Luiss DREAM - OPICC have contributed to the Public Consultation launched on march 23rd 2016 on the role of publishers in the copyright value chain and on the 'panorama exception' by the European Commission.

Luiss-DREAM (Diritto e Regole per Europa Amministrazione e Mercati) is a research center instituted by the Department of Law of LUISS "Guido Carli" University (Libera Università Internazionale degli Studi Sociali) in Rome, directed by Prof. Giandomenico Mosco, vice-Director Pro. Gustavo Olivieri. OPICC (Osservatorio di Proprietà Intellettuale Concorrenza e Comunicazioni), founded by Prof. Gustavo Ghidini. Luiss-DREAM and OPICC are the respondents to the present European Consultation (the response is specifically ascribable to: Prof. Gustavo Olivieri; Prof. Gustavo Ghidini; Prof. Francesco Graziadei; Prof.ssa Emanuela Arezzo; Dott.ssa Eleonora Sbarbaro, PhD; Dott. Alessandro Romano; Dott.ssa Andrea Cristina Tassoni; Dott.ssa Andrea Elisa Pisu).

Summary

1. The role of the publishers and the so-called 'ancillary copyright'

1.1 General remarks

About the first of the two subjects of the Consultation, those concerning the so-called 'ancillary copyright', a sort of neighboring right provided for some publishers and for some kinds of online access to their contents through news aggregators (by linking or snippet tools), it is possible outline as follows.

The economic side of the 'jus excludendi alios' typical of the authorial paradigm and of the neighboring rights finds its function in the need to recognise the possible economic utilities generated by the use of an intellectual work (or related activities) to someone to whom such utilities are attributable. In the case of linking the hypothesis could be two: the work is already available to anyone because it is freely accessible online, and in this case the different procedures for access (directly from the site or with a link of an aggregator) does not generate a new utility for the public; or there is a public for which that different procedure of access represent the only possibility of using the work, for which, obviously, is willing to pay, and in this case the diffusion of the work creates new utilities of which the original or the secondary holder

benefits. But this is strictly a case of –already ruled - right of communication to the public (right of making available to the public), which is already included in the provision. Instead the other hypothesis of an exclusive right doesn't seem an intellectual property right, because of the lack of juridical and economic justification, and it appears more similar to a taxation or to a welfare payment[1].
According to this copyright's rational, European Court of Justice has established (in the Case C-466/12, better known as Case Svensson) the following principle «there is no copyright infringement when providing hyperlinks to freely accessible copyright protected content».
Therefore article 3 of the Infosoc Directive should mean that not every linking or quoting activity represents a communication to the public (and a consequent right's violation), but only those activities in which hyperlinks address a 'new public', i.e. a public that was not taken into account by the rightholders when they authorized the initial communication: this interpretation of the article 3 is more than sufficient to protect publishers' prerogatives.
More generally it's possible to argue that the intellectual property system strike a balance between different and opposite values. Therefore shaping an IPR is highly thorny. The exclusives recognised by the judicial system have to be set up on precise purposes: arise the technological innovation level or the cultural heritage, to which the community could benefit («to promote the science and useful arts»…just to cite the American Constitution). The exclusives should represent an exception to the system, they should be strictly functional to the aforementioned goals and they should be balanced with counter-values like the freedom of competition and the freedom of speech.
Moreover, article 5, number 3, letters C and D of Infosoc Directive allows member States to provide for exceptions to the reproduction and communication rights: those provisions of the Directive translate in UE law the Berne Convention on the protection of literary and artistic works, which since its original version recognised the right of free quotations from newspaper articles and periodicals in the form of press summaries, in order to harmonize national legislations of the Member States. The fundamental principle of the right to quote, and regarding to which the exercise of the ancillary copyright could be in contrast, is held in the article 10 of the Berne Convention, called 'Free Uses of Work'[2]. During the Stockholm Conference in 1967 it has been strongly affirmed that free quotations should be able to include also 'fairly considerable portions of articles'.
It's necessary to remind that Berne Convention is included in TRIPS Agreements, which represent a part of the WTO Agreements: so, the member States of the World Trade Organization (definition that includes UE member States) have a «*mandatory, affirmative obligation to permit anyone to quote from a work that is already lawfully publicly available*». According to this systematic analysis, the ancillary copyright contrasts with the European and also with the international principle of the right to quote.
Finally, must be outlined that aggregators play an important role as technical instruments to increase the level of pluralism, suggesting contents that, without their activity, would be probably ignored by users: in this sense, the ancillary copyright implies an obsolete philosophy of the digital sharing of contents.

1.2 The impact of the ancillary copyright on stakeholders

In the public consultation the European Commission ask for an analysis of the consequences that a publishers' ancillary copyright could bring to stakeholders, particularly: publishers, authors, researchers/educational or research institutions, end-users.

[1] In the countries which have already adopted this legal institute, it works like a 'private taxation' that burdens news aggregators: as already observed, an institute different from copyright, but able to create 'entitlement' on contents usually covered by authorial protection.
[2] The article 10 states «*It shall be permissable to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries*».

Before going in the depth analysis of the consequences that the introduction of the neighboring rights at European level could lead to, it's necessary to explain that this subject is considerable by both a subjective and an objective perspective.

From a subjective point of view, we have to take account of the position and interests of different stakeholders:

1) About the **publishers**, the consequences of the introduction of the so-called neighboring rights in the European Regulation seem at first sight satisfactory: the new provision would allow them to cashing fees for the uses, as link and snippet, of their own contents by third parties. However, in essence, also for publishers it could be a short term economic benefit: as demonstrated by the Spanish[3] and German[4] experiences, in fact, the ancillary copyright could lead, in the long term, to a huge decrease of news aggregators market (like Spain, where headquarters of Google News closed) or to a split in publishing industry, with some publishers whose would demand to get the fee and others who would grant at no cost the use of their contents to news aggregators, in exchange of the return of visibility.
   In both cases it's easy to imagine a loss in visibility (therefore in advertising revenues, linked to the visualizations), especially for smaller sites (and then publishers) because of the non convenience for news aggregators in paying fees.

2) About the **authors**, it's possible to outline two different argumentations:

   - In economic terms, with particular reference to contractual relationship between authors and publishers, probably the introduction of the ancillary copyright wouldn't have an effect and wouldn't change the current situation. It is probable (unless particular contractual arrangement, due to a considerable leverage by the author in negotiation with publisher) that the author, which assigns to the publisher his own IP rights on the work, wouldn't receive any further percentage of the fee paid to the publisher by the news aggregator. It is conceivable that the neighboring rights would be considered included in the economic exploitation of the work previously sold by the author to the publisher, with the consequence that the editor would be legitimized to hold this hypothetical benefit. The only solution to remedy such hypothesis would be to incorporate, together with the ancillary copyright, the introduction of payable fee to the author, for example on the model of article 46 c 3 of Italian Copyright Law, for the author of cinematography work[5].

[3] In Spain, in 2014, the Ley de Propiedad Intelectual was reformed, and the so-called Canon AEDE was introduced. In particular, article 32 creates a division between 'non significant fragment of news' (in this case the aggregator has to pay the fair compensation, but it doesn't need the consensus of the rightholder) and 'significant fragment of news' (in this case the aggregator has to pay the fair compensation and it needs the consensus). For a detailed analysis, "Understanding "Ancillary Copyright" in the Global Intellectual property Environment", Computer and communication Industy Association, Febbario 2015, available at http://cdn.ccianet.org/wp-content/uploads/2016/05/CCIA_AncillaryCopyright_Pape r_A4-1.pdf.

[4] The Leistungschutzrecht was introduced in Germany in 2013, and it ratified the prohibition for "search engines or other business operators" to index and moreover to make available to the public "editorial's products". So, an actual exclusive to protect the publishers has been introduced, having the length of one year from the moment of the news' publication. The only exception considered for this exclusive is for "smallest extract" of the editorial which, however, can be no longer than eight words. The law has been declared and focused only for commercial search engines, so its application can't be extended to the sharing of content by private users.

[5] This article states «*The author of music, musical composition and of the words that compose music has the right to receive from those who publically broadcast the work, a further compensation*».

- in cultural terms, the impact of the ancillary copyright for the authors could appear extremely negative. If, as happened in Spain, the introduction of neighboring rights at the European level could lead to a decrease in the sector of news aggregators, it would be probable that the loss or the huge reduction of linking, indexing and quoting activities could penalise the diffusion of newspaper articles or other works, and it could also reduce the possibility that such articles and work (and their authors) contribute to fuel the socio-cultural debate and the freedom of information: a similar hypothesis would go obviously in opposition also to a significant part of the purposes which lie behind the concept of the Digital Single Market.

3) About **researchers/educational or research institutions**, the introduction of neighboring rights referred only to press publishers contents would have a negative impact on their activity. Researchers and research and educational institutions, despite being part of 'consumer audience' of protected works, play a key part in this context, under their prominent role not only in the diffusion, but also and especially in fueling the freedom of speech and the freedom of information, which represent also part of the goals pursued by the Digital Single Market strategy. It is clear that the impoverishment of the possibility of linking and quoting activities, due to the potential introduction of neighboring rights, would lead to an impoverishment also of the confrontation of opinions and of the richness of argumentation concerning research institutions, in the detriment of cultural and scientific debate.
   The research center or formation institute have to be considered, in this context, as 'qualified users', in other words like subjects that have access to information in order to carry out an activity of scientific-cultural in depth analysis. Considering that this subjects have the duty to create a link between the society, on one hand, and innovation and culture on the other hand, the immediacy in reception of any political, economic or scientific news is crucial. The possibility to have access to 'live' news, not being jeopardized by the acquisition of licenses that allow the diffusion of the content, or without the need of specific authorizations, is strictly functional to the efficiency of the research center or the educational institute. The critic profile embraces both the case in which the research center calls for a mere access to the content, and when it wants to reproduce the same content in order to make a comparison, a presentation, an analysis. In the first case, which supposes the center as a 'passive information receiver', the eventual existence of an exclusive in favor of the press publisher may cause a limit in the speed of the circulation of the latest news, generating a problem for the immediate access to the information. Whereas, in the case in which, the center may have the need to reproduce the content of the news to make an analysis, if this is a topic correlated to the research activity, the center should demand the specific authorization, necessary for the reproduction and making the content available. This would probably be a deterrent for the use of the news and it would, as a final result, dissuade the center from circulating the news.
   Furthermore, the reference to the contents' uses for educational, scientific and cultural purposes implies an accurate consideration on the relation between an hypothetical ancillary copyright and the exceptions' and limitations' system to the copyright related to the already mentioned activities.

4) About the end-users, supposing an ancillary copyright designed as distinct and cumulative in comparison to the copyright, even if the author would allow the sharing of the contents, there

would be a second problem to overcome, that is the license of the publisher itself: in this situation, the 'active' end-user would be strongly limited in eventual activity of circulation of the information. Moreover, supposing the absence of the aggregator due to the introduction of the ancillary copyright, the user that is willing to have access to the news, would be deprived of a useful 'cataloguing' tool: news aggregator currently catalogues the news according to their content and the moment in which they have been published. This allows the end user to have access to a range of news previously catalogued, to focalize his attention on a determined subject, having also the possibility to choose between different sources. The news aggregators could be defined, in this sense, as 'web balancers'. They offer to the reader a tool for choosing contents, in a democratic, impartial and apolitical way. So the interest of the end-users to a huge freedom of information arises. Freedom of information which nowadays is far away from press papers and near to the perfect and infinite digital reproducibility. In this sense, it's possible to argue that a news can probably represent an underlayer and a prerequisite of the digital freedom of information. The debate about the social relevance of news aggregators – free from the monopolistic worries, thanks to the plurality of subjects acting in this market, that instead concern, for example, the affair Google Books – seems clear: in fact aggregators represent not only a digital tool that guarantees the technological effectivity to the plurality of information principle, but also definitely a digital answer to the encouragement of learning principle that animate the authorial debate from the very beginning.

From an objective point of view, the crucial focus of the following considerations is the aforementioned construction of the neighboring rights, in terms of unwaivability or of waivability.

1) Unwaivable ancillary copyright: the unwaivability of the right – aspect aimed to avoid anti-competition matters of a waivable right – could involve two negative consequences in the publishing European background. On one hand, a similar provision will prevent authors and publishers from grant their content for free, also if they want it, for linking, indexing and quoting purposes. On the other hand, the unwaivability could prevent news aggregators from acting on the market without paying a fair payment to the publishers. The most probable consequence, as already shown by the experiences of some Member States, will be the decrease of the aggregators market, or even its disappearance, with huge losses for both publishers and users: for the first ones in terms of visibility (with economic negative repercussion, especially for small publishers which have a few amount of direct contacts and to whom the aggregators represent an essential vehicle of resources), for the second ones in terms of possible access to the plurality of information.

2) Waivable ancillary copyright: the waivability of the right could involve evident risk profiles for the competitive structure of the news aggregators market. The waivability in fact could persuade publishers to grant their contents for free only to those aggregators that guarantee a huge return of visibility (for example, Google News), while they demand the payment to the smaller aggregators. A similar scenario could lead, in the worst hypothesis, to vertical restrictive agreements and, in the best hypothesis, at least to significant barriers to aggregators market's entry[6].

[6] See also REUTERS T., Ancillary copyright for publisher the end of search engines and news aggregators in Germany?, European Intellectual Property Rewiew, 2013, 35(5), 243-245.

2. The State of the Art on the "Freedom of Panorama Exception"

As highlighted by the European Commission, the so-called freedom of panorama is an issue which, as of today, has not been the subject of a public consultations, however it needs attention and deep thinking[7].

As of today, there is certainly a need to intervene in order to reduce the judicial uncertainty, both in favour of the users who intend, professionally or not, to reproduce and share online images of art works or architectural establishments located in public places, and in favour of the right holders in order to be aware of their own prerogatives, and in order to guarantee a wider access to the contents within the environment of the European Single Market, digital and not.

On one side, the majority of internet users believes that everything that is freely visible and to the public can also be freely reproduced and used in all forms and means. On the other side, the fragmentation and uncertainty of the norms on the exceptions to copyright in the different legislations of the EU States, including that regarding the freedom of panorama, constitute an impediment for the development of new diffusion and fruition models of the contents at the cross-border level, first of which, the new models of education, characterized by online courses (e-learning) designed in order to be used by students from different countries.

Concerning the EU legislation, the discretionary exception regarding the so-called "freedom of panorama", is beheld in Article 5(3)(h) of the 29/2001 Directive, which allows the reproduction and communication to the public of images portraying works of architecture or sculptures made to be located in public areas without further limits, exception made if such use does not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder[8].

The "panorama exception", as is well known, has not be introduced by all member States – Italy and France, for example, have not implemented it in their systems – while the member States that decided to regulate the matter have drew up the exception in a different way, by guaranteeing the regulation for some works instead of others, or allowing or not the commercial uses [9].

Law uncertainty does not, in addition, place itself only at the cross-border diffusion level or at the European single market level, but also within the legislation of the single Member States, as is the case of Italy, in which there has been the need to perform two Points of order on the issue, the answers of which, though, have not cleared out the doubts[10].

---

[7] See Communication from the Commission COM(2015) 626 final 9.12.2015 "Towards a modern, more European copyright framework"; Press Release on the 9.12.2015: "Commission takes first steps to broaden access to online content and outlines its vision to modernize EU copyright rules", http://europa.eu/rapid/press-release_IP-15-6261_en.htm.

[8] See the three step test: Article 5(5) of the 29/2001 Directive.

[9] See, German, Danish and UK systems.

[10] Point of order 4-04417 presented by Gianni Mancuso on Wednesday 18th of July 2007 in session number 191, at which followed a written answer by the member of Congress Andrea Marcucci, Undersecretary of the State for Heritage and Cultural Activities, dated 12 November 2007; Point of order 4-05031 presented by Franco Grillini on Monday 1st October 2007 in session number 214, at which followed written answer by the member of Congress Danielle Mazzonis, Undersecretary of State for Heritage and Cultural Activities, dated 19 February 2008.

2.1 The Free Uses of images of works of architecture or sculpture, made to be located permanently in public places, from the viewpoint of an Italian research center

Beforehand, there is a premise to make: the juridical research center OPICC–LUISSDream, which refers to issues such as intellectual and industrial property as well as competition and communication law, is an Italian center.

In the Italian system, the discretionary exception regarding the "freedom of panorama", beheld in Article 5(3)(h) of the 29/2001 Directive, has not been implemented.

Furthermore, in the Italian legal system, there is no "special law", not even one that differs from copyright law, to regulate the reproduction of works exposed to public view, works which in Italy do not enjoy a specific regime *per sé.*

Therefore, the research center, during its activity, conforms itself to the exception provided for scientific research, teaching, criticism and discussion provided by Article 70 of Italian copyright law, law n. 633/1941 and along the rule of the three step test, provided by Article 71 –*nonies* of the law, beheld with reference to the works or other materials protected which were made for the public so that everyone can have access to them from the area and moment most desired.

The exception in Article 70 allows the use of works within the limits justified by the specific purposes (scientific research, teaching, critic and discussion) as long as the utilization does not conflict with the competition of the economic use of the work on behalf of those who own its rights, specifying that the utilization's aim of teaching or scientific research must further have information goals and not commercial ones. In addition, Article 70 allows the free posting on internet means of images (and sounds) for scientific or academic purposes, as long as such utilization is non-profit and only if such images are taken with "low-resolution or degraded" formats.

Being a research center which does not involve courses or activities with fees, the center can generally exercise the above-mentioned exception. Scientific publications and other research and academic materials of the center – in which images of architectural or sculptural works could be reproduced for informative purposes – are diffused and eventually made available to those interested free of charge. This rule, however, does not apply, for obvious reasons, if the research center, which does not have a publishing house, is the author of scientific publications that have a commercial purpose, either made by the publishing house of the university or from other legal publishers.

The exception mentioned, however, states that the utilization for scientific, teaching, critic and discussion purposes, must be confined as only "fragments or pieces" of the works, and therefore not related to the work as a whole; as if, during the description of a work – for example, when there is the aim to confront it with another to highlight the similarities which can be defined as plagiarism, forgery and other judicial elements of interest for the research center – it wouldn't be fundamental to describe the work as a whole, instead being able to represent/reproduce only parts or fragments of it[11].

[11] As widely explained by the research center, together with the ASK-Art research center, Science and Knowledge of the Bocconi University and in collaboration with the Library of the Bocconi University in the previous Public Consultation held in European headquarters for a reform of the copyright law, "Public Consultation on the review of EU copyright rules", held within a period of three months, from the 5th of December 2013 to the 5th of March 2014. For further information, see the answer sheet to the consultation available at the following link: http://giurisprudenza.luiss.it/sites/ricerca.giurisprudenza.luiss.it/files/Consultationdocument_en_OPICC_ASK_inviato.pdf.

In addition, concerning the posting on internet of images for academic or scientific purposes, subsists obvious interpretation problems, other than 'practical' ones, due to the fact that the norm requires that the images must be taken with "low-resolution or degraded" formats.

Lastly, it is clear that the lack of harmonization of the exceptions to copyright law, including that regarding the freedom of panorama, requires, in case the use has relevance outside the strict national law, the verification that the exception for teaching, research, critic, discussion is implemented, interpreted and applied in the same way by the different European country[12].

2.2 The possibility of introducing a compulsory "Freedom of Panorama Exception" for non commercial uses, to be implemented in all Member States' legislation. The perspective of an Italian research center

The application of a specific exception, compulsory in all Member States, with reference to the non commercial use of images of architectural or sculptural works made in order to be established and exposed to the public in public areas (as advocated by the Commission with the scope of the general objectives regarding the harmonization of copyright law, furthermore not linked exclusively to the exception of panorama: COM(2015) 626 final 9.12.2015 – "Towards a modern, more European copyright framework"), would certainly have a positive effect for the activity of a research center together with the other institutions who work within the lines of this same activity. This would happen because, on one hand, it would give 'freedom' to all those who carry out academic and research activities from the limits imposed by Article 70 above mentioned, even if strictly limited by the type of works involved in the panorama exception; on the other hand, it would have the positive effect of assuring the juridical certainty necessary for the improvement of the offer of the contents at a cross-border level.

However, a wider law intervention would be desirable, one that could involve even other types of intellectual properties and their relative exceptions, serving as a remedy to the present level of fragmentation within the different Member States' copyright law norms, which is significantly high especially when it comes to the exceptions.

Moreover, the OPICC-LUISSDream center has intervened throughout the years many times, in reference to the diffusion of culture and in favour of the collective benefit which can occur from the latter, advocating the introduction, by the community legislator, of compulsory exceptions to be implemented by all Member States, in order to allow harmonization of copyright law, eliminating the respective uncertain norms and applications, and mostly in order to guarantee that some non-commercial utilization of the works can be assured, as long as they do not clash with the normal utilization of the works or the other materials and they do not cause unjustified prejudice to the legitimate interests of the owner. The first fundamental right which would be assured would concern the utilization of the work for academic and research purposes, and obviously it would refer to all works, not only limited to those exposed to the public.

In addition, the best and most flexible legislative approach, regarding the exceptions to copyright law, would surely be that of providing a primary role to the three step test, as a general and principle clause – similarly to what occurs in the north-American fair use model – excluding the duty of "disposition of

[12] For more information on this section, and more in general, on the critic of the present formulation of the exception to copyright law, see: Gustavo Ghidini, "Exclusion and Access in Copyright Law: The unbalanced features of the InfoSoc Directive, in Methods and Perspectives in Intellectual Property", ATRIP Intellectual Property Series, G. B. Dinwoodie (ed.), Edward Elgar Publishing, 2013, 307; Gustavo Ghidini, "Innovation, Competition and Consumer Welfare in Intellectual Property Law", Edward Elgar, 2010; Eleonora Sbarbaro, "Note sulla disciplina delle libere utilizzazioni tra mondo analogico e mondo digitale", in "DigItalia – Rivista del Digitale Nei Beni Culturali", 1/2012, 23.

closure" of the exception list. In this way, the principle of the three step test could walk along with the existing and fundamental exceptions (made compulsory), offering the possibility of formulating other ones or adapting the existing ones to the evolution of the fruition and diffusion models of the works, via jurisprudence, through interpretation means and even in the digital environment, allowing therefore the coexistence of the principles of copyright law and the evolution of technology.

2.3 The possibility of introducing a "Freedom of Panorama Exception" for commercial and non commercial uses. The viewpoint of an Italian research center

The impact of a panorama exception that also allows commercial uses would, in fact, be minimum for the activity of the research center, as described in the previous answers.

However, in general, the most correct option, according to who writes, would be that of introducing a panorama exception which could guarantee the non commercial uses and that could eventually allow only commercial uses of little economic interest *per sé* (uses "de minimis"), in which the reproduction of the work would not have an autonomous economic relevance and the image of the work would withstand in an environmental use which is not centered on the reproduction of the same.

The centrality or not of the work in respect to the photography or film in which it is reproduced in its whole, can certainly be a good interpretation criteria in order to face the issue and meet a fair balance between different and counterposed interests, all constitutionally guaranteed, which is the central debate regarding copyright law.

Concerning the non-commercial uses, an example could be drawn by the extremely strict limitation of individual freedom if posing a ban for visitors to take pictures or "selfies" as a photo memory of the experience, when in front of a museum which constitutes a contemporary architectural work (for example the MAXXI in Rome), even if the pictures are intended to be published and shared on social networks.

Instead, concerning the commercial use "de minimis", we could enjoy the exception, for example, in the case of audio-visual reproductions in which, for a moment, there is visibility of a sculptural and architectural work where some scenes are taking place.

Again, it is easy to imagine the many obstacles to the production, as well as the high costs, in order to obtain a specific authorization from the right holders in all the cases in which there is a reproduction of a minimum and occasional level in a larger work or activity.

The compensation for the right holder, instead, should be provided whenever the economic relevance of the use of the work focuses strictly on the reproduction of the work itself, for example in a case in which postcards are being sold with the image of the work, both online or not, but also in the frequent case of utilization which is indirectly commercial, for example when the image is set as a background of a website, a cover of a cd or dvd or it performs an important role in an advertising campaign, both online or not.

2.4 Other issues regarding the "Freedom of Panorama"

With reference to the exception of panorama, it has to be noted that, even once that such free use is introduced, which has the nature of exception to copyright, a true real "freedom of panorama" cannot be considered applicable at the European level, because in each single Member State's juridical system, norms which prescribe authorization and reproduction fees for works exposed to the public will continue to apply.

Such norms have generally an administrative nature, such as norms which require the demand of council authorization for photo-shoots and cinematographic filming on public ground and/or authorizations concerning the concessions of use and reproduction of cultural heritage which need to be requested to the competent authorities.

For example, in Italy, all the works that qualifies as "cultural heritage", in accordance with the respective law[13], are to be provided with terms of concession and reproduction compensation, who, furthermore, a part from some recent hypotheses introduced, find some exemption (similar to the exceptions of authorship rights) which concern the sole necessity to correspond a compensation and do not exclude the burden of demanding a specific authorization[14].

Within this framework, the so-called Artbonus decree[15] has introduced a clause which has had a significant relevance and can probably be seen as "revolutionary". The new comma 3-*bis* of Article 108 of the Code of Cultural Heritage and Landscape, liberalizes the reproduction of the cultural heritage, different from the bibliographical and archive heritage, as well as the distribution by all means of images of the cultural heritage sites, legitimately acknowledged, in order that they cannot be further reproduced for profit, not even in an indirect way. All this, provided that it occurs without profit purposes, for academic or research purpose, free manifestation of though, creative expression or promotion of the cultural heritage. In these cases, the above-mentioned uses are authorized *ex lege*, without necessity of presenting any motion to the administration.

Being there an existing area in which the two norms – the copyrights one and the other protecting the cultural heritage – could overcome one another in their appliance[16], at the occurrence of the respective premise, subsists the obligation of obtaining two different authorizations for those who intend to reproduce a work which is also a cultural heritage. Also, once the authorship rights fall, and the works are of public property, those which can be considered as cultural heritage will continue to experience and have applied the norms concerning concession and reproduction terms required by the law on cultural heritage, without limitation of time, especially if these are under public authority custody.

Furthermore, the authorization rules to the reproduction of cultural heritage tend to be strictly implemented by Italian public authorities, especially when the image of the work is used for a commercial purpose. A recent case of an unauthorized use for commercial purpose, that has arisen a great debate in Italy, is that of the reproduction and publication of the image of the Michelangelo's statue of "David" (preserved in the Galleria dell'Accademia of Florence, with its copy standing in Piazza della Signoria, since 1910) in an "armed" version, for advertising, by ArmaLite Inc., an American company that produces weapons: an use to which the Ministry of Cultural Heritage and Tourism (MIBACT) has immediately "reacted" against it.

Thus, it is important to highlight that even when the exception of panorama shall be newly proposed from the EU law, this time with the obligation on behalf of all Member States to introduce and apply the norm in their own legislations, if for "freedom of panorama" one intends that everything that is freely visible and exposed to the public is also freely reproducible in all forms and means, such freedom would still not be complete, because of the eventual obligation of demanding/requesting the administration authority of the Member State which has in custody such cultural heritage, as to obtain the authorization required by the respective special law.

---

[13] See Article 2, 10 and 11 Legislative Decree 22 January 2004 number 42, Code of Cultural Heritage and Landscape.
[14] See Article 107-108 Code of Cultural Heritage.
[15] See Article 2, comma 3, (b), Legislative Decree 31.05.2014, number 83.
[16] Both regarding the object of protection and the time period of the protection itself, see Article 10.5 Code of Cultural Heritage.

In this framework, concerning Italy, there is a new program of digitalization in development by the Ministry of Cultural Heritage and Tourism (MIBACT), the aim of which is that of allowing the access, the fruition online and therefore even the promotion of the knowledge of the cultural heritage detained by the public administration, first of all referred to those cultural heritage works already in copyright public domain. This program is available free of charge to the public through pertinent websites and databases, as well as through license agreements with web operators such as Google[17].

[17] For further information, see: Eleonora Sbarbaro, "Smart cities and cultural heritage: cultural heritage sites in smart cities and right of innovation", in "Quaderni di Giurisprudenza Commerciale", edited by Gustavo Olivieri and Valeria Falce, Giuffré, 2016 and Eleonora Sbarbaro, "Codice dei Beni Culturali e diritto d'autore: recenti evoluzioni nella valorizzazione e nella fruizione del patrimonio culturale", in "Rivista di Diritto Industriale", 2/2016, pp. 63-91.