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Art. 14 of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 ('Copyright Directive') states that 'Member States shall provide that, when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation'.

Art. 14 of the Copyright Directive has been clearly introduced to foster, in the European Union, the principle of open data within the context of the digitisation of EU cultural heritage: the rationale behind this rule is to make available a (free) database of cultural heritage images to SMEs as a powerful instrument to create intangible products – in other words, to incentivise the development of an economy based on creativity in the EU.

It is worth noting that the enhancement of the open data principle had already been addressed through the Directive (EU) 2001/29/EC of the European Parliament and of the Council of 22 May 2001 ('Infosoc Directive') with the introduction of the so-called 'panorama exception'; which affords exemption of art works that are permanently located in a public place, from the right of reproduction and of communication to the public. Nevertheless, whilst the 'panorama exception' is optional, Art. 14 of the Copyright Directive is mandatory. This shift of legislative approach clearly signals the growing importance that the EU is giving to cultural heritage and that this is viewed not only as something 'to be preserved' but also to 'be used' so as to foster the EU economy, at least in its 'digital twin' version – that is to say, through digitisation.

The approach of the Italian legislation towards the digitisation of cultural heritage is strict and is not seen to favour the idea or principal of open data, that the EU is fostering. Two features of Italian legislation are a clear indication of the difference in approach.

- The first, being the Italian Code on Cultural Heritage and Landscape, Legislative Decree 42/2004 ('Decree 42/2004'). More specifically, Art. 107 and 108 of Decree 42/2004 require those wishing to use pictures reproducing Italian cultural heritage items to (a) seek authorisation from the competent authority (being either the state or a local public entity), and (b) pay a fee, in the event consent is granted.
- Second, Italy one of few EU countries where the 'panorama exception' is not available.

Italy has, with the introduction of Law 177 of 8 November 2021, now implemented the Copyright Directive. Art. 14 of the Directive has been implemented in Art. 32-quater of Italian Law 633/1941, the Law for the Protection of Copyright and Neighbouring Rights (Law 633/1941). While the first part of Art. 32-quater of Law 633/1941 is, by and large, the Italian translation of the wording of Art. 14 of the Copyright Directive, the second part of Art. 32-quater specifies that the aforementioned Art. 107 and 108 of Decree 42/2004 are still valid and effective.

In other words, Italy is introducing Art. 14 of the Copyright Directive into its legislation on the one hand but, with the other, has explicitly specified that those who want to take advantage of the exception introduced by Art. 14, in case of Italian cultural heritage belonging to a public entity (which probably amounts to 90 percent of cases), should also seek explicit administrative authorisation. This appears to have created a substantial incoherence in the legislation as Italy, in implementing Art. 14, should have more properly, simultaneously, have repealed the abovementioned Art. 107 and 108 of Decree 42/2004, instead of re-affirming their validity within the wording of the (new) Art. 32-quater of Law 633/1941.

In the end, it is worth asking which remedies might be available within the Italian legislation to counteract the operativity of Art. 107 and 108 of Decree 42/2004. Based on the ruling No.170 of 1984 of the Italian Constitutional Court (the 'Granital' decision), it is an established principle in the Italian legal system that EU norms having direct effect should always prevail over national norms and should, consequently, be applied by judges with no necessity to formally repeal the national norms in contrast with the EU norms – when the same case is governed by both an Italian and a EU norm, the former is no longer relevant to the case. Further decisions of the Italian Constitutional Court have stated that not only judges, but also administrative authorities should not apply the national norms in contrast with the EU ones (decision No. 389 of 1989) as well as that also EU directives norms should automatically prevail over contrasting national norms as far as the directives norms are clearly worded and Member States are bound to introduce them into their legal system (decision No. 168 of 1991). Art. 14 of the Copyright Directive can be probably considered to be clearly worded as well as mandatory for Member States so that it could be said that this norm should automatically prevail over the aforementioned Art. 107 and 108 of Decree 42/2004. In case of courts, obviously there is always the possibility of asking to the Court of Justice of the European Union a preliminary ruling pursuant to Art. 267 of the Treaty of Functioning of the European Union.

Finally, should a court consider Art. 14 of the Copyright Directive not (sufficiently) clearly worded to the level of having 'direct effect', its only option would be to raise the constitutionality of Art. 107 and 108 of Decree 42/2004 before the Italian Constitutional Court. This will not be possible for administrative authorities as in the Italian legal system they are not allowed to raise the constitutionality of a norm before the Constitutional Court.«

The Implementation of Article 14 of the Copyright Directive into the Italian Legislation