not aware of facts or circumstances from which the illegal activity or information is apparent (e.g., specific and sufficiently detailed notifications from rights holders);

-upon obtaining such knowledge or awareness, acts expeditiously to remove or disable access to the information;

Crucially, there is no general monitoring obligation imposed on passive hosting providers. They are not required to actively scrutinize all content uploaded by users.

However, if a rights holder provides a sufficiently reasoned notice identifying the infringing content (e.g., with specific URLs), the platform is obliged to act promptly to remove or disable access to it.

**"Active" Hosting Providers / Online Content-Sharing Service Providers (OCSSPs):**

Italian jurisprudence and EU case law (especially from the CJEU) have increasingly distinguished between "passive" and "active" hosting providers. An "active" provider is one that plays an "indispensable role" and demonstrates a "deliberate nature of its intervention" in making content available, going beyond a merely technical, automatic, and passive service.

Indicators of "active" involvement can include:

-selecting, managing, or organizing content for advertising purposes;

-developing operating systems that encourage or facilitate infringement;

-promoting or optimizing user-uploaded content.;-

-adopting a business model that encourages the illegal sharing of content.

If an online platform is deemed "active," it generally cannot rely on the safe harbour exemption of the e-Commerce Directive. Instead, its liability is assessed under general civil liability rules for aiding and abetting the dissemination of illicit products.

Article 17 of the Copyright Directive (EU 2019/790 - DSM Copyright Directive), implemented in Italy, significantly impacts OCSSPs (Online Content-Sharing Service Providers, e.g. platforms like YouTube). This article introduces a new liability regime, making these platforms directly liable for copyright-protected content uploaded by their users unless they can demonstrate that they have:

-made best efforts to obtain authorization (e.g., licensing agreements) from rights holders;

-made best efforts to ensure the unavailability of specific works for which rights holders have provided relevant and necessary information;

-acted expeditiously, upon receiving a sufficiently reasoned notice from rights holders, to disable access to, or remove from their websites, the notified works and made best efforts to prevent their future re-uploading. This implies a "stay-down" obligation.

The Digital Services Act (DSA - EU Regulation 2022/2065)which is now directly applicable in Italy, aims to create a safer digital space and sets out harmonized rules for online intermediary services.

While it largely maintains the liability exemptions of the e-Commerce Directive for general hosting services, it introduces more stringent obligations for larger platforms, particularly in relation to illegal content (including IP infringement).

These obligations include:

-implementing notice-and-action mechanisms that are user-friendly and allow rights holders to easily flag infringing content;

-providing reasons for content moderation decisions and offering internal complaint-handling systems;

-adopting measures to address repeat infringers;

-for Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSEs), additional obligations apply, such as conducting risk assessments and implementing mitigation measures to combat the dissemination of illegal content.

**Unfair Competition:**

Unfair competition in Italy is primarily governed by Article 2598 of the Civil Code. Online platforms can be held liable for unfair competition in various scenarios.

If the platform itself engages in practices that are contrary to professional fairness and capable of harming competitors, such as:

-misleading advertising or deceptive commercial practices regarding its own services or products (e.g., related to data usage, service quality);

-abuse of economic dependence, particularly for "gatekeeper" platforms that hold a dominant position over their business users (e.g., imposing unfair contractual terms, providing insufficient data to business users). Recent Italian legislation has introduced a rebuttable presumption of economic dependence for digital platforms playing a key role in reaching end users;

-ambush marketing, even if indirect, that misleads the public about sponsorship or affiliation with events.

While platforms generally don't have a proactive duty to monitor for all forms of unfair competition by their users, they can be held liable if they have knowledge of such practices and fail to act.

This often arises in cases of trademark infringement where users sell counterfeit goods or use trademarks as keywords for advertising. If an online marketplace is aware of such activities and provides assistance in optimizing or promoting these offers, it may lose its safe harbour protection and be held contributorily liable.

The Italian Competition Authority (AGCM) also has powers to intervene and impose measures, including website blocking, against platforms facilitating unfair commercial practices (e.g., sale of counterfeits, misleading information to consumers).

Thegeneral rule remains that platforms are primarily liable when they have actual knowledge of illegal content or activities and fail to act expeditiously. However, the definition of "knowledge" is evolving, especially with the introduction of automated tools and the emphasis on platforms taking a more proactive role in content moderation.

The obligations imposed on platforms are often assessed based on the principle of proportionality. Larger platforms with more resources and greater societal impact are expected to implement more robust measures.

While the traditional model was "notice and takedown" (remove content upon notification), Article 17 of the Copyright Directive introduces a "stay down" obligation for OCSSPs, requiring them to make best efforts to prevent re-uploads of previously identified infringing content.

While a general monitoring obligation is still generally rejected, courts and regulatory bodies are increasingly pushing for platforms to implement preventive measures where feasible and proportionate, particularly for repeat infringers or easily identifiable infringing content (e.g., through content filtering technologies for IP).

Online platforms are expected to cooperate with national authorities (judicial and administrative, like the Italian AGCOM Communications Regulatory Authority for copyright enforcement or AGCM for competition matters) in identifying and eliminating infringements.

In summary, online platforms in Italy, like in the broader EU, face a complex and evolving landscape of responsibilities regarding user-generated infringements. The trend is towards greater accountability, particularly for large platforms, with an increased emphasis on proactive measures, effective notice-and-action procedures, and cooperation with rights holders and regulatory bodies.

In Italy, the legal landscape concerning the liability and responsibility of online platforms for intellectual property (IP) infringements and unfair competition by their users is dynamic, heavily influenced by EU law and evolving national jurisprudence.

Here's a summary of the substantive developments:

**1.1 Definition of Platforms or Similar:**

Traditionally, Italian law did not provide a single, comprehensive definition of "online platforms." Instead, the focus has been on the *type of service* provided, drawing from the categories established by the EU e-Commerce Directive (2000/31/EC), implemented by Legislative Decree 70/2003. These categories include "mere conduit," "caching," and "hosting."

Italian courts have extensively developed the distinction between "passive" hosting providers (who merely offer technical, automatic, and passive services) and "active" hosting providers. An "active" platform is one that plays an "indispensable role" in making content available, exercising a "deliberate intervention" that goes beyond purely technical processes. Indicators include managing, organizing, optimizing, or promoting user content, or having a business model that encourages infringement. This distinction is crucial as "active" platforms generally *do not* benefit from the safe harbour liability exemptions.

The Digital Services Act (DSA - EU Regulation 2022/2065), directly applicable in Italy, now provides a more granular classification of intermediary services, including:

-"intermediary services" (encompassing mere conduit, caching, and hosting services);

-"hosting services" (specifically for IP, this is often the relevant category);

-"online platforms" (a sub-category of hosting services that store and disseminate to the public information provided by recipients of the service, at their request, potentially including social media, online marketplaces, etc.);

-"Very Large Online Platforms (VLOPs)" and "Very Large Online Search Engines (VLOSEs)" (platforms reaching a significant number of active users in the EU, subject to enhanced obligations).

**1.2. International Legal Provisions**

**-**e-Commerce Directive (2000/31/EC): This remains the foundational text for intermediary liability, establishing the "safe harbour" principle for passive hosting providers (Art. 14). No general monitoring obligation;

**-**Copyright Directive (EU 2019/790 - DSM Copyright Directive): Implemented in Italy, Article 17 significantly altered the landscape for Online Content-Sharing Service Providers (OCSSPs). It established that OCSSPs perform an act of communication to the public and are therefore directly liable for copyright-protected content uploaded by their users, unless they can prove they have:

-made best efforts to obtain authorization such as a license;

-made best efforts to ensure unavailability of specific identified works;

-acted expeditiously to remove and prevent future re-uploads ("stay down" obligation) upon receiving a sufficiently reasoned notice.

-Digital Services Act (DSA - EU Regulation 2022/2065):

* + reinforces the "safe harbour" exemptions but clarifies that they don't imply a general monitoring obligation (Art. 8).
  + introduces enhanced "notice-and-action" mechanisms (Art. 16 for all hosting services, with specific requirements for online platforms, Art. 17).
  + mandates internal complaint-handling systems (Art. 20) and out-of-court dispute settlement (Art. 21).
  + imposes "trusted flagger" schemes (Art. 22) to prioritize notifications from reliable entities.
  + for online marketplaces, it introduces specific obligations related to traceability of traders (Art. 30) to combat illegal products, including counterfeits.
  + VLOPs and VLOSEs face additional obligations, such as risk assessments (Art. 34) related to illegal content and fundamental rights, and transparency reporting.

**-** P2B Regulation (EU 2019/1150**):** while not directly about IP or unfair competition infringement by users, this regulation (Platform to Business) imposes transparency and fairness obligations on online platforms towards their business users, which can indirectly impact issues related to unfair competition (e.g., terms and conditions, ranking transparency).

**1.3. National Legal Provisions:**

* Legislative Decree 70/2003 (e-Commerce): transposed the e-Commerce Directive, reiterating the safe harbour exemptions and the lack of a general monitoring obligation.
* Law No. 633/1941 (Copyright Law): this fundamental law on copyright provides the basis for infringement actions. With the implementation of the DSM Copyright Directive, it now incorporates the specific liability regime for OCSSPs.
* Italian Civil Code (Art. 2043, 2598):
  + Art. 2043 (Tort Liability):provides the general framework for civil liability, which is applied to "active" platforms when the safe harbour exemptions do not apply.
  + Art. 2598 (Unfair Competition): defines acts of unfair competition (confusion, disparagement, misappropriation of merits, and general unfairness). Platforms can be directly liable if they engage in such practices or contributorily liable if they facilitate them with knowledge.
* Legislative Decree No. 192/1998 (Abuse of Economic Dependence): the "2021 annual competition law" (Law No. 118/2022) significantly amended Article 9 of this decree, introducing a rebuttable presumption of economic dependence for companies using digital platforms that play a "key role" in reaching end users or suppliers (e.g., in terms of network effects or data availability). This shifts the burden of proof to the platform to demonstrate the absence of dependence and aims to address power imbalances, which can intersect with unfair competition concerns.
* **Legislative Decree 145/2007 (Unfair Commercial Practices):** implements the EU Unfair Commercial Practices Directive, enforced by the AGCM (Italian Competition Authority). This allows for intervention against platforms engaging in misleading or aggressive commercial practices, including those that facilitate the sale of counterfeit goods or services based on misleading information.

**1.4. Cases (Italian Jurisprudence):**

* "Active Host" Doctrine: A cornerstone of Italian jurisprudence. Landmark cases (e.g., those involving RTI vs. various video-sharing platforms like Break Media/Dailymotion, or Mediaset vs. YouTube) have consistently held platforms liable when they were deemed "active hosts." The Italian Supreme Court (the so called Cassazione) in the decision n. 7708/2009 ( RTI vs.Yahoo!) has affirmed that active hosts are subject to general civil liability for aiding and abetting the dissemination of illicit content, emphasizing indicators like content categorization, curation, and advertising revenue generation.
* Trademark Infringement/Counterfeiting on Marketplaces: Courts have increasingly held online marketplaces liable for the sale of counterfeit goods by third-party sellers if they have knowledge of the infringement (e.g., through specific notifications) and fail to act expeditiously. The "prevalent role" or "active role" of the platform in promoting or organizing the illicit offers is often key.
* Ambush Marketing: Recent cases, such as the Council of State judgment (no. 3118 of 11 April 2025) against Zalando concerning its advertising during UEFA Euro 2020, have affirmed the AGCM's powers to fine entities for ambush marketing, even without direct use of official logos, if the overall "framing effect" misleads the public. This can apply to platforms that host or engage in such practices.
* NFTs and IP Infringement: The Court of Rome has issued initial decisions on IP infringement through unauthorized sale of NFTs, confirming that trademark use in this context can constitute infringement and unfair competition. This opens the door for rights holders to seek action against platforms facilitating such sales, especially under the DSA's traceability obligations.
* Abuse of Economic Dependence (AGCM decisions): The AGCM has been active in applying the strengthened rules on abuse of economic dependence, investigating and issuing decisions against major online platforms (e.g., Booking.com, TikTok, Meta) for practices related to pricing, data sharing, or content moderation that disadvantage business users.

**1.5. Activities of Platforms (Impact on Liability):**

Platforms' internal content have moderation policies and practices (e.g., use of AI filters, human review, notice-and-takedown systems) are increasingly scrutinized. Under the DSA, transparency around these activities is mandatory.

The design and operation of recommender systems can influence liability, particularly under the DSA, which requires transparency and user control over personalization. If a recommender system actively promotes infringing or unfair content, it could contribute to an "active host" determination.

Platforms' revenue models, especially those based on advertising linked to user-generated content, are key factors in determining "active" involvement. Generating revenue from infringing content strengthens the argument for platform liability.

The sharing of data with business users on platforms is a recurring theme in unfair competition cases, particularly under the abuse of economic dependence framework. Insufficient data provision can be considered an abusive practice.

**1.6. Others (NGOs, Stakeholders):**

* Rights Holders' Associations (e.g., FIMI, SIAE): These entities play a significant role in advocating for stronger IP enforcement and routinely issue "notice and takedown" requests to platforms. They are key stakeholders in shaping the implementation of the Copyright Directive.
* Consumer Protection Associations: Advocate for consumer rights and are involved in reporting unfair commercial practices by platforms or by sellers on platforms to the AGCM.
* Industry Associations: Represent the interests of online platforms and often engage in dialogue with policymakers to ensure a balanced regulatory environment, advocating for clear liability rules and against overly burdensome monitoring obligations.
* Academics and Legal Scholars: Continuously analyze and interpret the evolving legal framework, contributing to the judicial and legislative debate through research, publications, and expert opinions.
* AGCOM (Autorità per le Garanzie nelle Comunicazioni): Designated as Italy's Digital Services Coordinator under the DSA. AGCOM's role includes monitoring the implementation of the DSA, enforcing its provisions, and cooperating with the European Commission and other national authorities. This significantly strengthens the regulatory oversight of platforms.
* AGCM (Autorità Garante della Concorrenza e del Mercato): The Italian Competition Authority, which has broad powers to enforce competition law and consumer protection law, including against online platforms for unfair commercial practices, abuse of dominant position, and abuse of economic dependence.

In conclusion, Italian law, heavily influenced by robust EU directives like the e-Commerce Directive, Copyright Directive, and now the DSA, holds online platforms increasingly accountable for illegal content and unfair practices. The shift is from a purely "passive" intermediary model to one where platforms, especially larger ones, are expected to implement more proactive measures and cooperate closely with rights holders and regulatory bodies, while still avoiding a general monitoring obligation. The "active host" doctrine remains a critical tool for Italian courts in assessing liability, complemented by the comprehensive obligations introduced by the DSA and strengthened national competition law provisions.

The liability and responsibility of online platforms in Italy, particularly concerning intellectual property (IP) and unfair competition, is a complex and evolving area, driven significantly by EU law and Italian jurisprudence.

Here's a breakdown of the legal basis:

**2. Legal Basis for Platform Liability in Italy (IP and Unfair Competition)**

**2.1. Types of Platforms**

Italian law, in line with EU directives, doesn't have a single, static definition of "platform." Instead, it categorizes online service providers based on their functions, which impacts their liability.

Mere Conduit Providers: Services that transmit information provided by a recipient of the service, or provide access to a communication network (e.g., internet access providers). They are generally exempt from liability for the transmitted information, provided they do not initiate the transmission, select the receiver, or select/modify the information transmitted.

Caching Providers: Services that transmit information provided by a recipient of the service, where the transmission involves automatic, intermediate, and temporary storage of that information for the sole purpose of making the onward transmission of the information to other recipients more efficient (e.g., proxy servers). They are generally exempt from liability if they do not modify the information, comply with access conditions, and act expeditiously to remove or disable access to the information upon notification.

Hosting Providers: Services that store information provided by a recipient of the service (e.g., cloud storage, web hosting, social media, online marketplaces). This is the most critical category for IP and unfair competition.

"Passive" Hosting Providers: These merely provide the technical infrastructure for storing content. They benefit from liability exemptions (safe harbour) if they lack actual knowledge of the illegal activity/information and, upon obtaining such knowledge, act expeditiously to remove or disable access.

"Active" Hosting Providers / Online Content-Sharing Service Providers (OCSSPs): This crucial distinction, developed by Italian courts and reinforced by EU law, refers to platforms that play an "active role" in managing, optimizing, organizing, promoting, or curating user-generated content, going beyond a merely technical and passive service. Examples include many social media platforms and video-sharing sites (like YouTube before the DSM Copyright Directive's full implementation). The presence of advertising revenue generated from user content, content categorization, and recommendation algorithms are key indicators.

Online Marketplaces: While generally falling under "hosting," their specific activities (e.g., providing payment services, managing deliveries, communicating with buyers) can lead to a determination of an "active" role, particularly concerning the sale of counterfeit goods.

Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSEs): Under the Digital Services Act (DSA), these are platforms reaching a significant number of active users in the EU (45 million or more). They are subject to additional, more stringent obligations due to their systemic impact.

**2.2 Civil and Criminal Law**

Civil Law is the primary avenue for addressing IP infringements and unfair competition.

When IP Infringements (e.g., copyright, trademark)occured rights holders can seek injunctions (including preliminary injunctions), removal or disabling access to infringing content, damages (calculated based on lost profits, unjust enrichment, or a reasonable royalty), and publication of the judgment. The legal basis is primarily Law No. 633/1941 (Copyright Law) and Legislative Decree No. 30/2005 (Industrial Property Code), interpreted in light of relevant EU Directives (e.g., Enforcement Directive 2004/48/EC).

When unfair Competition acts are present (Art. 2598 Italian Civil Code) actions can be brought against platforms for engaging in or facilitating unfair competitive practices. Remedies include injunctions to cease the unfair conduct and damages.

The general Tort Liability (Art. 2043 Italian Civil Code) applies when platforms are found to be "active" and their conduct causes damage.

Criminal Law faces both ip infringements and unfair competition.

Certain severe IP infringements, particularly those involving large-scale commercial counterfeiting or unauthorized reproduction/dissemination of copyrighted works for profit, can lead to criminal charges under the Industrial Property Code and Copyright Law. Penalties can include fines and imprisonment. While direct criminal liability for platforms is rare and typically focuses on the individual infringer, a platform could theoretically face charges for aiding and abetting if it is proven to have knowingly and deliberately facilitated extensive criminal activity.

Criminal liability for unfair competition is less common, primarily reserved for specific, severe instances of deceptive practices or industrial espionage as defined by law.

**2.3. Direct and Accessorial Liability**

Direct Liability is conceive in the following cases.

Italian courts, even before the full implementation of the DSM Copyright Directive, have increasingly found "active" hosting providers directly liable for copyright infringements, considering them as performing a "communication to the public." This liability is typically based on their "active role" and knowledge (even general knowledge, when combined with active management).

For Online Content-Sharing Service Providers (e.g., YouTube), the DSM Copyright Directive explicitly establishes direct liability for copyright-protected content uploaded by users. This is a significant shift, making them primarily responsible for content on their platforms, with specific conditions for avoiding liability.

A platform can be directly liable if it engages in unfair competitive practices itself (e.g., misleading advertising on its own services, abusing its dominant position vis-à-vis business users).

For "passive" hosting providers, liability is generally accessorial, contingent on their failure to act expeditiously once they have "actual knowledge" of the infringement. This typically means a well-founded notification from the rights holder. Their liability is for "aiding and abetting" the infringement by omission.

In unfair competition cases, a platform could be held accessorily liable if it knowingly facilitates unfair practices by its users and fails to take action after being made aware.

**3. Are platforms required to monitor content generated by their users for possible infringements on intellectual property rights?**

There is not a general monitoring obligation: the fundamental principle enshrined in Article 15 of the e-Commerce Directive (and reaffirmed in Article 8 of the DSA) is that online platforms are not subject to a general obligation to monitor the information they transmit or store, nor to actively seek facts or circumstances indicating illegal activity. This is crucial for balancing IP protection with fundamental rights like freedom of expression and the practical feasibility for platforms.

However, Article 17 of the DSM Copyright Directive effectively introduces a de facto specific monitoring obligation for Online Content-Sharing Service Providers (OCSSPs). To avoid direct liability, OCSSPs must make "best efforts" to ensure the unavailability of specific identified works for which rights holders have provided relevant and necessary information. This often necessitates the use of content recognition technologies or other proactive measures to prevent re-uploads ("stay down" obligation). This is not a "general" monitoring obligation across all content, but a targeted one for specific, identified works.

While still not a "general monitoring obligation," the DSA places more extensive obligations on VLOPs and VLOSEs, requiring them to conduct systemic risk assessments related to illegal content (including IP infringement) and implement reasonable, proportionate, and effective mitigation measures (Art. 34). This can include proactive measures like automated tools, but it must be balanced and targeted.

**3.1.** **The liability privileges available to platforms for intellectual property infringements by their users**

There aresome "safe harbour" exemptions: the core liability privileges stem from Articles 12, 13, and 14 of Legislative Decree 70/2003 (implementing the e-Commerce Directive). These grant exemptions from liability for mere conduit, caching, and passive hosting providers, provided they meet specific conditions:

-no actual knowledge of the illegal activity/information;

-no awareness of facts/circumstances from which the illegal activity/information is apparent;

-expeditious action to remove or disable access upon obtaining such knowledge or awareness (the "notice and takedown" principle).

These privileges are lost if the platform is deemed an "active" host (as per Italian jurisprudence) or an OCSSP failing to meet the obligations of Article 17 DSM Copyright Directive. The DSA largely preserves these exemptions but introduces additional duties, especially for larger platforms, that may require a more active approach to content management.

**3.2 Good Samaritan rule under the DSA**

Platforms are allowed and/or encouraged to proactively monitor and/or remove user content possibly infringing intellectual property rights without losing their liability privileges.

Historically, there was a concern that proactive monitoring by platforms might be interpreted as an "active" role, thereby causing them to lose their safe harbour protection.

DSA's "Good Samaritan" Clause states that engaging in voluntary own-initiative investigations or other voluntary measures aimed at detecting, identifying, and removing, or disabling access to, illegal content does not, in itself, lead to the platform losing its liability exemption. This is a crucial "Good Samaritan" rule designed to encourage platforms to take proactive steps against illegal content without fear of increasing their liability. This explicitly allows and encourages proactive monitoring.

For OCSSPs, the requirement to make "best efforts" to prevent re-uploads of identified infringing content inherently means they must proactively monitor to fulfill their "stay down" obligation under Article 17 DSM Copyright Directive. This is not just allowed but required to avoid direct liability.

**4. Are there rules in Italian jurisdiction clarifying in how far and how platforms need to refrain from algorithmic content monitoring or other measures influencing user experience?**

While the DSA encourages proactive monitoring (Art. 7), it also introduces rules to balance this with user rights, particularly concerning algorithmic systems:

Transparency of Recommender Systems (Art. 27 DSA) states that online platforms using recommender systems must set out in their terms and conditions the main parameters used in their recommender systems and provide options for recipients to modify or influence these parameters (e.g., not receiving personalized recommendations). This aims to increase user control over algorithmic influence.

Content Moderation Decisions (Art. 17 DSA) works in this way: platforms must provide clear and specific statements of reasons when they remove, disable, or restrict content. Users have the right to complain and seek redress for such decisions.

Risk Assessments for VLOPs/VLOSEs (Art. 34 DSA) should be taken in account from huge platforms. These larger platforms must assess systemic risks, including those arising from the design and functioning of their algorithmic systems (e.g., how they might amplify illegal content, or infringe fundamental rights like freedom of expression or non-discrimination). They must implement reasonable, proportionate, and effective mitigation measures, which can involve adjusting algorithmic parameters.

VLOPs and VLOSEs are subject to independent audits of their risk management systems, and the Digital Services Coordinator (AGCOM in Italy) or the European Commission can demand access to their data and algorithms to assess compliance.

Italian courts and regulators are mindful of the need to balance IP protection with fundamental rights like freedom of expression, privacy, and non-discrimination. Measures influencing user experience, especially algorithmic ones, must respect these rights and avoid arbitrary or discriminatory outcomes.

**5. Are liability privileges different in cases of IP infringements and/or unfair competition cases on the one hand and other possible infringements on the other hand?**

There are notable differences and specificities:

IP Infringements should be divided in several categories:

-copyright cases (Art. 17 DSMCD) are the most distinct regime, introducing direct liability for OCSSPs unless specific "best efforts" (including "stay down") are met. This is a higher bar than for other types of illegal content.

-in trademarks/counterfeiting cases, liability often hinges on the platform's "active role" in the transaction (e.g., for online marketplaces) and the "knowledge" threshold. The DSA's obligations for online marketplaces regarding trader traceability (Art. 30) specifically aim to combat illegal products, including counterfeits.

-in unfair competition cases, liability often stems from the platform's own conduct or its active facilitation of unfair practices by users, particularly when it has knowledge. The rules on abuse of economic dependence (Art. 9 Legislative Decree 192/1998, as amended) are highly specific to platform-business user relationships and can lead to liability regardless of user-generated content directly.

In other infringements cases (e.g., defamation, hate speech, illegal products not involving IP) the general "notice and takedown" rule from the e-Commerce Directive (Article 14) and the DSA (Article 16) are applied. Platforms benefit from safe harbour exemptions provided they act expeditiously upon receiving a sufficient notice. There is generally no specific de facto monitoring obligation comparable to Article 17 DSMCD. However, the DSA's broader systemic risk obligations for VLOPs/VLOSEs would cover these types of illegal content as well, potentially leading to more proactive measures.

In essence, while the "no general monitoring obligation" remains a cornerstone, the legal framework in Italy is pushing platforms, especially the largest ones, towards greater responsibility. This involves implementing robust notice-and-action mechanisms, engaging in targeted monitoring for specific IP infringements (especially under Article 17 DSMCD), and critically, assessing and mitigating systemic risks arising from their operations, including those influenced by their algorithms. The DSA's "Good Samaritan" clause is a significant encouragement for platforms to take proactive steps against all forms of illegal content.

**6.** **Are platforms required to provide mechanisms to report content that may be violating intellectual property rights?**

Under Article 16 of the Digital Services Act (DSA - EU Regulation 2022/2065), which is directly applicable in Italy, all hosting service providers (including online platforms) are required to establish easily accessible and user-friendly mechanisms that allow individuals or entities to report content that they consider to be illegal (which explicitly includes IP infringing content). This formalizes and standardizes the "notice-and-action" mechanisms that were already common practice.

The requirements for such processes or mechanisms are the following.

**6.1 Detection of possible IP infringements**

Even if platforms are not generally required to proactively monitor all content for IP infringements (as per Article 8 DSA and the e-Commerce Directive).

However, the reporting mechanism itself is a key tool for detecting infringements. It must be designed to facilitate the effective reporting of IP violations.

For Online Content-Sharing Service Providers (OCSSPs) under Article 17 of the DSM Copyright Directive (EU 2019/790), while not a general monitoring obligation, the "best efforts" to ensure unavailability of specific works and prevent their re-upload implies a *de facto* form of automated detection, often through content recognition technologies, for previously identified infringing content. This is a specific obligation that goes beyond merely reacting to notices.

**6.2 Further processing procedure:**

The notice (Art. 16 (2) DSA) must be sufficiently precise and adequately substantiated. This includes:

-a sufficiently reasoned explanation of why the person or entity considers the information to be illegal content (e.g., specific IP right infringed, legal basis);

-a clear indication of the exact electronic location of the information (e.g., specific URLs, timestamps for video content);

-the name and email address of the individual or entity submitting the notice (unless falling under certain exceptions, like child sexual abuse material);

-a good-faith declaration confirming the accuracy of the information and allegations;

-acknowledgment of Receipt (Art. 16(3) DSA): Platforms must promptly acknowledge receipt of the notice;

-platforms must, without undue delay, inform the notifier of their decision regarding the content and any available remedies.

All notices must be processed in a timely, diligent, non-arbitrary, and objective manner. Platforms using automated systems for processing or decision-making must disclose this.

**6.3 Timeframe**

The DSA requires platforms to act "without undue delay" and "expeditiously" upon receiving actual knowledge or awareness of illegal content (Art. 14 e-Commerce Directive / Art. 16 DSA). While no specific number of hours/days is universally prescribed, Italian courts generally expect prompt action. What constitutes "expeditious" depends on the specific circumstances, the nature of the infringement, and the platform's capabilities.

For OCSSPs under Article 17 DSMCD, the obligation to act "expeditiously" upon notice to disable access to or remove notified works and prevent future re-uploads is particularly stringent.

**6.4 Consequences in case of failure to adhere to aforementioned requirements**

If a platform (especially a passive hosting provider) fails to act expeditiously after receiving a sufficiently detailed notice, it risks losing its "safe harbour" exemption from liability. It would then be liable under general civil law principles (Art. 2043 Italian Civil Code) for the continued presence of the infringing content.

Non-compliance with the DSA's procedural requirements (e.g., failure to provide proper notice-and-action mechanisms, lack of transparency) can lead to significant administrative fines imposed by the Italian Digital Services Coordinator (AGCOM). For VLOPs/VLOSEs, these fines can be up to 6% of their annual global turnover.

Rights holders can seek judicial orders (injunctions) compelling the platform to remove or disable access to the infringing content. If the platform's failure to act causes damage, the rights holder can also seek compensation for damages.

**7. Remedies, Compensations, and Other Legal Requirements Against Platforms**

Various remedies and legal requirements can be directed against platforms.

1. IP Infringements (Copyright, Trademark, etc.):

-injunctions: This is the most common and effective remedy. Rights holders can obtain court orders (including urgent preliminary injunctions – provvedimenti cautelari) requiring platforms to:

-immediately cease the infringement (e.g., by removing specific infringing content).

-disable access to infringing material.

-prevent future re-uploads of identified infringing content (the "stay down" obligation for OCSSPs, which courts may extend to active hosts).

In severe cases (e.g., widespread counterfeiting on marketplaces), an injunction could theoretically extend to requiring enhanced proactive filtering for well-known marks, though general monitoring is still avoided.

Damages:

-actual Damages: Compensation for the loss suffered by the rights holder (e.g., lost profits from sales, loss of reputation).

-unjust Enrichment: Recovery of the infringer's illicit profits.

-reasonable Royalty: An amount that the infringer would have paid if they had legitimately licensed the IP.

-moral Damages: For certain IP rights like copyright, compensation for non-economic harm.

Damages are typically awarded when the platform has lost its safe harbour (due to knowledge and failure to act) or is directly liable (e.g., as an OCSSP failing its Article 17 obligations).

-publication of Judgment: Courts can order the publication of the judgment against the platform in newspapers or on websites, at the platform's expense, to inform the public of the infringement.

-seizure/description Orders: Courts can order the seizure of infringing materials or a "description" (judicial inspection) on the platform's premises or servers to gather evidence of the infringement.

-administrative measures (AGCOM): For copyright infringements, especially massive online piracy, the Italian Communications Authority (AGCOM) has significant powers. Following a complaint and administrative procedure, AGCOM can order:

-hosting providers in Italy to selectively remove infringing digital works.

-access providers to block access to websites disseminating illegal content, even if hosted abroad (dynamic injunctions).

AGCOM has "fast-track" procedures for massive or severely damaging violations.

2. Unfair Competition:

-injunctions: Courts can order platforms to cease acts of unfair competition (e.g., remove misleading advertisements, stop abusive commercial practices).

-damages: Compensation for the harm caused by the unfair competition.

-publication of Judgment: Similar to IP cases, to inform the public.

-measures by Italian Competition Authority (AGCM): The AGCM has extensive powers to intervene against platforms for:

If a platform itself engages in misleading or aggressive practices (e.g., misleading advertising for its own services, allowing the widespread sale of counterfeits without adequate checks that mislead consumers). The AGCM can impose significant administrative fines.

If a platform abuses its stronger bargaining position over a business user (e.g., by imposing unduly burdensome contractual terms, denying access to data essential for the business user), the AGCM can impose fines and order the cessation of the abusive conduct. This is distinct from IP but often overlaps with platform liability.

Recent legislative developments (e.g., Law Decree no. 16/2020) and AGCM decisions (e.g., against Zalando) show that platforms can be fined for facilitating or engaging in ambush marketing practices that mislead the public about sponsorship, even without direct use of official logos.

**8. Is the use of so-called ‘trusted flaggers’ established in the respective jurisdiction to identify and/or report possible infringements of intellectual property rights?**

The concept of "trusted flaggers" has been formally established and strengthened in Italy through the Digital Services Act (DSA), particularly Article 22. While similar voluntary schemes existed previously, the DSA provides a harmonized EU-wide framework.

**8.1 What criteria are applied?**

Under Article 22(2) DSA, an entity seeking "trusted flagger" status must demonstrate:

-particular expertise and competence: In detecting, identifying, and notifying illegal content (including IP infringements);

-independence: From any provider of online platforms. This ensures unbiased assessments.

-diligence, accuracy, and objectivity: In its activities.

-only entities (not individuals) established in an EU Member State can be awarded this status.

**8.2 How are these entities identified, nominated, and/or appointed?**

The "trusted flagger" status is awarded by the Digital Services Coordinator (DSC) of the Member State in which the applicant entity is established. In Italy, the AGCOM (Autorità per le Garanzie nelle Comunicazioni) has been designated as the DSC.

The DSC assesses applications against the criteria mentioned above.

Once awarded by a DSC, the status is recognized across the entire EU by all online platforms falling under the DSA's scope.

DSCs communicate details of appointed trusted flaggers to the European Commission, which maintains a public list.

**8.3. If a possible infringement is reported by such an entity, are platforms to deviate from procedures regarding possible user reported by non-trusted flaggers (e.g. prioritised treatment of notices by trusted flaggers under the DSA)?**

Article 22(1) DSA mandates that online platforms must give priority treatment to notices submitted by trusted flaggers. This means:

-prioritized Processing: Notifications from trusted flaggers should be processed more swiftly than those from ordinary users.

-enhanced Accuracy: The assumption is that trusted flaggers, due to their expertise and diligence, provide more accurate and reliable notifications, reducing the need for extensive verification by the platform.

This prioritization is a key incentive for platforms to engage constructively with trusted flaggers and helps to more efficiently combat illegal content.

**9.0 Are there any requirements to be met in the respective jurisdiction before the removal of content that could possibly infringe on intellectual property rights (e.g., court orders)?**

Court order is not a prerequisite for the removal of content that may be infringing IP rights under the "notice and action" framework, with some important nuances:

For passive hosting providers (and more generally for all hosting services under Article 16 DSA), the obligation to remove content arises upon receiving "actual knowledge" of its illegality. A sufficiently detailed and substantiated notice from a rights holder can constitute this "actual knowledge" and trigger the obligation to act expeditiously without a prior court order.

For copyright infringements, AGCOM can order removal or blocking without a prior court order, but this is an administrative process initiated by a complaint, not a direct action by the platform itself.

While platforms can (and often do) remove content based on notices, if the legality of the content is highly ambiguous or disputed, platforms might hesitate to remove it without a court order to avoid liability for wrongful removal (e.g., for breaching a user's freedom of expression). In such cases, rights holders would typically need to seek a judicial injunction.

Does this affect the efficiency of “notice and action” procedures?

No, quite the opposite. The fact that a court order is generally not required for "notice and action" is fundamental to the efficiency of these procedures. If every removal required a court order, the system would be extremely slow and ineffective in combating widespread online infringements.

The system relies on platforms acting expeditiously based on credible notices, with the risk of losing their liability exemption if they fail to do so. This incentivizes swift action.

**10. Are there measures in place to appeal content removal decisions based on infringement on intellectual property rights in the respective jurisdiction?**

The DSA introduces robust mechanisms for users to challenge content moderation decisions, including those based on IP infringement:

Internal Complaint-Handling System (Art. 20 DSA): Online platforms must provide an internal complaint-handling system, free of charge, allowing users to challenge content moderation decisions (e.g., removal of their content for IP infringement). Users must be able to submit a complaint within six months of the decision. The platform must then review the decision and reply without undue delay.

Out-of-Court Dispute Settlement Bodies (Art. 21 DSA): Users have the right to choose an out-of-court dispute settlement body, certified by the Digital Services Coordinator (AGCOM in Italy), to resolve disputes concerning content moderation decisions. This provides an alternative to judicial proceedings.

Judicial Review: Users always retain the right to seek redress before Italian courts against content moderation decisions, including those based on alleged IP infringement. This is the ultimate appeal mechanism.

These appeal mechanisms are crucial for safeguarding users' fundamental rights, including freedom of expression, and ensuring that IP enforcement does not lead to disproportionate or unwarranted content removal.

**11. Safeguards to Balance IP Enforcement and Fundamental Rights in Italy**

There is a complex interplay of legal principles and procedures designed to achieve this balance.

Legal Basis for Safeguards:

Italian Constitution:

Article 21 (Freedom of Expression): Guarantees the right to freely express one's thoughts. This is a bedrock principle when considering restrictions on online content.

Article 33 (Freedom of Art and Science): Protects the freedom of art and scientific research.

Article 24 (Right to a Fair Trial): Guarantees the right to judicial protection for everyone.

Article 9 (Protection of Landscape and Historical/Artistic Heritage): While not a "fundamental right" in the same vein as expression, it introduces a unique dimension in Italy concerning the use of cultural heritage images, sometimes creating tension with IP and free use.

Charter of Fundamental Rights of the European Union (CFREU): Directly applicable in Italy, it includes:

Article 11 (Freedom of Expression and Information).

Article 17(2) (Right to Property), which includes intellectual property.

Article 47 (Right to an Effective Remedy and to a Fair Trial).

EU Directives and Regulations (transposed into Italian law):

e-Commerce Directive (2000/31/EC) / Legislative Decree 70/2003: The "no general monitoring obligation" is a key safeguard against excessive burdens on platforms that could stifle freedom of expression.

DSM Copyright Directive (EU 2019/790): While introducing strict liability for OCSSPs (Article 17), it explicitly mandates Member States to ensure that users can rely on exceptions and limitations when uploading content, particularly for quotation, criticism, review, and for parody, pastiche, and caricature (Article 17(7)). This is a crucial balancing act.

Digital Services Act (DSA - EU Regulation 2022/2065): The DSA is paramount in this balance. It introduces:

Transparency obligations for content moderation (Art. 17).

Internal complaint-handling mechanisms (Art. 20) and out-of-court dispute settlement (Art. 21) for users to challenge removal decisions.

The "Good Samaritan" clause (Art. 7), allowing platforms to proactively act without losing liability exemptions, but not mandating general monitoring.

Specific rules for VLOPs/VLOSEs requiring them to conduct risk assessments that consider fundamental rights, including freedom of expression (Art. 34).

Applicable Procedure(s):

Judicial Scrutiny: When IP rights are enforced in court (e.g., through injunctions or damages claims), Italian judges must, in each specific case, perform a balancing test between the IP right asserted and any relevant fundamental rights (e.g., freedom of expression, freedom of art) potentially implicated by the alleged infringement. This is a case-by-case assessment.

Exceptions and Limitations to Copyright (Italian Copyright Law No. 633/1941, Arts. 65-71 decies): These provisions allow for specific uses of copyrighted works without authorization, serving as safeguards for public interest and fundamental rights. Examples include:

Use for purposes of criticism or discussion.

Reproduction for personal use (within limits).

Use for teaching or scientific research.

Crucially, following the DSM Copyright Directive, the exceptions for quotation, criticism, review, and for parody, pastiche, and caricature are now mandatory for OCSSPs. While Italian law previously lacked a general explicit "parody" exception, jurisprudence often recognized parody as a transformative work. Now, it's explicitly mandated for platforms.

DSA's Due Diligence for Content Moderation:

Reasoned Statement: Platforms must provide a clear and specific statement of reasons for any content moderation decision, explaining the legal basis and facts (Art. 17 DSA). This increases transparency and allows users to understand and challenge the decision.

User Complaint Mechanisms: Users whose content is removed or restricted for IP infringement (or any other reason) can use the platform's internal complaint system, out-of-court dispute resolution, or directly challenge the decision in court. These procedural safeguards ensure due process and proportionality.

Risk Mitigation (for VLOPs/VLOSEs): These platforms must implement measures to mitigate systemic risks that their services might pose to fundamental rights, including freedom of expression (e.g., preventing over-removal of lawful content by algorithms).

**12. Past Cases Challenging IP Enforcement**

Italian jurisprudence, like that of other EU countries, has seen cases grappling with the tension between IP enforcement and fundamental rights:

**12.1 Freedom of Expression:**

Outcome: Italian courts, particularly in copyright cases involving "active" hosts, have consistently affirmed the need to balance copyright protection with freedom of expression. However, the balance has often tilted towards IP rights, especially when commercial exploitation was evident. The concept of "transformative use" (where a new work significantly changes the original) has been used as a defense, akin to fair use, but its application varies.

Example: Before the DSM Copyright Directive, cases against video-sharing platforms (e.g., RTI vs. YouTube/Dailymotion) sometimes saw platforms argue that user-uploaded content, even if containing copyrighted material, served freedom of expression purposes. The outcome often depended on the "active" nature of the platform and whether it derived significant commercial benefit from the infringing content.

Recent Case Law on Parody (Post-DSMCD): The Tribunale di Roma (Rome Court) in 2021 (e.g., a case involving the film "Rango" and its reference to "Man with No Name" from Sergio Leone's films) made explicit reference to "fair use" principles (though not a formal doctrine in Italy) and applied a flexible approach to balance copyright and freedom of expression, finding the reference a mere citation rather than infringement. This suggests a growing judicial willingness to consider these exceptions. The Supreme Court (Cassazione) has also recognized that parody must respect a balance between rights holders and the parodist's freedom of expression, provided it doesn't harm the original work's economic exploitation.

**12.2 Right to a Fair Trial:**

Outcome: This is primarily addressed through the procedural safeguards mandated by the DSA. Before the DSA, concerns sometimes arose regarding platforms acting unilaterally based on notices without sufficient due process for the user whose content was removed.

The DSA now provides clear internal complaint mechanisms and access to out-of-court dispute resolution bodies, reinforcing the user's right to challenge decisions and thus ensuring a more balanced and fair process. Judicial review remains the ultimate recourse.

Others (e.g., Consumer Protection, Unfair Competition related to fundamental rights):

Cases involving abuse of economic dependence or unfair commercial practices by platforms often touch upon fundamental rights of business users or consumers (e.g., freedom to conduct business, access to information). The AGCM (Italian Competition Authority) is very active here, imposing fines and remedies when platforms' practices (e.g., algorithms favoring their own services, opaque terms) are deemed unfair.

Assessment of Current Responsibilities/Obligations of Online Platforms

The current responsibilities and obligations of online platforms in Italy represent a significant increase in accountability compared to the pre-DSA/DSM Copyright Directive era.

Shift from Passive to Active Responsibility: While the "no general monitoring obligation" remains, the reality, especially for larger platforms, is a de facto expectation of greater proactivity.

OCSSPs: Are explicitly deemed "active" and directly liable for copyright content, requiring "best efforts" in licensing, ensuring unavailability, and preventing re-uploads.

DSA: Requires enhanced "notice-and-action," transparency, and for VLOPs/VLOSEs, systemic risk assessments (including for IP infringements) and mitigation measures. The "Good Samaritan" clause encourages proactive filtering.

Balancing Act: Platforms are increasingly caught between rights holders demanding swift removal and users asserting their fundamental rights (freedom of expression, parody, fair use). The legal framework aims to provide safeguards (e.g., transparency, appeals) but this creates complex operational challenges for platforms.

Increased Regulatory Scrutiny: With AGCOM as the Digital Services Coordinator and AGCM's powers, platforms face heightened regulatory oversight and the risk of substantial fines for non-compliance with the DSA and competition/consumer protection rules.

Complexity: The layered legal framework (e-Commerce Directive, DSMCD, DSA, national IP codes, Civil Code, Cultural Heritage Code, competition law) makes compliance a sophisticated task requiring significant legal and technical resources.

**12.3 Freedom of Art:**

Outcome: Cases often involve artists using existing works (including public domain) in new contexts. The Italian Cultural Heritage Code (Legislative Decree No. 42/2004) introduces a unique layer of protection for cultural assets, requiring authorization and fees for commercial reproduction even if copyright has expired. This has led to conflicts, particularly with the fashion and merchandising industries.

Examples:

The Michelangelo's David case (Court of Florence, 2023): Condemned a company for commercially using the image of David (a cultural asset) without authorization from the Galleria dell'Accademia.

The Leonardo da Vinci's Vitruvian Man case (Court of Venice, 2022): Prohibited Ravensburger from using the image of the Vitruvian Man for puzzles without authorization, despite the work being in the public domain. This highlights how Article 9 of the Italian Constitution (safeguarding cultural heritage) and the Cultural Heritage Code can override traditional copyright expiry for culturally significant works held in public institutions.

The Jean Paul Gaultier case (2022): Successfully sued for reproducing Botticelli's Birth of Venus (a cultural asset) in a fashion collection without authorization. These cases show that while artists have freedom, it's balanced against cultural heritage protection, which is quite unique to Italy.

**13. Obligations of the platforms**

While Italy has implemented the necessary legal frameworks (particularly through the DSA and DSMCD) to mandate a balance between IP enforcement and fundamental rights, the practical challenge of automated content filtering remains significant. The effectiveness of these safeguards relies heavily on platforms investing in sophisticated technologies, transparently communicating their content moderation policies, and robustly implementing appeal mechanisms, all under the vigilant oversight of Italian regulatory bodies and the judiciary.

**14. Foreseeable Future Developments and Suggestions**

The digital landscape is constantly evolving, and Italy, within the EU framework, will see further developments:

Legislation:

Continued focus on the practical implementation and enforcement of the DSA by AGCOM. This will involve the certification of trusted flaggers and out-of-court dispute bodies, and the development of specific guidelines.

AI Act: While focused on AI systems, its intersection with IP and fundamental rights is crucial. The AI Act will influence how AI is used in content moderation, potentially imposing transparency, risk management, and human oversight requirements on AI systems that could impact IP enforcement. This will create new challenges and opportunities for platforms.

Further Refinement of Exceptions: As digital creativity evolves, there might be pressure to further clarify or expand copyright exceptions (e.g., for data mining and text mining, though the DSMCD already has some provisions) to ensure they are future-proof and genuinely support innovation and fundamental rights in the AI era.

**15. Legislation, case law or policy initiatives in Italy**

Case Law:

Article 17 DSMCD Interpretation: We expect more jurisprudence from Italian courts, potentially referring to CJEU rulings, on the precise scope of "best efforts," "stay down" obligations, and the practical application of the mandatory exceptions for parody, pastiche, and caricature in the context of OCSSPs.

DSA Enforcement: Initial cases challenging AGCOM's decisions as DSC are likely, which will help define the boundaries of platforms' new obligations.

AI and IP: Litigation concerning AI-generated content, training data issues (whether using copyrighted material to train AI is an infringement), and AI's role in IP infringement detection will undoubtedly increase. This is a nascent but rapidly developing area.

Cultural Heritage Code vs. Freedom of Art: The ongoing tension between protecting cultural heritage and freedom of artistic expression will likely continue to generate significant case law, particularly as digital reproduction and commercialization of public domain works become more widespread.

Policy Initiatives:

Guidelines and Best Practices: AGCOM (as DSC) and other relevant authorities (AGCM) will likely issue further guidelines and engage in dialogues with stakeholders to provide clarity on compliance with the DSA and related IP/competition rules.

Industry Collaboration: Continued efforts to foster collaboration between platforms, rights holders, and user groups to develop effective and balanced solutions for content moderation.

Suggestions to Enhance the Legal Landscape:

Clearer Guidelines on Automated Filtering: While the DSA's "Good Samaritan" clause is helpful, more detailed guidance is needed on how platforms can implement automated filtering systems in a way that respects exceptions and fundamental rights, perhaps with industry-specific codes of conduct approved by regulators.

Harmonized "Fair Use"/Flexible Exceptions: While Italy has moved on parody/pastiche, a broader, more flexible "fair use" or "fair dealing" doctrine (akin to common law systems) could provide greater certainty for creators and platforms, rather than relying solely on a closed list of exceptions. This would require legislative reform.

Proactive ADR for IP Disputes: Strengthening and promoting the use of the DSA's out-of-court dispute settlement bodies specifically for IP infringement cases could reduce the burden on courts and provide quicker, more accessible remedies for both rights holders and users.

Specialized Training for Judges and Regulators: The complexity of digital IP and fundamental rights requires ongoing specialized training for judges, prosecutors, and regulatory staff to ensure consistent and technologically informed application of the law.

Interoperability and Data Portability: While not directly IP enforcement, promoting interoperability and data portability between platforms could foster competition and reduce the "lock-in" effect, which is often a source of unfair competition complaints against dominant platforms.

Automated Content Filtering and Risk of "Capture" of Lawful Content

The increasing use of automated content filtering systems, particularly driven by Article 17 of the DSM Copyright Directive (the "upload filters" debate), indeed carries a significant risk of "overblocking" – the capture and removal of content that is actually lawful under copyright exceptions like fair dealing (criticism/review/quotation) and the mandatory exceptions for parody, pastiche, and caricature.

The Problem: Automated filters (e.g., content ID systems) are highly effective at identifying exact or near-exact matches of copyrighted works. However, they struggle to understand context, intent, and the nuances of transformative use. A system cannot easily distinguish between an unauthorized reproduction and a legitimate parody, critical review, o short quotation. This often leads to:

False Positives: Legitimate content being flagged and removed.

Chilling Effect: Users self-censoring to avoid removal, hindering creativity and freedom of expression.

Burden on Users: Requiring users to appeal erroneous removals, which can be a lengthy and frustrating process.

Developments in Italian Jurisdiction (Attempting to Deal with This):

DSM Copyright Directive Implementation (Article 17(7)): This is the primary legal development attempting to deal with this. The Directive explicitly states that Member States (and thus Italy) must ensure that users can rely on the exceptions for quotation, criticism, review, and for parody, pastiche, and caricature when uploading and making available content on OCSSPs.

Practical Challenge: The Directive requires OCSSPs to implement mechanisms to ensure these exceptions are respected. This is the "user rights safeguards" aspect of Article 17. However, precisely how platforms are to achieve this technologically without requiring ex ante human review of every upload (which would be impractical) is the core dilemma.

AGCOM's Role as DSC: AGCOM, as the Digital Services Coordinator, is responsible for monitoring the implementation of the DSA, including how platforms balance IP enforcement with fundamental rights. This includes overseeing how platforms handle appeals from users whose content has been erroneously removed by automated filters. AGCOM's guidelines and future enforcement actions will be crucial in shaping best practices here.

Judicial Review: Users whose content is wrongfully removed due to automated filtering can challenge these decisions in court. Judges, when reviewing such cases, are expected to apply the balancing test between IP rights and fundamental rights, and specifically consider if the content falls under any applicable exceptions. Italian jurisprudence, as mentioned, is becoming more receptive to arguments based on "transformative use" or "citation" that align with the spirit of fair dealing/parody.

"Trusted Flagger" Dialogue: While trusted flaggers streamline the process, there's an ongoing debate about whether their specialized focus on infringement detection might inadvertently contribute to overblocking if they don't adequately consider exceptions. This requires ongoing dialogue between trusted flaggers, platforms, and user representatives.

Lack of a General "Fair Use" Doctrine: Italy's system of enumerated exceptions (closed list) rather than a broad "fair use" doctrine makes it inherently more challenging for automated systems to assess nuanced cases of lawful use. A "fair use" doctrine would provide more flexibility but also more uncertainty, requiring judicial interpretation on a case-by-case basis.

**BIBLIOGRAPHY**

**I. EU Regulations (Directly Applicable in Italy or Transposed)**

1. **Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("e-Commerce Directive").**
2. **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 ("DSM Copyright Directive").**
3. **Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC ("Digital Services Act" - DSA).**
4. **Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services ("P2B Regulation").**

**II. Italian Regulation (Legislative Decrees, Laws, etc.)**

1. **Decreto Legislativo 9 aprile 2003, n. 70**
2. **Legge 22 aprile 1941, n. 633** Amended by **Decreto Legislativo 8 novembre 2021, n. 177** which implemented the DSM Copyright Directive, introducing Articles 102-sexies et seq. on OCSSP liability.
3. **Decreto Legislativo 10 febbraio 2005, n. 30**
4. **Codice Civile (Civil Code):**
   * **Art. 2043 c.c.** (- general tort liability);
   * **Art. 2598 c.c.** (unfair competition);
5. **Legge 18 giugno 1998, n. 192**;
6. **Legge 5 agosto 2022, n. 118**;
7. **Decreto Legislativo 6 settembre 2005, n. 206**;
8. **Delibera AGCOM n. 680/13/CONS**

**III. Italian Case Law (Selected Key Rulings and Trends)**

1. **On "Active" vs. "Passive" Hosting Providers (prior to DSMCD, still relevant for non-OCSSPs):**
   * **Corte di Cassazione, Sezioni Unite, 13 dicembre 2021, n. 39763:** Important ruling reaffirming the "active hosting provider" doctrine, clarifying criteria for attribution of liability for IP infringements (e.g., active management, optimization, selection of content).
   * **Corte di Cassazione, Sez. I Civ., 29 luglio 2021, n. 21833:** Further confirms principles of ISP liability.
   * **Tribunale di Roma n. 14757 del 12 luglio 2019 (RTI vs. Italia On Line / Dailymotion);**
   * **Tribunale di Roma, 20 marzo 2011 (Yahoo! Italia):** Early cases developing the "active hosting" concept.
   * **Tribunale di Milano, 14 maggio 2013, n. 6563 (RTI vs. YouTube):** Landmark case holding YouTube (at the time) liable as an "active host."
2. **On Unfair Competition (especially Abuse of Economic Dependence):**
   * **Decisioni AGCM (Autorità Garante della Concorrenza e del Mercato):** Numerous decisions against major tech platforms (Google, Apple, Amazon, Meta, Booking.com) for alleged unfair commercial practices and abuse of dominant position/economic dependence. These can be found on AGCM's official website.
3. **On Balance between IP and Fundamental Rights (Parody, Cultural Heritage):**
   * **Tribunale di Roma, 16 maggio 2021 N. 6054/2021 (on "Rango" film):** Interpreting "fair use" principles in a copyright context.
   * **Tribunale di Firenze, 21 aprile 2023, n. 1207/2023, (on Michelangelo's David):** Ruling on the commercial use of public cultural heritage images without authorization, balancing Art. 9 of the Constitution with IP and commercial freedom.
   * **Tribunale di Venezia, 24 ottobre 2022 (on Leonardo's Vitruvian Man):** Similar case regarding the commercial use of cultural heritage.
   * **Consiglio di Stato, 11 aprile 2025, n. 3118 (on Zalando Ambush Marketing):** Upholding AGCM's fine for misleading advertising practices.

**IV. Italian Doctrine (Selected Authors and Works)**

This is a selection, as the Italian doctrine on platform liability is vast and continually updated.

* **General Works on IP and Digital Law:**
  + **Autori Vari,** *Commentario al Codice della Proprietà Industriale*, Giuffrè Francis Lefebvre.
  + **Autori Vari,** *Commentario alla Legge sul Diritto d'Autore*, Giuffrè Francis Lefebvre
  + **G. Resta, V. Zeno-Zencovich (a cura di),** *Il diritto d'autore nell'era digitale. La riforma del diritto d'autore in Europa e in Italia*, Giuffrè Francis Lefebvre, 2022.
  + **F. Galli, P. Marzian (a cura di),** *Diritto dell'informatica e delle nuove tecnologie*, Giuffrè Francis Lefebvre.
* **Specific Articles/Essays on Platform Liability:**
  + **M. Patrone,** "Responsabilità del provider per violazioni del diritto d'autore nel quadro del diritto europeo," DPCE Online, 2021.
  + **A. D'Avack,** "La responsabilità dei provider per violazioni di diritto d'autore e la Direttiva DSM: dalla giurisprudenza alla nuova legge," *Il Diritto Industriale*, 2022.
  + **G. Allegri,** "La responsabilità dei fornitori di servizi di condivisione di contenuti online ai sensi della Direttiva sul diritto d'autore nel mercato unico digitale: il difficile equilibrio tra filtraggio automatico e libertà di espressione," *DPCE Online*, 2022.
  + Libertà e limiti della comunicazione nello spazio pubblico digitale**,** *Federalismi.it,* 24 luglio 2024