Questionnaire for the ALAI Study Days 2015 in Bonn

Remuneration for the use of works

Exclusivity v. other approaches

ITALY - 2015

A. Questions in relation to scope and enforcement of exclusive rights under existing law

In many areas, exclusive rights can be exercised and enforced in relation to users either on the basis of license agreements or, in cases of infringements, on the basis of enforcement rules and mechanisms. However, in particular in the internet environment, it may be difficult to identify users, who may be anonymous, so that a license agreement in the first place cannot be concluded and infringements are difficult to pursue. The first set of questions addresses these problematic areas. Since most problems arise in the digital environment, questions focus thereon.

1. How are the following acts covered by the copyright law of your country (statute and case law):

   i. Offering of hyperlinks to works
   ii. Offering of deep links to works
   iii. Framing/embedding of works

On the basis of the interpretation of Italian law it could be assumed that a link constitutes a form of making available to the public when made in the form of deep link or framing/embedding of works in such a way that the final user does not perceive the difference between works directly hosted in the website and works simply embedded or pulled from external sources. On the contrary, the case of mere redirect to a different web site by means of a hyperlink is not to be considered as an act of communication provided that the link is simply a referencing tool to external elements.

The judgment of February 13, 2014 of the Court of Justice of the European Union in the Case C-466/12, Svensson et al. v. Retriever Sverige AB, and in the following decision in the case C-348/13, Bestwater International GmbH v. Mebesa and Potsch, affects said interpretation, that is based on the distinction among different types of hyperlinks.

The two decisions appear to conflict with some of the basic assumptions of the Infosoc Directive, where it is expressly stated that no act of communication to the public can cause copyright exhaustion. On the contrary, by requiring a new public or a new media as a requirement for the protection of the communication to the public, the Court introduces the equivalent of exhaustion of the on-line communication right. As the study approved by the ALAI Executive Committee in September 2014 clearly explains, this requirement conflicts also with the rules of the WIPO Treaties.

iv. Streaming of works

Streaming of protected works or subject matter is covered by the right of communication to the public. When streaming is made from one point to many, i.e. not on-demand, like in the case of non-interactive web radios and simulcasting, it is an exclusive right as far as works are concerned (art. 16 of the Copyright Law), while it is mainly considered a right to remuneration as far as producers' and performing artists' neighbouring rights are concerned (respectively art. 73 and 73-bis for producers and art. 80, par.2, lett. c) of the copyright law for performers).

Streaming on-demand (like interactive communication) is covered by the exclusive right of making available to the public applicable both to works and to protected subject matters.

Except in the cases of simulcasting of broadcasts and live streaming, the usages above involve also reproduction right, since the content is streamed from a data base where the works and subject matters are reproduced and stored.

v. Download of works

The reproduction right as defined in art. 13 of the Copyright Law includes all the acts that make it possible to dowload protected works and subject matters, typically the receipt and copy of a digital file containing the work from the source server or device to the personal device or cloud account/space of a member of the public. On-demand download always implies the making available of the involved protected works and subject matters.

vi. Upload of works

In practice, upload is download reverse act, since normally it refers to the sending of the digital file containing the work from a local system to a remote system such as a server or another client with the intent that the remote system should store a copy of the content being transferred. Typically, upload include the making available right and the reproduction right, both acts being necessary to realize said transfer.

vii. Supply of a platform for 'user-generated content'

The supply of platform services is still quite a controversial issue and the Italian case law is not consistent. UGC platforms usually state that they are mere hosting service providers and refuse any direct liability for copyright infringement committed by their users. Their terms of usage usually have the user uploading the content assume the full copyright liability; users have to state that they control all the rights related to content they upload on the platform; the platform reserves the right to remove such content should it receive a notice from rightowners claiming that their copyright is infringed by UGC. These standard usage terms and conditions are not uniformly and consistently applied by UGC platforms.

Case Law shows some uncertainty in respect of UGC platforms. In the case Mediaset v. Yahoo, the broadcaster whose content had been uploaded on Yahoo service sued the platform; the Court judged that Yahoo was liable for copyright infringement because it could not be deemed a mere "passive" hosting provider and, therefore, could not be exempted from liability on the basis of the EU e-commerce directive (Directive 2000/31/CE) and its implementation decree 70/2003. In fact, the activities performed by Yahoo were not considered compatible with the safe harbour provisions. In appeal, the judgment was reversed. One of the main findings of the appeal judgment is the irrelevance of the distinction between active and passive providers, which had previously been taken into account to rule that, if the hosting provider activity entails some kind of "active" involvement, the liability regime set forth by the e-commerce directive would not apply. Moreover, according to the judgment, the right holder must expressly and specifically identify the illicit content before the hosting provider is liable to remove that content.
The case will be decided by the Supreme Court.

viii. Other novel forms of use on the internet.

There is no case law on other novel forms of use on the Internet. Apps or applications providing access to copyright contents are normally assimilated to web sites, as far as they allow the public's access to content through their specific features and presentations and are therefore considered liable for the restricted acts referred to such copyright content.

2. In cases in which there are practical obstacles to the conclusion of licensing agreements, in particular where multiple individual (end) users do not address right owners before using works (eg, users uploading protected content on platforms like Youtube), are there particular clearing mechanisms? In particular, are license agreements possible and practiced with involved third parties, such as platforms, regarding the exploitation acts done by the actual users (e.g., license agreements with the platform operator rather than with the platform users (uploaders))?

The current situation is not uniform and there are still contradictory reactions referred to the various types of services that can be defined by the term "platform".

Currently, the only concretely working licensing mechanisms in place with a UGC platform concerns You Tube. Google has built up a business relationship with professional content providers, such as record producers and collecting societies and similar entities, for the licensing of monetized music contents. Individual license agreements with record producers and content aggregators include the upload of digital files of so called official videos (including the relevant metadata) and fingerprints that should enable the identification of all content (including UGC) reproducing said official videos, either wholly or partially. Publishing rights are cleared through license

agreements with collective management societies and collecting entities that represent major publishers.

According to the terms and conditions for the upload of content published by users, UGC is monetized based on an agreement with the uploader that states his ownership of the content he uploads. In all cases, You Tube publishes detailed instructions for the implementation of its policy for Notice and Take Down of infringing videos

Most other UGC platforms publish similar instructions that are based rather on DMCA rules than on the rules implementing the mentioned EU e-commerce directive.

Platforms aggregating web radios or web TVs normally insist presenting themselves as hosting providers; consequently they publish notice and take down procedures based on such assumption. Nonetheless, the accurate and protracted implementation of said procedures to remove infringing content can create remarkable inconveniences so that some experimental agreements have been tried in the case of platforms of this type. The licensing mechanism tentatively put in place in these cases is based on the agreement by which the rightowners or their representative (such as a CMO) accept that the copyright liability of the "aggregated" webradios or services, hosted by the platform is contractually borne by the platform itself on behalf of the aggregated content providers.

3. a) If there is infringement of copyright, in particular of exclusive rights covering the acts listed under 1. above, and the direct infringer cannot be identified or addressed, does your law (including case law) provide for liability of intermediaries or others for infringement by third persons, namely:

   - for content providers
   - for host providers
   - for access providers
   - for others?

Internet intermediaries can be held liable only if they do not comply with the rules of Decree 70/2003, implementing the e-commerce directive in Italy. Articles 14, 15, 16 and 17 of the Decree transpose almost literally the provisions on safe harbour for providers of mere conduit, cache services and hosting services in said directive, including the rule excluding any obligation to monitor the content.

   b) If so, under what conditions are they liable, and for what (in particular, damages, information on the direct infringer, information on the scope of infringement to estimate the amount of damage)?

In case Internet intermediaries do not comply willfully with duly notified Take Down requests, in the circumstances the law foresees, such intermediary service providers are liable for damages.

When required by judicial authority, they must provide information in their possession on the identity of the infringer, the organization of the illicit activity (articles 156-bis and 156-ter).

4. In these cases of infringement, who has standing to sue:

- the author
- the exclusive licensee
- the non-exclusive licensee
- the employer of the author
- the CMO that manages the exclusive right?

All the above listed persons have the standing to sue, with the following caveats.

Art. 167 of the Copyright Law states that the legimate copyright holder has the standing to sue as the representative of the right owner, but the rules do not make explicit reference to the licensee. The courts have consistently accepted that the exclusive licensee has the standing to sue in his own interest, even without a specific authorization of the author, while the non-exclusive licensee has no standing to sue for copyright infringement, but can be the plaintiff for unfair competition.

As a general principle, consistently recognized by the Courts, the economic rights for works created as a part of the employee's contractual tasks are owned by the employer, the same applies for works made for hire or on commission. Moreover, this is explicitly stated in article 12-bis for software and in article 12-ter for data bases.

Collective management organizations have the standing to sue and can be required to give evidence of their representation referring to individual works and authors.

B. Questions regarding mechanisms to ensure adequate remuneration for creators and performers in their relationship with licensees

If authors and performers exercise their exclusive rights by licensing them to exploitation businesses, such as publishers, the question arises how they best may ensure an adequate remuneration from such licenses.

1. Does your law provide for legal rules, including by case law, on mechanisms for authors and performers to ensure an adequate remuneration in relation to exploitation businesses in the following cases:

- as a general rule for all kinds of contracts;
- as regards ‘best-seller’ situations (i.e., when parties did not presume that the work would become a best-seller);
- in the case of oppressive contracts;
- in other cases;
  and if so, under what conditions?

The general principle enshrined in copyright law is based on private law, and supports the freedom to contract for all the rightowners, which includes the bargaining of all the terms and conditions of an exploitation agreement in the case of exclusive rights.

Some rules of the copyright law are established in favour of the author, considered as the weaker party in a contractual relationship, as far as the economic rights are concerned.

2. If your law provides for rules as addressed under B. 1. above, does the law determine the percentage of the income from exploitation to be received by authors and performers, or does it otherwise specify the amount of remuneration?

There is no legal determination of percentage of the income from exploitation of exclusive rights.

Special provisions concern the determination of tariffs in certain cases where there is the presumption of assignment of exclusive rights and no agreement is reached between the parties:

- Art. 46 of the copyright law, concerns the separate remuneration due to the authors of the music sound track of a film by the persons publicly showing the work (e.g. public projection, broadcast, streaming etc.). The amount of such remuneration is established according to article 16 of the Regulations by means of periodical agreement between the trade associations representing movie theaters and the Italian CMO SIAE. Absent the agreement, the remuneration is set by a mandatory arbitration of the President of the Council of Ministers.

- Article 18-bis, par. 5, concerns the equitable remuneration mandatorily due to the author after the assignment of the rental right to a phonogram producer or to a cinematographic producer. The amount is established according to article 16 of the Regulations by means of an agreement between the producers' trade associations and the Italian CMO SIAE. Absent the agreement, the remuneration is set by a mandatory arbitration of the President of the Council of Ministers.

- Art. 46-bis concerns the equitable remuneration due to film directors, script writers and screenwriters, as well as adaptors/translators of audiovisual works originally in foreign language, for any act of exploitation of a film or any other audiovisual work, except the projection in public[1].

- Art. 84, para. 2 concerns the equitable remuneration due to audiovisual performers who play important acting parts, for any act of exploitation of a film or any other audiovisual work, except the projection in public.

- Art. 80, para. 2, lett. f) concerns the equitable remuneration due to performing artists (both music and film performers) after the assignment of the rental right to a phonogram producer or to a cinematographic producer. The payment shall be fixed according to the applicable Regulations (art. 4 of Decree Law n. 440 of July 20, 1945), that states that the relevant amount is set by an arbitration committee of three members, on the basis of reasonableness ex aequo et bono.

- Following the recently introduced lengthening of the performers' neighbouring rights duration, art. 84-bis establishes that, after the expiry of the fiftieth year from the earlier between the lawful publication or communication to the public of the phonogram, two different provisions apply:

a) if the performer is contractually entitled to a non-recurring remuneration (as it is normally the case for session musicians), he will receive a supplementary remuneration equal to 20% of the revenue that the phonogram producer has derived from the phonogram exploitation (reproduction, distribution and making available) during the preceding year. The right to remuneration may not be waived and is administered by the collecting society representing the performer.

b) If the performer is entitled to a recurrent remuneration, in case the phonogram producer and the performer fail to reach an agreement, the conciliation procedure in front of the Standing Consultative Copyright Committee established by art. 194-bis the Copyright Law applies.

- Articles 73 and 73-bis concern the equitable remuneration for public performing right and broadcasting right due to record producers. After the issue of the Decree of the President of the Council of Ministers (DPCM) on February 10, 2015, the amount of such remuneration is established by agreement between the parties, taking into account some criteria indicated by the same decree. The collections are paid 50% to performing artists.

  Previously, said amount was established by decree of the President of the Council of Ministers (DPCM) of September 1, 1975 for public performances and DPCM of July 15, 1976 for broadcasts..

[1] See also the answer to question 3 of this section.

3. Please indicate also whether these mechanisms that are addressed under B. 1. and 2. above are efficient in practice.

Generally speaking, it can been deemed that the mechanisms mentioned above have worked as a deterrent against positions exceedingly unfavourable to authors' remuneration. The rules on conciliation and arbitration indicated above have not been implemented, since the parties involved in controversies on tariffs have normally reached an agreeement.

Only recently, when SIAE and Sky Italia did not reach an agreement on the equitable remuneration due to audiovisual authors under art. 46-bis, Sky sued SIAE alleging, inter alia, that art. 46-bis is incostitutional. The decision of the Court of Rome on January 3, 2014 rejects Sky complaint and confirms that, absent the agreement on the amount of the remuneration, the parties make recourse to the arbitration procedure referred to in art. 46-bis of the Law. For the first time since their enactment in 1945, these provisions have been applied in 2013 for the determination of the level of the equitable remuneration to be paid by commercial satellite broadcaster Sky. The arbitration took place between SIAE and Confindustria (the Italian industry trade association).

C. Questions in relation to statutory remuneration rights

The questions below concern the question of the scope of remuneration rights and their enforcement (which usually takes place through collective management organizations (CMOs)) towards users.

1. In which cases do statutory remuneration rights exist in your country, e.g., public lending rights, resale rights, remuneration rights for private copying, or others (often, they are provided in the context with limitations of rights)?

- articles 71-sexies, 71-septies and 71-octies concern Private copying remuneration. The remuneration is determined by a decree of the Minister of Culture, after hearing the Standing Consultative Copyright Committee and the most representative trade associations of manufacturers of devices and media that must pay the remuneration. The decree is revised every three years. A system of mandatory collective management is in place, that confers on the Italian CMO SIAE the tasks of the collection of the remuneration and its allocation to the categories of beneficiaries, according to the shares established by the law.

- Articles 144-155 concern resale right. The percentage of the remuneration is established by the law, on the basis of the EU directive on resale right. A system of mandatory collective management is in place, that confers on SIAE

the tasks of the collection of the remuneration and its distribution to the beneficiaries, that are not obliged to become SIAE members for this purpose.

- Art. 68 concerns reprography, with different provisions for public institutions on the one hand and premises open to the public such as copy centers on the other hand. In public institutions, works may be reproduced for the personal use of the public within the limit of 15% of the total number of pages of the publication, against the payment of a yearly lump sum in favor of the right holder. Copy centers pay a per-page remuneration, whose amount is determined according to the agreement reached between SIAE and the trade associations of copy centers.

  In both cases, a mandatory collective management regime is in force (article 181-ter) and SIAE is in charge of its implementation.

- Art. 69 concerns the remuneration for public lending right, that is paid from the Fund for the Public Lending Right, created by the Government for this purpose, providing for a yearly lump-sum compensation. The collection is entrusted to the representative bodies of the categories concerned.

  Public school libraries and public university libraries remain exempted from the payment.

2. Is there the possibility of obtaining compulsory licenses, and if so, under what conditions and for what categories of works?

No compulsory licenses are admissable for exclusive rights.

3. i. For which statutory remuneration rights does your law provide for obligatory collective management?

Private copying remuneration; reprography; resale right; equitable remuneration for audiovisual authors and performers. Non recurrent remuneration for performers who have transferred their rights to the producer, after the extension of the duration of performer's related rights.For details, see C 1. above.

ii. For which statutory remuneration rights does your law not provide for obligatory collective management, but in practice, the right is managed by a CMO?

No explicit rule states that the separate compensation due to the authors of film sound tracks (art. 46) is subject to obligatory collective management, but the authors mandate SIAE to collect and distribute it when they become members.

iii. Who has to pay the remuneration regarding each of these statutory remuneration rights – the user, a third person (e.g., a copy shop or a manufacturer of a copying equipment and devices) or a tax payer (through money allocated from the public budget)?

See above, for the different cases.

The only provision establishing that the remuneration is paid from money allocated from the public budget refers to public lending right.

iv. How is the tariff / the remuneration for each of these remuneration rights fixed (in particular, by contract, by law, by a Commission, etc.)?

See above, for the different cases.

v. Is there supervision of CMOs regarding tariffs, and if so, what are the criteria for supervision?

No supervision mechanism is applicable by law as far as tariffs for the exploitation of exclusive rights are concerned. According to case law, when the exclusive rights are conferred on the Italian Collective Management Organization SIAE, some rules aiming at avoiding abuse of dominant position are applicable to tariffs, as argumented by the Italian Antitrust Authority in case of July 28, 1995, n. 3195, case SILB v. SIAE.

vi. What problems exist when right holders assert the statutory remuneration right in relation to users or others who are obliged to pay the remuneration (e.g., a claim is rejected and results in long legal proceedings; those who are obliged to pay in the meantime go bankrupt, etc.)?

vii. If problems to assert the remuneration exist, does your law provide for any solutions to these problems (e.g., an obligation to deposit a certain amount in a neutral account)?

No such provision exists in the Copyright Law. Such measure can be taken by the Judge on the basis of the rules generally applicable.

D. Mechanisms to ensure adequate remuneration for creators and performers

The questions below address the issue of existing mechanisms, in particular within CMOs, to ensure that authors and performers, also in relation to exploitation businesses such as publishers and phonogram producers, receive an adequate remuneration.

1. In respect of the statutory remuneration rights under your law, does the law determine the percentage of the collected remuneration to be received by particular groups of right owners (e.g., the allocation between authors and producers, among different kinds of authors, performers, and producers, et al.)?

The only provision concerning mandatory allocation of royalties to authors refers to the obligation for SIAE to ensure that at least a share of the revenues for the exploitation of the rights conferred to its administration is reserved to the author of the work. This implies that the assignment contract for example between author members and publisher members cannot foresee a 100% transfer of royalties to the assignee.

There are several rules applicable to the equitable remuneration deriving from statutory limitations of exploitation rights.

Private copying remuneration[2] for phonograms must be allocated 50% to authors and their successors in title and 50% to phonographic producers. This latter must be shared equally with involved performing artists.

Private copying remuneration for videograms is allocated in the measure of 30% to the authors and the remaining 70%, in equal shares, to the original producers of audiovisual works, to the producers of videograms and to the performing artists. 50% of the performing artists' share is allocated to activities common purposes of the category. Such purposes are determined pursuant to art. 7, paragraph 2, of the law 5 February 1992, no. 93, that originally introduced the remuneration.

2. If so, what percentages are fixed by the law? Are these percentages different for different statutory remuneration rights?

3. If there are no such legal determinations, how are the percentages or the otherwise fixed distribution keys for the different rights of remuneration determined in practice (in particular, by which decision-making procedures and by whom are these distribution keys determined inside CMOs)? Which percentages are in practice applied?

Provided that a share is reserved to the author, the percentage due to the original author and the percentage due to its assignee or successor in title are agreed among the parties and are duly recorded in the data base of the CMO.

As to musical works, the most frequent distribution key applied by SIAE is 50% authors' share and 50% publisher' share, but this key can vary if the agreement foresees otherwise.

4. If owners of derived rights (such as publishers who derived the rights from their authors) transfer these derived statutory remuneration rights to a CMO, how and on the basis of which agreement is the remuneration distributed between them in this case?

   See question 3.

5. Which mechanisms of supervision exist in your country to control the distribution keys applied by CMOs, if any?

As explained above, the distribution keys applicable to the equitable remunerations collected in respect of limitations are established by the Law.

The distribution keys applicable for the distribution of royalties collected by SIAE are agreed between the parties involved. The distribution key for related rights of

[2] Articles 71 sexies, 71 septies and 71 octies of the Copyright Law, introduced when directive 2001/29/EU was transposed by legislative decree 68/2003.

performers and of phonographic producers is established by means of contractual agreements in the case of exclusive rights, while statutory remunerations are allocated 50% to performers and 50% to phonogram producers.

E. Questions on new business models and their legal assessment

1. Which new business models do you know in your country in respect of the supply of works via the internet?

   Please list such business models, such as Spotify, Netflix, etc., and describe them briefly.

The supply of works via the Internet can include several and varying forms of exploitation, corresponding to business models that keep changing quite quickly. The summary here below covers only services where copyright works are the main content, therefore no background or secondary usage is taken into consideration (such as music and jingles in ads streamed in the Internet or music in e-commerce fashion websites, etc.).

Music works are distributed in Italy through several business models, mainly:
- Download services, such as iTunes.
- Streaming subscription services (including bundled packages, where the subscription includes music and telecommunication services), such as Spotify, Deezer, Rdio, Google Play, and several other multiterritorial services; Tim Music is a national music streaming service reserved to the customers of Telecom Italia. Other subscription services with specific features are also available.
- Cloud services, such as i-cloud, Soundcloud, Google, where the offer include the so called synchronization of the downloads in a certain number of devices and in the cloud account of the final user.
- UGC platforms, such as You Tube, Dailymotion, etc.
- Webradios, that can be either pure webradios or services linked to traditional radios, offering to the public simulcasting of on-air transmissions, podcasts, and web channels.

Musical and audiovisual works are exploited via the Internet through the following business models
- Broadcast like and VOD services, such as Sky-go
- VOD services such as Google VOD, iMovie, and others that are related to broadcasters, like RTI Infinity and Sky online.

Newspapers and other journalistic works are distributed via the Internet by means of:
- pay on-line subscription for newspapers, e.g. Repubblica, Corriere della Sera and others, offering all the contents of the publication on paper and other content produced exclusively for the on line versions.

- Online websites linked to publications distributed on paper (newspapers, magazines, etc.).
- Subscription to a selection of the Italian press for a monthly fixed fee (all you can read) through the portal www.edicolaitaliana.it in two versions, one for the main Italian newspapers currently at 9,90 € per month, and one including magazines, at 14,90 € per month. The subscription is accessible from five different devices and has limited download functionalities.

5. Which of these business models have raised legal problems, which are, or have been, dealt with by courts? If there have been problems, please describe them and the solutions found

UGC platforms have been the most controversial business model until now (apart from pure pirate offers, like file sharing, torrents, etc.). Yahoo and You Tube have been sued for UGC content publication.

6. In your country, are there offers that are based on flat rates, 'pay-per-click' or on other micro-payment models? Please indicate how popular (frequently offered or used) each of these models is.

Presently, flat-rate offers are available for music works, in the form of subscription services. On the contrary, audiovisual services are still based on fees per usage, like download to own (permanent download) or temporary download (similar to rental in the physical world).

For newspapers, online offer usually include not only monthly subscription but also daily access to PDF version of the publication.
For national and international scientific publications, pay services can provide either a monthly or yearly subscription (like magazines in general) but also the pay download of individual articles on demand.

4. Within these business models, how do authors and performers get paid?

There are substantial differences between the remuneration of authors and performers in sectors where a CMO exists (music and audiovisual works on line exploitation) and sectors where the exploitation rights are assigned on the basis of an employment or a commission contract, such as the press or software production. Individual contracts are the rule also in book publishing, newspapers, art works, graphics, broadcasts, etc.; when direct negotiation prevails, the online rights are normally assigned and it is not usual that the authors are remunerated separately for different types of exploitation.

For music, authors and their successors in title receive a revenue share based on the fees negotiated with the music service provider by the CMO they belong to. Music performing artists receive their remuneration from their respective record producer on the basis of their performing and reproduction right assignment agreement.

The Italian Copyright law grants the right to equitable remuneration to audiovisual authors and audiovisual performers after the assignment of their rights, as described above.

Stefania Ercolani
President ALAI Italia

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Please send your completed questionnaire to elisabeth.amler@ip.mpg.de by 15 March 2015