

**Articles 15 & 17 of the Directive on  
Copyright in the Digital Single Market**  
Questionnaire – Annex to the Comparative  
National Implementation Report

**ITALY**

**Last Updated:** 9 August 2022

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This comparative report is based on 25 national questionnaires prepared by national legal experts.

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**Caterina Sganga** joined Sant'Anna as an Associate Professor of Comparative Private Law in October 2018. Prior to her appointment at SSSA, she was Assistant and later Associate Professor of Law at the Department of Legal Studies and Department of Economics and Business of Central European University (CEU, 2012-2018). She holds a Ph.D. in Comparative Private Law from Sant'Anna, an LL.M. from Yale Law School, and an LL.B. and J.D. from University of Pisa.

She is a member elected of the European Copyright Society ([ECS](#)), one of the most prestigious independent academic associations in the field of copyright, a fellow of the European Law Institute (ELI), and a member of several international IP and property law associations (EPIP, ATRIP, ALPS).

From January 2020, she is the coordinator of the H2020 project [reCreating Europe](#) (“Rethinking digital copyright law for a culturally diverse, accessible, creative Europe”), which studies the impact of EU digital copyright law on creativity, cultural diversity and access to knowledge through a multidisciplinary approach and a focus on five groups of stakeholders (authors and performers, creative industries, cultural heritage institutions, intermediaries, users). *ReCreating Europe* aims at offering innovative contributions to assess the impact of current laws, develop reform proposals, and prepare and test guidelines which may inspire the self-regulatory efforts of different interest groups.

In the past years she held visiting teaching appointments at Maynooth University (Ireland), CEU, the Europa-Kolleg of the University of Hamburg and the University of Pisa, was a fellow at the Information Society Project at Yale Law School, and a visiting researcher at the Center for Intellectual Property Policy at McGill University (Montreal).

Caterina's book "[Propertizing European Copyright. History, Challenges and Opportunities](#)" has been published by Edward Elgar in 2018 (electronic version with Introduction and Chapter One in open access available [here](#)). She authored the volume "[I beni in generale](#)" (On goods - general theory) in the Italian *Commentario al Codice Civile P.Schlesinger* (Giuffr  Editore) in 2015, and several contributions published in edited books, international journals such as the *International Review of Intellectual Property and Competition Law* (IIC), the *Cambridge Journal of International and Comparative Law*, the *European Intellectual Property Review* (EIPR), the *Journal of Intellectual Property, Information Technology and E-Commerce Law* (JIPITEC), the *Journal of Intellectual Property Law and Practice*, *GRUR Int.*, *ERA Forum*, and a number of Italian law reviews.

You can find most of her publications in open access on [SSRN](#) and [ResearchGate](#), and sporadic [tweets here](#). Caterina is also *avvocato* at the Italian State Bar and attorney-at-law at the New York State Bar.

**The research project was funded by the Coalition for Creativity (C4C) (for more information see: <https://coalition4creativity.org>). Pursuant to the principles of academic freedom, the research was conducted in complete independence from third parties, including the commissioning party.**

**The full study is available for download at: <https://informationlabs.org/copyright>**

## Country: ITALY

National Expert: DR CATERINA SGANGA (Sant'Anna School of Advanced Studies)

Last updated: 9 August 2022

### PART I: Article 15 CDSMD

**Note:** The questions below concern the national implementation of Article 15 CDSMD in your country. They refer to this as the “local national implementation” or LNI. It is recommended that you read all the questions before beginning to compose answers. In all responses, please cite the relevant provisions of national law in your country.

#### Background information

1. Did your national jurisdiction provide protection (whether via copyright or a relevant targeted related right) for press publications prior to the adoption of the CDSMD? If so, please briefly describe this, indicating any differences from the protection provided by Article 15 CDSMD.

No, Italy did not provide any protection for press publications apart from regular copyright protection for original articles.

2. Has Article 15 CDSMD been transposed into national law in your country? If so, please cite the legal act with which and the date on which this was done. Please also briefly indicate whether you consider that the transposition takes a textual (“*ad litteram*”) or intentionalist approach (e.g., one that is adaptive to national circumstances).

If available, please provide a link to the legal provision in the official language(s) of your jurisdiction. If you are aware of a good (official or unofficial) English language translation, please include that as well.

**Note:** if there is no national implementation of Article 15 CDSMD, please process to Part II of the questionnaire.

**Yes.** Italy has implemented the CDSM Directive with the Legislative Decree (Decreto Legislativo, D.Lgs. no. 177 of 9 November 2021). The decree has modified the Italian Copyright Act (Legge sul diritto d’autore, law 22 April 1941, no.633 (l.aut)). Art. 1, paragraph (c) of the D.Lgs. no.177/21 implements Art. 15 CDSMD by introducing a new Art. 43bis to the Copyright Act.

The implementation of Article 15 CDSMD has been textual in some paragraphs, intentionalist in other.

This is the link to the official text of the Decree <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2021-11-08;177>. I am not aware of good English language translation so far.

## **AC 1: Subject matter**

- 3. What is the subject matter (object) of protection by the LNI and how is this defined? Please focus on any differences (including additions) from the concept of “press publications” as defined by Art. 2(4) CDSMD.**

Art. 43bis l.aut., paragraph 2 defines press publication fully in line with Article 2(4) CDSMD. The only additions are (1) the reference to photographs and videograms to specify the meaning of “other works or other subject matter”<sup>1</sup> and (2) the reference to publishers and press agencies instead of “service provider”

- 4. Does the LNI protect against uses of individual words or very short extracts? If these are excluded from protection, how are they defined? Please note whether a qualitative or quantitative approach is taken and whether such short extracts may include non-literary content. Please note whether there are specific provisions on headlines.**

Art.43bis, paragraph 6 excludes from the scope of the press publishers’ right hyperlinks, individual words and very short extracts. Paragraph 7 defines “very short extracts” as “any portion of such a publication that does not exempt users from the need to consult the journalistic article in its entirety”. The Explanatory Memorandum to the Decree testifies for a long and heated debate that led to the final wording of the paragraph. During the preparatory phase, several stakeholders and some Parliamentary Committees emphasized the risk that a vague qualitative definition could weaken the protection offered to press publishers, increase uncertainties, and thus trigger litigation, and proposed instead the adoption of a quantitative definition based on the number of characters reproduced, which was potentially enforceable also by means of algorithms. However, albeit practical and straightforward, this option was considered too straightjacketing, disproportionately compressing other rights, and also prejudicing press publishers, for they could have been denied protection in case of excerpts that did not reach the quantitative benchmark, but still satisfied readers enough to make it unnecessary for them to land on the publisher’s website. As a result, the general qualitative approach prevailed.

- 5. Does the LNI extend to mere facts reported in its subject matter? If these are excluded from protection, how are they defined?**

There is no such reference in Art.43bis l.aut.

- 6. Does the LNI extend to public domain content incorporated in its subject matter? If these are excluded from protection, how are they defined?**

Art.43bis l.aut. makes no explicit mention to public domain content. The only side reference lies in paragraph 5, which states that “when a work or other protected materials are include in a press publication on the basis of a non-exclusive license, the [press publishers’ rights] cannot be used to prevent the use by other authorized users nor to prevent the use of works and materials on which the term of protection has expired.”

- 7. Does the LNI include any other threshold conditions for protection?**

No.

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<sup>1</sup> “Per pubblicazione di carattere giornalistico si intende un insieme composto principalmente da opere letterarie di carattere giornalistico, che può includere altre opere e materiali protetti, come fotografie o videogrammi, e costituisce un singolo elemento all’interno di una pubblicazione periodica o regolarmente aggiornata, recante un titolo unico, quale un quotidiano o una rivista di interesse generale o specifico, con la funzione di informare il pubblico su notizie, o altri argomenti, pubblicata su qualsiasi mezzo di comunicazione sotto l’iniziativa, la responsabilità editoriale e il controllo di un editore o di un’agenzia di stampa. Ai fini del presente articolo le pubblicazioni periodiche a fini scientifici o accademici non sono considerate quali pubblicazioni di carattere giornalistico.”

## **AC 2: Right-holders**

- 8. Who are the beneficiaries of the protection for press publications in the LNI? Please indicate any exclusions, (e.g., territorial). Please indicate if the LNI employs lists of press publications or beneficiaries that would be covered.**

Art.43bis, paragraph 3 provides slightly more details than Article 15 CDSMD in defining the beneficiaries of protection. It states that press publishers are “subjects that, either individually or in association or consortium, and in the exercise of an economic activity, publish the works defined in paragraph 2, even if they have their seat or establishment in another Member State”. The Explanatory Memorandum highlights that the drafters purposefully declined the request, advanced by two Parliamentary Committees, to introduce additional specific requirements. This was dictated by the wish to provide an all-encompassing definition that could cover also publishers established in other Member States, which might be subject to diverging rules and requirements.

## **AC 3: Restricted acts**

- 9. Against what kind of acts does the LNI protect? Please provide any relevant definitions.**

Article 43bis, paragraph 1 attributes to press publishers the rights of reproduction and communication to the public under Arts.13 and 16 l.aut. for the online use of their press publications.

The right of communication to the public is defined in Italy as follows: “the exclusive right of communication to the public by wire or wireless means of a work covers the use of a distant communication means, such as a telegraph, telephone, radio, television and other similar means, including communication to the public via satellite, cable retransmission, and communication to the public encrypted under particular access conditions. It also includes the making available to the public of the work in a way that anyone can have access to it from a place and at a time individually chosen by them” (see Art.16 l.aut.).

- 10. Does the LNI cover hyperlinking to the protected subject matter? If not, how is hyperlinking defined?**

No, hyperlinks are explicitly excluded from the scope of the right by Art.43bis, paragraph 6. No definition of hyperlink is provided.

## **AC 4: Targeted users**

- 11. Does the LNI target use by a specific kind of user (provider)? Please provide any relevant definitions. Specifically, please indicate whether private or non-commercial uses by individual users are covered. Please also indicate whether online platforms (OCSSPs) are covered.**

Art.43bis, paragraph 1 targets “information society service providers as defined by art.1, para 1, letter b) of the Legislative Decree 15 December 2017, no.233, including media monitoring and press review companies”. The D.Lgs. no.233/2017 implemented Regulation (EU) no.1025/2012 of 25 October 2012 on European standardisation. Its art.1(1)(b) defines the notion of “service”, “at a distance” and “via electronic means”. OCSSPs are not explicitly mentioned.

Art.43bis, paragraph 6 specifies that the press publishers’ rights do not cover private or non-commercial uses by individual users.

**12. Does the LNI allow for the rights it provides to be invoked against:**

- a) **right owners whose content is incorporated in the protected subject matter?**
- b) **holders of licenses to exercise rights in content that is incorporated in the protected subject matter?**

**Please describe the applicable rules.**

Art.43bis, paragraph 4 excludes the application of the press publishers' right against authors and other holders of rights on works and other materials incorporated in the protected subject matter, including the right to exploit them also in other forms than press publications.

As mentioned above Article 43 bis, paragraph 5 states that "when a work or other protected materials are included in a press publication on the basis of a non-exclusive license, the [press publishers' rights] cannot be used to prevent the use by other authorized users nor to prevent the use of works and materials on which the term of protection has expired"

**AC 5: Exceptions and limitations**

**13. Does the LNI recognise exceptions or limitations to the protection it provides? If so, please indicate what these are.**

Article 43bis, paragraph 16 extends to the press publishers' rights general copyright exceptions and limitations provided by Chapter V, Title I of the Italian Copyright Act (arts. 65 ff.), i.e. exceptions for news reporting, reporting of political or administrative speeches, public security and parliamentary, judicial or administrative procedures, general private copy, private copy of phonograms, transient electronic copy, public lending, digitisation and making available to the public of library's collections for private study and research, orphan works, citation, criticism and pastiche, production of accessible copies for visually impaired individuals, reproduction of broadcasts in prisons and hospitals.

**AC 6: Licensing,**

**14. Does the LNI include provisions on the licensing (incl. systems of extended collective licensing) of uses of press publications? If so, please briefly describe any relevant details. For example, these could involve the following:**

- **criteria for determining the height of compensation;**
- **the process for negotiating compensation;**
- **transparency duties (incl. data sharing obligations);**
- **duties to engage in negotiations;**
- **oversight by a government authority;**
- **(mandatory) collective rights management.**

This represents the most contested part of the new Italian press publishers' right.

Art.43bis, paragraph 7 already opts for a particular semantic choice, stating that "for the online use of press publications, information society providers recognize to [press publishers] a **fair compensation**". From a contextual and systemic perspective, the reference to "compensation" recalls a language that is generally used in the context of exceptions and mandatory licensing, when exclusive rights turn into remuneration rights. In fact, the mechanism envisioned by the Italian decree presents hybrid traits, where elements that are typical of forms of assisted or collective negotiations are coupled with features that characterize mandatory licensing, collective licensing or private levy schemes.

Within sixty days from the entry into force of the decree, the Italian Communications Authority (Autorità Garante per le Comunicazioni, AGCOM) was supposed to issue a decree indicating the criteria to determine the amount of fair compensation due to press publishers, taking into due account the number of online consultations of the work, the years of activity and market relevance of each publisher, the number of journalists employed, the investments both publisher and provider made for infrastructures and technologies, and the economic benefit derived by each party from the work, in terms both of visibility and of advertising revenues (art.43bis, para 8).

The relationship between these criteria and the independent negotiation parties must carry on is unclear. Article 43bis(9) l.aut. states that "the negotiation to conclude the contract regulating the exercise of the rights (...) is conducted by taking into account also the criteria set by the [AGCOM] Regulation", and that during the

negotiation information society service providers should not limit the visibility of press publishers' content in the search result. An unjustified limitation of this sort during the negotiation process may be held against providers in the evaluation of their compliance with the duty of good faith and fair dealing under art.1337 of the Italian Civil Code.

However, paragraph 10 specifies that, if within thirty days from the launch of the negotiations no agreement is reached on the compensation amount, each party may request AGCOM to determine it. The Authority has then thirty days to indicate which of the parties' proposal is more compatible with the criteria set in the Regulation. In case both fail to comply, AGCOM may determine *ex officio* the amount of the compensation. To facilitate the process and ensure its regularity, providers have the duty to disclose all data necessary to calculate the compensation due to press publishers, which, if violated, triggers an administrative sanction up to 1% of the provider's yearly gross profit (Article 43bis(12) l.aut.).

Very much along the lines of an arbitrage, after the final price is established, parties are still in charge of concluding the license agreement. This is what Article 43bis(11) l.aut. suggests by providing that "when, after AGCOM has determined the fair compensation, parties fail to stipulate the contract, each party may refer the case to the competent first instance court (...), also to introduce the proceedings under Article 9, law 18 June 1998, no.192", which regulates claims related to abuse of economic dependence. Two elements deserve to be highlighted here, which - unsurprisingly - have also been the most contested features of the new Italian press publishers' right. First, the possibility to recur to courts in case of failed negotiations is offered not only to publishers but also to providers, with a decision that seems to equalize their positions in a manner that conflicts with the rationale and considerations grounding Article 15 CDSM. Second, the provision does not specify nor limit the types of judicial claims parties may introduce. This opens the door to the recourse to a plethora of interim and permanent remedies, including specific performance and duty to contract, both potentially issuable also against right-holders. Such a conclusion is reinforced by the explicit reference, in Art. 43bis, para 11, to Article 9, law no.192/98, which features among its key remedies the duty to contract, again potentially issuable against both parties. This legislative choice may end up eliminating the press publishers' freedom of contract, and thus frustrate the principle of prior consent, which represents the distinguishing feature of preventive rights vis-à-vis remuneration rights. And while in the field of competition law the CJEU's Magill doctrine limits to "exceptional circumstances" the cases in which a copyright holder's refusal to license may constitute an abuse of dominant position and thus trigger remedies that may elide her freedom of contract, this does not apply in case of abuses of economic dependence where, in addition, indications on what may constitute an abuse of IP rights are largely missing, and no harmonization exists across the EU.

In the context of the negotiation process, providers are obliged to disclose, upon request of the interested party, and also through collecting societies or independent management entities regulated under D.Lgs. no.35/2017 or the Italian Communications Authority, all data necessary to determine the amount of fair compensation. The fulfilment of such duties does not exempt publishers from the duty to respect confidentiality of commercial, industrial and financial information they have learnt. The Communications Authority oversees the fulfilment of information duties by providers. In case of no communication of such data within thirty days from the request, the Authority may apply an administrative sanction up to 1% of the profits from the last budget.

### **AC 7: Revenue sharing**

**15. Does the LNI require that any revenue it provides be shared with authors of works incorporated in its subject matter? If so, does it provide details on e.g., the size of the share or modes of collection and distribution or transparency obligations on press publishers? Please describe the applicable rules.**

Press publishers should provide to authors of press publications a share between 2% and 5% of the "fair compensation" they receive, to be determined by individual contracts in case of freelancers and other non-employed authors. In case of employees, the share may be determined by collective agreements.

### **AC 8: Term of protection**

**16. What is the term of the protection afforded to press publications by the LNI?**

Two years after the publication, calculated from 1<sup>st</sup> of January of the year after the date of publication of the work (Art. 43bis, para 14). The provision does not apply to works published before 6 June 2019.

## AC 9: Waiver

### **17. Can right-holders waive their rights under the LNI? Can authorisation be given for free?**

There is no reference to unwaivability of the rights in Art. 43bis l.aut.

## AC 10: Entry into effect

### **18. From what date did the protection provided by the LNI come into effect in your jurisdiction?**

The Decree entered into force on 12 December 2021.

## Additional information

### **19. Can you think of any noteworthy divergence in the LNI from the standards set out in Article 15 of the CDSMD that you have not already addressed above? If so, please elaborate.**

See above, Q14. I will report here a short excerpt from C.Sganga, M.Contardi, *The new Italian press publishers' right: creative, fairness-oriented... and invalid?*, forthcoming in *JiPLP*, where we illustrate the potential profiles of invalidity of the Italian press publishers' right.

“Depending on how much Article43bis l.aut. will actually trigger litigation, it might not take much for the new provision to land on the table of the CJEU.<sup>2</sup> And while it is true that Article 15 CDSMD provides little or no guidance on the matters on which the Italian provision stands out for its original approach, it is also true that the guidelines offered by the Commission and the CJEU offer sufficient hints to foresee what the outcome of an invalidity claim *vis-à-vis* EU law against Article43bis l.aut. would be.

The Italian version of Article 15 CDSMD classifies the amount due to press publishers as “fair compensation” (*equo compenso*), instead of remuneration, giving the undue impression that the sum stems from the exercise of an exception or from a mandatory collective management scheme instead that from a voluntary license agreement. This semantic twist was probably originated by the similarities between the calculation system provided by Article 43bis l.aut. and the levy scheme used for the private copying exception (Article 68 l.aut.). The two mechanisms diverge only with regard to the source determining the amount due to right-holders. While, in fact, the decree issued under Article 68 l.aut. directly indicates the sums due as levies, the decree issued under Article 43bis l.aut. only dictates the criteria that should guide the negotiation of the fees or its determination by the AGCOM. Analogies and semantic confusion notwithstanding, however, the use of the word “compensation” is not enough to transform the Italian press publisher’s right into a remuneration right.

Still, the criterion indicated by Article43bis l.aut. as guidelines for the future AGCOM Regulation are not without problems. They include, in fact, variables that have nothing to do with the value of the news and the publisher’s investments, bringing in also, for example, the size of the publisher’s company and the years the latter was active on the market. Such factors may heavily impact on the final amount due, yet they are alien to the rationale of Article 15 CDSMD and its subject-matter. In this sense, they may be well construed as incompatible with EU law on the basis of arguments similar to those that led the Court’s assessment in relation to levy schemes under the InfoSoc private copy exceptions, and particularly the fact that they improperly use calculation criteria that were not linked to the prejudice suffered by right-holders, as requested by the InfoSoc Directive’s own preamble.<sup>3</sup>

The most controversial aspect of Article43bis l.aut., however, is represented by the features of the negotiation scheme it envisages. The circumstance that not only the publisher but also the provider may revert to AGCOM and trigger the administrative determination of the remuneration represents a massive limit to the publisher’s

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<sup>2</sup> Some scholars (Finocchiaro-Pollicino 2022) have also hinted at the possibility that Article 43bis l.aut. constitutes an excess of delegated regulatory power by the Government, for its content would go beyond the guidelines provided by the Parliament in its delegation law.

<sup>3</sup> Landmark examples are Judgement of 21 October 2010, *Padawan SL v Sociedad General de Autores y Editores de España*, C 467/08, ECLI:EU:C:2010:620; Judgement of 5 March 2015, *Copydan Båndkopi v Nokia Danmark A/S*, C-463/12, ECLI:EU:C:2015:144; Judgement of 12 November 2015, *Hewlett-Packard Belgium SPRL v Reprobel SCRL*, C-572/13, ECLI: EU:C:2015:750.



contractual freedom, which is the primary form of exercise of its exploitation rights. Despite it being formally different, the functional effects of the mechanism described by Article 43bis(8) l.aut. are very similar to those characterizing mandatory collective management schemes, where right-holders cannot negotiate individually with users, not even when they find the conditions bargained for by the collecting society unsatisfactory for their needs. This makes the Italian solution clash with the guidance provided by the Commission during the implementation process, which crossed out the possibility to introduce mandatory collective management under Article 15 CDSMD.

In all this, the feature that raises more concerns as to its potential invalidity is contained in Article 43bis(11) l.aut., which attributes again to both parties the right to sue if no contract is concluded after the AGCOM has fixed the price, without limitation as to the remedies available. This means that both providers and publishers will be able not only to claim compensation in tort, but also to request the granting of positive and negative injunctions, including the imposition of a duty to contract. As a result, the publisher's freedom of contract may be completely stripped away, with a clear compression of the principle of prior consent, and the potential transformation of the preventive right of Article 15 CDSMD into a remuneration right. Since Article 43bis l.aut. does not grant any opt-out possibilities nor any presumption of publisher's consent based on reasonable grounds, the CJEU may well dictate that, in order not to be held invalid, the provision has to be interpreted as not allowing the judicial imposition of a duty to contract on publishers, as this would run counter the doctrine developed in *Spedidam*,<sup>4</sup> and possibly fail the "essence check" under Articles 17(2) and 52(1) CFREU.

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<sup>4</sup> Judgment of 14 November 2019, *Société de perception et de distribution des droits des artistes-interprètes de la musique et de la danse (Spedidam) and Others v Institut national de l'audiovisuel*, C-484/18, ECLI:EU:C:2019:970, largely following Judgment of 16 November 2016, *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication*, C-301/15, ECLI:EU:C:2016:878.

## PART II: Article 17 CDSMD

**Note:** The questions below concern the national implementation of Article 17 CDSMD in your country. They refer to this as the “local national implementation” or LNI. It is recommended that you read all the questions before beginning to compose answers. In all responses, please cite the relevant provisions of national law in your country.

### **Background information**

- 1. Has Article 17 CDSMD been transposed into national law in your country? If so, please cite the legal act with which and the date on which this was done. Please also briefly indicate whether you consider that the transposition takes a textual (“*ad litteram*”) or intentionalist approach (e.g., one that is adaptive to national circumstances).**

**If available, please provide a link to the legal provision in the official language(s) of your jurisdiction. If you are aware of a good (official or unofficial) English language translation, please include that as well.**

**Note: if there is no national implementation of Article 17 CDSMD you can end the questionnaire at this point.**

Yes. Italy has implemented the CDSM Directive with the Legislative Decree (Decreto Legislativo, D.Lgs. no. 177 of 9 November 2021. The decree has modified the Italian Copyright Act (Legge sul diritto d’autore, law 22 April 1941, no.633). Art. 1, paragraph (n) of the D.Lgs. no.177/21 implements Art. 15 CDSMD by introducing a new Title II-quater and Arts.102-sexies, 102-septies, 102-octies, 102-nonies, 102-decies to the Copyright Act.

The implementation of Article 17 CDSMD has been largely textual, with no actual reception of the EC guidelines.

This is the link to the official text of the Decree <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2021-11-08;177>. I am not aware of good English language translation so far.

### **AC 1: Subject matter**

- 2. What is the subject matter (object) of protection by the LNI?**

Art. 102-sexies, paragraph 3 refers to acts of communicating/making available to the public of works protected by copyright or other protected materials uploaded by platform users, including acts performed by users who do not act for commercial purposes, nor their activities generate significant profits (paragraph 4).

### **AC 2: Right-holders**

- 3. Who are the beneficiaries of the protection provided by LNI? Please note whether there are any deviations from the directive.**

From Art. 102-sexies, paragraph 3 it may be inferred that beneficiaries of the protection are copyright holders and holders of rights over other protected materials.

### AC 3: Exclusive rights

#### 4. Against what kind of act does the LNI protect right-holders? Is a legal qualification given to those acts (e.g., “communication to the public”)?

See Q2. Art. 102-sexies, paragraph 3 refers to acts of communicating/making available to the public of works protected by copyright or other protected materials uploaded by OCSSPs’ users, including acts performed by users who do not act for commercial purposes nor their activities generate significant profits (paragraph 4). Such uploads are qualified as direct acts of communication/making available to the public by OCSSPs.

### AC 4: Targeted providers

#### 5. Does the LNI target a specific kind of service provider? Please provide any relevant definitions, including any exclusions (“carve-outs”). Please focus on any differences from the concept of “online content sharing providers” (OCSSPs) as defined by Article 2(6) CDSMD and any elements taken from the recitals (e.g., facilitating piracy, definitions of “large amounts”).

The definition provided by Art. 102-sexies, paragraphs 1 and 2 follows almost slavishly the wording of Art. 2(6) CDSMD, with only a few minor specifications, such as (a) the addition of the words “directly or indirectly” to qualify the profit-making purposes, and (b) the exclusion, from the carve-outs of cloud service providers and online marketplaces, of OCSSPs that allow the sharing of protected works between multiple users. There is no translation of the lexeme “such as”. Whether this means that the carve-outs are listed in a closed way is a matter for judicial interpretation.

#### 6. Were the targeted service providers considered to infringe the relevant exclusive rights in your country prior to the adoption of the LNI? Please indicate whether any liability was primary or secondary.

According to Art. 16 Decree 70/2003, hosting providers are **directly liable** under the general civil liability clause of the Italian Civil Code (arts. 2043 et seq.) for copyright infringing content uploaded by the users if:

- They are **aware** of the infringement<sup>5</sup>
  - o In the case law it is particularly controversial whether, in order to be aware, the provider needs to receive notice of infringement inclusive of relevant URL addresses.<sup>6</sup>
- They have **not promptly removed** or made the content otherwise inaccessible.
- They failed to promptly **notify** the judicial authority about the infringement.

According to Art. 17 Decree 70/2003, hosting providers are directly liable if:

- **upon request of the competent authority**, the provider does not promptly block the access to the infringing content,
- or if upon knowledge of an infringement, it does not promptly **inform the authorities**.

Italy presents a consolidated case law on the liability of **active/passive providers**. The provider is always liable if active. However, court cases show a number of inconsistencies. For instance:

- Hosting providers are “**presumed** to carry out a merely technical, automatic and passive activity”, and declared not liable on this basis.<sup>7</sup>
- A hosting provider was considered “active”, hence liable, if it carried out an “activity that goes beyond services of merely technical, automated and passive nature, and engages in active behaviors, thus joining other parties in the infringement”.<sup>8</sup> At times this is described as a “manipulation or transformation of the information or of the content”.<sup>9</sup>

<sup>5</sup> See also e.g., Tribunal of Catania, 29 June 2004, n.2286 stressing on the requirement of “full” awareness.

<sup>6</sup> E.g., Court of Civil Cassation, First Section, Decision of 19 March 2019 n. 7708.

<sup>7</sup> E.g., Tribunal of Turin, First Civil Section, Order, 6 May 2014 (docket n. 38113/2013).

<sup>8</sup> E.g., Court of Civil Cassation, First Section, Decision of 19 March 2019 n. 7708 (original text: “attività che esula da un servizio di ordine meramente tecnico, automatico e passivo, e pone, invece, in essere una condotta attiva, concorrendo con altri nella commissione dell’illecito”).

<sup>9</sup> Tribunal of Rome, 10 January 2019, n.693 (“manipolazione o trasformazione delle informazioni o dei contenuti trasmessi o memorizzati”).

- Hosting providers were deemed to act as *de facto* content providers, and were thus held liable, if they transformed the uploaded content into “new” products by organizing, indexing and commercially exploiting the videos uploaded by its users.<sup>10</sup> Relevance was also given to their “economic profits and advertising activities accompanying the organized presentation and displaying of [users’] content”.<sup>11</sup>
- The notion of active hosting provider was at times found to be misleading and detached from the reality of hosting services.<sup>12</sup>
- Online encyclopedias were deemed passive hosting providers, as “they limit themselves to hosting information given by the users”.<sup>13</sup>

Hosting providers are always declared liable if they behave **negligently** by failing to promptly respond to users’ notices,<sup>14</sup> react with removal/blocking of infringing content<sup>15</sup> and/or notify the authorities.<sup>16</sup>

With specific regard to the **awareness** of the hosting provider about the infringement, the Italian case law presents contrasting developments. For instance, it has deemed sufficient OR necessary to hold the hosting provider liable:

- a general notice by the right holder (via cease-and-desist letter), e.g., general information about a sample of infringing contents;<sup>17</sup>
- a specific notice by the right holder (via cease-and-desist letter), capable of identifying the infringing content with clarity and precision, inclusive of URL addresses to locate the infringing contents;<sup>18</sup>
- a notice that meets the requirements set by the hosting provider itself.<sup>19</sup>

No clarity seems to be present either on the side of prohibition of **ex ante monitoring** obligations. Recently, in fact, the Court of Appeal of Florence found that “such an obligation stems from the fact that [TripAdvisor] had voluntarily committed to it and ensured it via [its contractual/private ordering] regulatory mechanisms”.<sup>20</sup>

On the side of **ex post monitoring** obligations to prevent repeated infringements (notice-and-stay-down), the Italian courts tend to uphold the hosting providers’ liability and require their proactive efforts to prevent further violations, once they are aware of infringing contents.<sup>21</sup>

## AC 5: Scope of protection

### **7. In your national jurisdiction prior to the transposition of the CDSMD did the service providers targeted by the LNI benefit from the protection of an immunity (e.g., the national implementation of the hosting safe harbour provided by Article 14 of the ECD (Directive 2000/31/EC))? If so, does this provision continue to apply?**

Yes. Hosting providers were shielded by the immunity introduced by Art. 16 of the D.Lgs. 9 April 2003, no.70, which implemented Art. 14 ECD. The new Art. 102-sexies l.aut. now excludes the application of this provision to the cases covered by the new Title II-quarter of the Italian Copyright Act.

<sup>10</sup> E.g., Tribunal of Turin, First Civil Section, 7 April 2017, n.1928 (docket n.38112/2013); Tribunal of Turin, First Civil Section, Order, 23 June 2014 (docket n. 15218/2014); Tribunal of Rome, Order, 16 December 2009 (docket n. 54218/2008); Tribunal of Rome, 27 April 2016, n.8437; Court of Appeal of Rome, 29 April 2017, n. 2833 (docket n. 24716/2012).

<sup>11</sup> Tribunal of Milan, 9 September 2011, n.10893. Original text of the quote: “(...) trae sostegno finanziario in ragione dello sfruttamento pubblicitario connesso alla presentazione (organizzata) di tali contenuti.”

<sup>12</sup> E.g., Court of Appeal of Milan, 7 January 2015, n.29 (docket nr. 3821/2011).

<sup>13</sup> Tribunal of Rome, 9 July 2014. Original text of the quote: “(...) in quanto si limita ad offrire ospitalità ad informazioni fornite dal pubblico degli utenti.”

<sup>14</sup> E.g., Tribunal of Milan, 9 September 2011, n.10893 (*RTI vs. Yahoo!*); Tribunal of Rome, 27 April 2016, n. 8437.

<sup>15</sup> E.g., Tribunal of Rome, 10 January 2019, n. 693; Tribunal of Rome, 15 February 2019, n. 3512.

<sup>16</sup> E.g., Tribunal of Milan, 11 June 2018.

<sup>17</sup> E.g., Tribunal of Milan, 9 September 2011, n.10893 (*RTI vs. Yahoo!*); Tribunal of Rome, order of 16 December 2009; Tribunal of Rome, order of 11 February 2010.

<sup>18</sup> E.g., Tribunal of Rome, 11 June 2011; Court of Appeal of Milan, 7 January 2015, n. 29; Tribunal of Turin, order of 3 June 2015 (*Delta vs Dailymotion*); Tribunal of Rome, 12 July 2019, n. 14757.

<sup>19</sup> E.g., Court of Appeal of Rome, 19 February 2018, n.1065.

<sup>20</sup> Court of Appeal of Florence, 26 March 2020, n.698 (“(...) tale obbligo tuttavia derivava a TripAdvisor dal fatto che lo aveva liberamente assunto e garantito in via regolamentare”).

<sup>21</sup> E.g., Tribunal of Turin, 7 April 2017, n.1928; Tribunal of Turin, order of 3 June 2015.

- 8. Does the LNI provide an immunity for targeted service providers against the protection it introduces? If so, please describe the conditions for this immunity. To the extent that such conditions relate to obligations to take action against infringing content, please distinguish between obligations to take action against current infringing content and obligations to take action against future infringing content.**

**Current infringing content.** According to Art. 102-sexies, paragraph 3, OCSSPs should obtain right-holders' authorization when they offer to the public access to works protected by copyright or to other protected materials, either directly or through a collecting society and independent managing entities regulated by D.Lgs. 15 March 2017, no.35. Absent the right-holder's authorization, OCSSPs are liable for direct infringement, unless they prove to have cumulatively satisfied the following conditions: (a) have made the greatest (or maximum) effort to obtain the authorization according to high industry standard of professional diligence; (b) have made, according to high industry standard of professional diligence, the greatest effort to ensure that works and other materials for which they have received necessary and pertaining information by right-holders are not made available; (c) after having received a sufficiently motivated notice by right-holders, have promptly disabled access or removed from their websites works and other materials for which they have been put on notice (Art. 102-septies, para 1, letter a-c)

**Future infringing content.** Article 102-septies, para 1, letter (c) also requires that OCSSPs makes the greatest effort to avoid the future upload of materials for which they have received notice of infringement and which they have already promptly removed.

- 9. Does the LNI identify a standard of care to which targeted service provider should adhere in relation to the conditions of the immunity? For example, the Directive makes reference to "best efforts" and to "high industry standards of professional diligence". Please also discuss whether you consider any such terms used in the LNI to represent accurate translations of the corresponding terms in the EU provision, preferably taking into account both the English language and the national language versions.**

See Q8.

- 10. Are the conditions for the immunity in the LNI subject to the principle of proportionality? If so, please describe any specified implications.**

Yes. Art. 102-septies, para 2 states that "in order to establish, according to the principle of proportionality, whether the OCSSP is immune from liability, account should be taken, on a case-by-case basis, also of the type, public and size of the service provided and the type of works or other materials uploaded by users, the availability of adequate and effective tools and related costs for the provider."

- 11. Do the conditions of the immunity differ depending on the characteristics of the specific service provider (e.g., size or age)? If so, please describe those differences, providing any relevant definitions.**

Yes. Article 102-octies provides that new OCSSPs, operating within the EU market for less than three years and having a yearly turnover of less than 10 million euros (calculated according to the EC Recommendation 6 May 2003 on the definition of micro entities and SMEs), are liable under Art. 102-septies unless they cumulatively prove to have made the greatest effort to obtain an authorization from right-holders and, after being put on specific notice, to have promptly disabled access to protected works and other materials or have removed them from their websites. Such OCSSPs, if they had an average of more than 5 million visitors per month in the previous year, may be shielded from liability only if they also prove that they have made the highest effort to prevent the future upload of protected works and other materials for which right-holders have provided pertinent and necessary notice and information.

### **AC 6: Right-holder cooperation**

- 12. Does the LNI depend the conditions of the immunity on right-holder cooperation? If so, please describe what cooperation is expected of right-holders.**

Not explicitly but only indirectly, and in a limited way. According to Art. 102-septies, para 1, letter (c), right-holders are expected to issue sufficiently motivated notices of infringement to providers in order to trigger the providers' duty to disable access or remove content. Under letter (b), they must also provide the relevant and necessary information to trigger a duty to make sure content is unavailable. Article 102-decies adds that when right-holders ask OCSSPs to disable access to specific works or other subject matters or to remove them, they should indicate the reasons of the request.

- 13. Does the LNI allow right-holders to “earmark” content the unauthorised online availability of which could cause them significant economic harm? If so, please provide any definitions and conditions that govern such earmarking and describe any special regime set in place for earmarked content.**

No such reference is made in the Italian transposition of Article 17 CDSMD.

### **AC 7: General monitoring**

- 14. Does the LNI permit the conditions of the immunity to result in general monitoring? If not, please explain how “general monitoring” is defined.**

Art. 102-septies, para 4 specifies that the new provisions do not introduce any general monitoring obligations for OCSSPs. No further definition is provided.

- 15. Does the LNI recommend or dissuade from using any specific kind of technology in order to adhere to the conditions for immunity? If so, please describe.**

Not really, apart from the specification that the new provisions do not introduce any general monitoring obligations for OCSSP (Art. 102-septies, para 4).

### **AC 8: Exceptions and limitations**

- 16. Prior to the adoption of the LNI, did national law provide for an exception or limitation to copyright for uses for the purpose of a) quotation, criticism and review; and b) caricature, parody or pastiche? If not, has it now introduced such exceptions or limitations? Please describe the conditions under which such exceptions or limitations apply.**

Prior to the adoption of D.Lgs. 177/2021, the Italian Copyright Act included an exception for uses for the purpose of quotation, criticism and review, but not explicitly for caricature, parody or pastiche, although decades of case law have included parody under the general quotation exception (Art. 70 l.aut.).

Art. 102-nonies, para 2, grants users, when they upload or make available content they generated through OCSSPs, the possibility of enjoying exceptions and limitations to copyright and related rights for the purposes of quotation, criticism and review, and of caricature, parody and pastiche. Yet, no general parody exception has been introduced to ensure internal consistency.

**17. Do other exceptions or limitations apply to the protection provided by the LNI? If so, please describe.**

The new provisions introduced by D.Lgs. no.177/2021 do not explicitly address the issue. However, the applicability of the full range of general copyright exceptions and limitations may be derived from the fact that Art. 102-nonies, para 1 specifies that “the cooperation between online content sharing service providers and right-holders does not prejudice the availability of protected works and other materials uploaded by users in compliance with copyright and related rights, **including in cases where such works and other materials are subject to an exception and limitation.**”

**AC 9: Licensing**

**18. Does the LNI include provisions on the licensing (incl. systems of extended collective licensing) of relevant uses? If so, please briefly describe any relevant details. For example, these could involve the following:**

- **criteria for determining the height of compensation;**
- **the process for negotiating compensation;**
- **transparency duties (incl. data sharing obligations);**
- **duties to engage in negotiations;**
- **oversight by a government authority;**
- **(mandatory) collective rights management.**

Differently than for the implementation of Article 15 CDSMD, the decree is almost completely silent on the matter. The only reference can be found in Art. 102-sexies, para 3, which states that the authorization that OCSSPs should obtain from right-holders may also be included into a license agreement “obtained directly or through collecting societies and independent management entities regulated by the legislative decree 25 March 2017, no.35.”

**19. Under the LNI, do licenses obtained by a platform cover the platform’s users and/or the other way around? If so, please explain.**

The only indirect reference to the matter comes from Article 102-sexies, para 4, which clarifies that the authorization conferred from right-holders to the provider “includes also acts carried out by users who upload on the provider’s platform works protected by copyright without commercial purposes or without obtaining any significant profits.”

**AC 10: Legitimate uses: *ex ante* safeguards**

**20. Does the LNI include a concept of “legitimate uses”? If so, how are these defined? How are legitimate uses treated?**

There is no explicit reference nor use of the concept of “legitimate uses”. Art. 102-nonies only refers to exceptions and limitations as reason why the availability of protected works and other materials uploaded by users should not be prejudiced by the cooperation between right-holders and providers.

**21. Does the LNI include a concept of “manifestly infringing uploads”? If so, how is this defined? How are “manifestly infringing” and “non-manifestly infringing” uploads treated?**

No such reference is made.

**22. Does the LNI include other *ex ante* mechanisms for the avoidance of action against legitimate content? If so, please describe these citing the relevant provisions of national law.**

No.

#### **AC 11: Legitimate uses: *ex post* safeguards**

- 23. Does the LNI provide for effective and expeditious complaint and redress mechanisms in the event of disputes? If so, please describe these. Please include information on the applicable time limits and decision-makers. If applicable, please include information on time limits, decision-makers, procedural steps and whether any review is performed by humans.**

Article 102-decies, para 2 only states that OCSSPs should establish and make available to users fast and effective complaint mechanisms to contest the provider's decision to disable access or remove specific works or other materials uploaded by them. To this end, the Italian Communications Authority (Autorità per le garanzie nelle comunicazioni) shall adopt specific guidelines, which are yet to be enacted.

- 24. Does the LNI foresee for any other ways of settling disputes over content posted on their platforms (e.g., out-of-court mechanisms or recourse to the courts, incl. collective redress)? If so, please list these.**

Article 102-decies provides that the OCSSP's decision on a user's complaint may be challenged in front of the Communications Authority, according to rules and procedures that will be defined in a Regulation that the Authority itself was supposed to issue within 60 days from the entry into force of the Legislative Decree implementing the CDSMD. This does not prejudice the right for users to recur to courts.

#### **AC 12: Sanctions**

- 25. Does the LNI foresee sanctions in cases of abuses of the procedures it introduces by right-holders, users and/or platforms? If so, please describe these.**

No.

#### **AC 13: Information obligations**

- 26. Does the LNI impose information obligations on platforms? If so, please describe these.**

Yes. OCSSPs should (a) promptly provide right-holders, upon their request, with complete and adequate information on the measures the provider implemented to comply with its obligations (Art. 102-septies, para 3); (b) promptly provide right-holders with information on the use of protected content that is subject to licence agreements (ibidem); (c) inform users, by communicating their general terms and conditions, of the possibility to use protected works and other materials by exploiting exceptions and limitations to copyright and related rights (Art. 102-nonies).

#### **AC 14: Waiver**

- 27. Can right-holders waive the rights provided by LNI? Can authorisation be given for free?**

The new provisions do not make any reference to the possibility of waiver or to have free licenses.

#### **AC 15: Entry into effect**

- 28. From what date did the protection provided by the LNI come into effect in your jurisdiction?**

The Decree entered into force on 12 December 2021.



**Additional information**

**29. Does the LNI explicitly address the relationship between the protection it provides as against OCSSPs and fundamental or human rights (whether of OCSSPs or third parties)?**

(Unfortunately) not.

**30. Can you think of any noteworthy divergence in the LNI from the standards set out in Article 17 of the CDSMD that you have not already addressed above? If so, please elaborate.**

Nothing to highlight.