



INTERNATIONAL ASSOCIATION  
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# **Are you Open Source compliant? Understanding OS licensing in preparation for the Internet of Things**

**Corporate Counsel Commission  
IP/TMT Commission**

**Prague, 2014 – Workshop A**

**National Report of (Italy)**

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24 / February / 2014

## 1. Software Protection Under Italian Law

In Italy, software's copyright protection, including Open Source Software, is regulated under specific articles incorporated in the Italian Copyright Law (i.e., Law dated 22 April 1941 n. 633)<sup>1</sup> amended by the Legislative Decree n. 518 dated 29 December 1992<sup>2</sup>, which, being the implementation of Directive 91/250/EEC (Council Directive of 14 May 1991) for the Legal Protection of Computer Programs into Italian national law, referred to as the "Software Directive"<sup>3</sup> (subsequently revised by Directive 2009/24/EC<sup>4</sup>), extended the protection of intellectual property to computer programs "*in whatsoever form, insofar as they are original and result from the intellectual creative activity of the author*"<sup>5</sup>.

Becoming software an intellectual work of creative nature, an exclusive right to (i) reproduce, duplicate, process and sale software and (ii) to all forms of its economic use has been recognized to the author/holder of the work. As a result, anyone who wishes to use computer program, is required to obtain a license, which covers forms of economic exploitation of the author's interest, and pay the required compensation to the latter.

Moreover, article 1 of the above mentioned Copyright Law underlines the software's position by stating that the copyright protection refers to

*"intellectual works of creative nature which belong to literature, music, arts, architecture, theater, cinema"*<sup>6</sup>

and to

*"computer programs as literary works pursuant to the Berne Convention on the Protection of Literary and Artistic Works".*<sup>7</sup>

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<sup>1</sup> Law n. 633 dated 22 April 1941, "*Protezione del diritto d'autore e di altri diritti connessi al suo esercizio*" (known also as "*L.d.a.*"). See online: [http://www.interlex.it/testi/141\\_633.htm](http://www.interlex.it/testi/141_633.htm)

<sup>2</sup> See online: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:1992;518>

<sup>3</sup> See online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:111:0016:0022:EN:PDF>

<sup>4</sup> Directive 2009/24/EEC (23 April 2009) for the Legal Protection of Computer Programs into Italian national law.

See online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:111:0016:0022:EN:PDF>

<sup>5</sup> Article 2 of Law dated 22 April 1941 n. 633 (Copyright Law).

<sup>6</sup> Paragraph 1 of Art. 1 of Law dated 22 April 1941 n. 633 (Copyright Law).

<sup>7</sup> Paragraph 2 of Art. 1 of Law dated 22 April 1941 n. 633 (Copyright Law).

The above article, therefore, specifies that, in order to protect such works, there has to be a creative nature, i.e. a personal contribution of the author that allows the work to present “something new” compared to the already existing works<sup>8</sup>. The concept of “creativity”, however, is not a new concept, but it should be identified with the originality that is capable of distinguishing any work from others<sup>9</sup>; indeed, the creativity’s requirement is given by the originality of the intellectual effort<sup>10</sup>. In fact, “*A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection*”.<sup>11</sup>

In light of the foregoing, computer programs are protected by copyright due to the fact that they are considered equivalent to literary works (therefore, works of creative nature) pursuant to the Berne Convention for the Legal Protection of Literary and Artistic Works ratified and enforced by Law dated 20 June 1978, n. 399.

Indeed, according to article 2, n. 8, of the Italian Copyright Law, software programs are protected

*“in whatsoever form, insofar as they are original and result from the intellectual creative activity of the author. The ideas and principles on which software programs are based, including those on which their interfaces are based, are excluded from protection”*.<sup>12</sup>

The Italian legislation regarding intellectual property rights recognizes on the author’s work property and moral rights.

Property rights, precisely exclusive rights of economic utilization, have a limited time duration (i.e. expire 70 years after the author’s death<sup>13</sup>), are alienable and, as a general principle of Italian copyright law, belong to the author or his employer. Indeed, article 12-bis of the Italian Copyright Law states that

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<sup>8</sup> Court of Cassation dated 2 December 1993, n. 11953.

<sup>9</sup> Court of Appeal of Perugia dated 23 February 1995.

<sup>10</sup> See L. C. UBERTAZZI, *Legge sul software, Commentario sistematico*, 4th Edition, Giuffrè editore, Milano, 1994, pages 17-18.

<sup>11</sup> Art. 1.3 of Directive 2009/24/EEC (23 April 2009) for the Legal Protection of Computer Programs into Italian national law, referred to as the “Software Directive”.

<sup>12</sup> Moreover, the same article adds that the concept of “program” includes also the preparatory material of the same.

<sup>13</sup> Art. 25 of Law dated 22 April 1941 n. 633 (Copyright Law) states: “*The rights of economic utilization of the work will last the entire life of the author and until the end of the seventieth year after his death*”.

*“[...] the employer holds the exclusive right to exploit the program [...] created by the employee while performing his/her job or working under instructions from the employer”.*<sup>14</sup>

As mentioned above, the EU in 1991 decided to provide for the computer programs the protection as copyright works, by means of the enactment of Directive 91/250/EEC (then modified by Directive 2009/24/EC), which has been transposed into the Italian legislation by Legislative Decree n. 518/1992 that amended the Copyright Law n. 633/1941 by adding to Chapter IV specifically on software, Section VI composed by articles 64-bis, 64-ter, and 64-quarter. Such articles regulate property rights on the computer programs.

According to article 64-bis of the Italian Copyright Law, the exploitation (property) rights on computer programs comprise the exclusive right to perform or authorize:

*“(a) the temporary or permanent reproduction of the computer program by any means or in any form. Insofar as acts like the uploading, displaying, execution, transmission or storage of a software program require its reproduction, those acts are also subject to the authorization of the copyright holder;*

*(b) the translation, adaptation, transformation and any other modification of the computer program, including the reproduction of the resulting program, without prejudice to the author of the modification;*

*(c) any form of public distribution, including lending the original computer program or copies thereof. The first sale within the European Union exhausts the right to further control the distribution of such copy within the European Union, with the exception of the right to control the further lending of the program or of a copy thereof.”*

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<sup>14</sup> According to a reliable doctrine, however, also in case of “work for hire”, i.e. when software development occurs under the performance of a development agreement and is paid by the client, the exploitation rights are assigned to the contracting party. See L. C. UBERTAZZI, *Diritto d'autore, estratto da Commentario breve alle leggi sulla Proprietà Intellettuale e Concorrenza*, 4th Edition, CEDAM, Milano, 2007, pages 62-63.

However, there are exceptions to the above mentioned exclusive rights according to articles 64-ter<sup>15</sup> e 64-quarter<sup>16</sup> of the Italian Copyright Law that identify four cases in which the authorization from the copyright holder shall not be required for certain users' activities on computer programs:

- 1) copy necessary for the use of the program;
- 2) copy made for the study of the program;
- 3) backup copy; and
- 4) copy to decompile the program in order to achieve interoperability<sup>17</sup> with other programs.

Significant in the Italian copyright system are also moral rights which are, on their side, non-transferable pursuant to article 22 of the Italian Copyright Law<sup>18</sup> and have no time limitation according to article 23 of the same law<sup>19</sup>, as after the author's death moral rights may be at any time exerted by the heirs of the author.

Moreover, the Italian Copyright Law provides for three separate moral rights, i.e.:

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<sup>15</sup> Art. 64-ter: *"In the absence of any contrary stipulation, authorization from the copyright holder shall not be required for the activities as per subheadings a) and b) of article 64-bis, whenever such activities are necessary for the program to be used, for its designated purpose, by the person who legally purchased it, including for the correction of errors. Whoever is entitled to use a copy of the computer program may not be prevented by contractual means from making a backup copy of that program, where this is necessary for its use. Whoever is entitled to use a copy of the computer program may, without being authorized by the copyright holder, evaluate, study or test the operation of such program in order to identify the ideas and principles underlying each component of that program, provided he carries out such acts during the course of loading, visualization, execution, transmission or storage of the program which he/she is entitled to perform. Any contractual stipulation conflicting with the provisions of this paragraph is null and void"*.

<sup>16</sup> Art. 64-quarter: *"The authorization of the right-holder shall not be required, should the reproduction of the code of the computer program and the translation of its form, pursuant to article 64-bis, letters a) and b), carried out in order to change the form of the code, are indispensable to obtain the information necessary to achieve interoperability of a program, independently created, with other programs [...]"*

<sup>17</sup> Directive 2009/24/EEC gives a specific definition of interoperability: *"can be defined as the ability to exchange information and mutually to use the information which has been exchanged."*

<sup>18</sup> Art. 22: *"The rights referred to in the previous articles are inalienable. [...]"*

<sup>19</sup> Art. 23: *"The right, provided for in article 20, may be exercised after the author's death, with no time limit, by his/her spouse and children and, in their absence, by the parents and other ascendants and direct descendants; in the absence of ascendants and descendants, by the brothers and sisters and their descendants. [...]"*

- right to be acknowledged as the author of the work (pursuant to article 20<sup>20</sup>);
- right to object to modifications or alterations which are prejudicial to the honour or reputation of the author (pursuant to article 20); and
- right to withdraw the work from distribution, when high moral reasons exist, except the obligation of indemnification of those who have acquired the right to exploit the work (pursuant to article 142<sup>21</sup>).

## 2. Free Open Source Software (FOSS) under Italian Law<sup>22</sup>

### 2.1 License, Nature and Legal Framework

As we know, a software license is a contract by which the owner of the property rights, i.e. the exclusive rights of economic utilization, of a program (licensor) grants the other party (licensee) to carry out the activities subject to his rights (copy, modification and distribution).

In Italy the free open source is an alternative method of development and distribution of software, based on the grant, carried out through a license, of certain rights of the author; indeed, the type of development and distribution of open source is possible by just exploiting the copyright protection on the software. Such protection exclusively confers to the holder of property rights on a program the power to authorize or inhibit the activities subject to his rights.

When we talk about Free Open Source Software (FOSS), the author/holder grants the users, by means of a license, the authorization to perform any activity that would otherwise be reserved to the author/holder himself (in particular, program's copy, modification and distribution). Therefore, the peculiarity of the FOSS licenses is that the authors/holders do not prohibit, but, instead, authorize to use,

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<sup>20</sup> Article 20: “Independently of the exclusive rights of economic utilization of the work [...] and even after the transfer of such rights, the author shall retain the right to **claim authorship** of the work and to **object** to any distortion, mutilation or any other modification of, and other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.”

<sup>21</sup> Article 142: “(1) The author, should serious moral reasons arise, has the right to withdraw the work from the market, except the obligation to compensate those who have acquired the rights to reproduce, distribute, perform, sell, or represent the work itself. (2) This right is personal and not transferable.”

<sup>22</sup> Are Free software / Open Source software and Italian copyright law in contrast? Absolutely not, the development and distribution model of free software / open source is possible by just exploiting the software's copyright protection”. See MARCO BERTANI, “Software open source e diritto d'autore. Distribuzione e condivisione delle opere dell'ingegno”, Politecnico di Milano, 2005.

copy, modify, expand, develop and/or sell with reference to the latter's rights. Moreover, no obligation to financially reward the authors/holders is imposed to the users.

There is no doubt that a FOSS license is a contract pursuant to article 1321 of the Italian Civil Code<sup>23</sup>. The license, and so FOSS license, is not regulated by the Italian legal system, therefore it shall be considered as an unnamed contract (atypical), concluded by the parties under the general contractual autonomy principle according to art. 1322 of the Italian Civil Code<sup>24</sup>, in which it is possible to identify an interest or indirect economic advantage.

FOSS can be the work of a sole person or the ownership of a single legal entity, but soon after it becomes the result of several authors who can claim rights over it.

As mentioned above, software and, therefore FOSS, is a work of creative nature. The Italian Copyright Law indeed expressly defines "creative elaborations" under art. 4, as follows:

*"Without prejudice to the rights in the original work, elaborations of a creative character of any such work, such as translations into another language, transformations into any other literary or artistic form, modifications and additions constituting a substantial recasting of the original work, adaptations, reductions, abridgements and variations which do not constitute an original work, shall also be protected."*

FOSS type of software, being a sort of "open system", can be implemented through the contribution of anybody. The open source software is subject to intriguing issues under the aspect of intellectual property, although it seems to be well-established the theory according to which, given the steady contribution provided by different parties, this particular software, under Italian Law, should be classified as a "collective/collaborative work" and, therefore, be enforceable, as such, pursuant to art. 10 of the Italian Copyright Law, which recites the following:

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<sup>23</sup> Art. 1321 of the Italian Civil Code - Notion: *"The contract is an agreement between two or more parties to establish, regulate or terminate a legal relationship between them"*.

<sup>24</sup> Art. 1322 of the Italian Civil Code - Contractual autonomy: *"The parties may freely establish the terms of the contract within the limits imposed by law. The parties may also conclude contracts that do not belong to the types governed by specific discipline, provided that they are aimed at achieving interests worthy of protection according to the laws"*.

*“(1) If the work was created with the indistinguishable and inseparable contribution of more people, the copyright is to be shared by all the co-authors.”<sup>25</sup>*

In view of the above article, the work has been created by co-authors. In this case, computer program is created precisely with the contribution of several persons, but at the end the result is indivisible, creating an indivisible work (pursuant to the above art. 10), namely it cannot be separated into different parts without making it unusable, as well as the contribution of the collaborators is non-detectable. Indeed, all the parties are presumed of equal value, subject to written agreement<sup>26</sup>. The law recognizes each collaborator as a co-author, by creating a sort of shared ownership on moral rights and economic utilization of the work<sup>27</sup>, as the Italian Civil Code provides for, making extensive reference to the rules of the “*Comunione*” (shared ownership)<sup>28</sup>. Indeed, unless the authors of the software can be clearly distinguished and separate, the software made in a collaborative way -as FOSS is- can thus be considered an “indivisible work”<sup>29</sup>. This involves works whereby it cannot be concluded clearly what the individual contribution of every author is. In the case of indivisible works, the authors are free to regulate the exercise of the copyrights by agreement<sup>30</sup>. In fact, dealing with the software, as an indivisible work, the co-authors are free to regulate the exercise of the copyrights and normally agree on how software should be made public (e.g. in the form of FOSS) and how to make decisions related to the copyright<sup>31</sup>.

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<sup>25</sup> Paragraph 1 of article 10 (Copyright Law). The remaining article states as follows: “(2) *The undivided parties are presumed of equal value, subject to the proof of a written agreement.* (3) *The provisions governing the share ownership shall apply mutatis mutandis. The moral right’s defense, however, may always be exercised individually by each co-author and the work cannot be published, if unpublished, and cannot be modified or used in a different form from that of the first publication without the consent of all co-authors. However, in the event of unjustified refusal of one or more co-authors, the publication, modification or new utilization of the work may be authorized by the court, under the conditions and modalities established by it.*”

<sup>26</sup> Paragraph 2 of article 10 (Copyright Law).

<sup>27</sup> See LAURA CHIMIENTI, “*La tutela del software nel diritto d’autore*”, Giuffrè editore, 2000, pages 48-50.

<sup>28</sup> Articles 1100 onwards of the Italian Civil Code.

<sup>29</sup> “Indivisible works” are governed by article 10 of the Italian Copyright law. See also articles 1100 onwards of the Italian Civil Code.

<sup>30</sup> See footnote 22.

<sup>31</sup> See SIMONE ALIPRANDI, CARLO PIANA, “*Il Free and Open Source software nell’ordinamento italiano: principali problematiche giuridiche*”, in Informatica e diritto, Edizioni Scientifiche Italiane.



If the co-authors have not reached an agreement as to how decisions are made (insofar as the law allows them to regulate the co-authors' decision-making process) the rules laid down by Art. 1105-1110 of the Italian Civil Code apply. The main rule is that any act, which does not involve the disposing of the copyright and that does not prevent the co-owners to exert their rights is allowed, but acts of "extraordinary administration" must be voted according to the majorities laid down by the law or agreed upon by the parties. In the event parties disagree, they can oppose the decisions of the majority in Court<sup>32</sup>.

## 2.2 Moral Rights

As mentioned in the first chapter, the Italian Copyright Law outlines three types of moral rights in accordance with articles 20 (*i.* right to be acknowledged as the author of the work and *ii.* right to object to modifications or alterations which are prejudicial to the honour or reputation of the author) and 142 (*iii.* right to withdraw the work from distribution, when high moral reasons exist).

According to the majority of FOSS licenses, it is prohibited the inclusion of restrictions concerning the scope of application or use of the work, therefore it appears that the presence and enforcing of moral rights might have a detrimental effect on the FOSS system.

The first moral right mentioned, i.e. to claim authorship, does not raise any concern, while the right to object to modifications and alterations has been referred sometimes as a possible restriction to the functioning of a FOSS license, because the author at any time could *de facto* revoke his/her permission to modify the program, but this situation would be in absolute contradiction to the provisions of any FOSS license. However, this right is limited to serious alterations of the work, as they must be detrimental to the honour or reputation of the author. In addition, pursuant to Art. 22, should the author be aware of and accepts the modifications and/or alterations, he/her has no right to object to them.

The third moral right, as mentioned above, is the right to withdraw the work from distribution when high moral reasons occur, based on art. 142 of the Italian Copyright Law. Also this provision does not apply -and may create problems with reference- to the FOSS system due to the same *ratio* as the one in art. 20, which reflects the fact that an author may have serious moral involvement with his/her

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<sup>32</sup> See article 1106 of the Italian Civil Code – Regulation of communion and appointment of the administrator.

own works, the distribution of which can be highly prejudicial to his/her reputation. Hence, it is arguable that the right to withdraw the work does not apply to software, therefore to FOSS, for the same reasons as set out in art. 20<sup>33</sup>.

On account of the above, the moral rights provisions are not applicable to software, therefore to FOSS, because of their *ratio*, which is to protect the “spirit” of the artist that lives in artistic works: spirit that is far less arguable in a software work.

There is no case in Italy dealing with the application of such rights to software.

## 2.3 Disclaimer Clauses

FOSS licenses contain strong disclaimer clauses, which discharge the author from all liabilities<sup>34</sup>, due to the fact that FOSS is often made available without monetary compensation of any sort, thus the author generates insufficient income to pay for liability insurances and legal costs.

Under Italian law there is a first issue. Under art. 1229 of the Italian Civil Code<sup>35</sup>, no disclaimer of liability can be made to the effect of excluding liability for gross negligence or willful misconduct. In view of such rule, any provision to the contrary is null and void under Italian Law. Nullity can be asserted *ex officio*

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<sup>33</sup> See footnote 29.

<sup>34</sup> An example of disclaimer clause is: “THIS SOFTWARE IS PROVIDED BY -copyright holder- “AS IS” AND ANY EXPRESS OR IMPLIED WARRANTIES, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE DISCLAIMED. IN NO EVENT SHALL -copyright holder- BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, OR CONSEQUENTIAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES; LOSS OF USE, DATA, OR PROFITS; OR BUSINESS INTERRUPTION) HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY, WHETHER IN CONTRACT, STRICT LIABILITY, OR TORT (INCLUDING NEGLIGENCE OR OTHERWISE) ARISING IN ANY WAY OUT OF THE USE OF THIS SOFTWARE, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGE.” See online: <http://www.opensource.org/licenses/bsd-license>

<sup>35</sup> Art. 1229 Italian Civil Code – Disclaimer clauses: “Any prior agreement that excludes or limits the debtor’s liability for willful misconduct or gross negligence, is null and void. (2) It is also null and void any prior disclaimer or limitation of liability agreement for cases in which the fact of the debtor and its auxiliaries constitute a breach of the obligations arising from rules of public policy.”

without a specific demand from the parties (art. 1421 of the Italian Civil Code<sup>36</sup>), but it must be instrumental to a demand made by the same. Therefore, the provisions of the licenses are null and void insofar as they unconditionally exclude all forms of liability. However, the invalidity does not extend to the clauses of the contract which are not affected by the nullity (art. 1429 of the Italian Civil Code) and, in any case, the clauses that are null and void can be converted into different clauses with similar effects, so as to create again the parties' will, if they had been aware of the nullity (art. 1424 of the Italian Civil Code<sup>37</sup>). All the above rules should be read in the light of the license quite likely being a unilateral act (art. 1424).

Should the disclaimer be ineffective, can a software developer be liable for damages caused by his/her software under Italian law, in the light of the fact that his/her software is released for free under the FOSS license? Apart from gross liability and willful misconduct (as specified above under art. 1229 of the Italian Civil Code), or a liability in tort, the answer seems negative<sup>38</sup>. On contractual grounds it is impossible to determine a liability because a license is just a permission, therefore it does not impose any obligation to deliver anything upon the developer.

This brings to identify the significant difference between a proprietary software and a FOSS license<sup>39</sup>. In proprietary software licensing consideration is exchanged against delivery of the software. Being this a sale (art. 1471 of the Italian Civil Code), it bears certain statutory warranties, including the product being free from defects that reduce its intended use (art. 1490 of the Italian Civil Code). The same cannot apply to FOSS, which is not "sold" but just freely offered for its exploitation by anyone. In fact, in case of a separate agreement (i.e. a software development agreement) the relationship between the client and the developer -for

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<sup>36</sup> Art. 1421 Italian Civil Code – Legitimacy for the action for nullity: *"Unless otherwise provided by law, nullity may be invoked by anyone who has an interest and can be detected by the courts."*

<sup>37</sup> Art. 1424 Italian Civil Code – Conversion of the void contract: *"The void contract can produce the effects of a different contract, which contains the substantial and formal requirements, if, taken into account the aim pursued by the parties, it should be considered that they would have wanted it should they had known the nullity."*

<sup>38</sup> See footnote 29.

<sup>39</sup> Proprietary licenses: reserve all activities in the hands of the holder of the rights and allow the only use of the program within the limits of the provisions of the license. FOSS: grant free authorization to perform reserved activities (copy, distribution and modification).

the liability for defective software- is governed by this specific contract and not by the license.

## 2.4 How To Seek Legal Protection - Damages

First of all, it is important to underline that the user is obliged to abide by the provisions of the license. Otherwise, the rights' holder can then request that the situations affecting his/her property rights be removed. Indeed, according to art. 158 of the Italian Copyright Law<sup>40</sup>, damages caused by copyright violations are compensated under Italian law in accordance with the general legal principles applicable to unlawful acts (articles 2056 and 2059 of the Italian Civil Code) and with the principles of breach of contractual obligations (article 1223, 1224 and 1225 of the Italian Civil Code). These provisions establish that damages shall be awarded in a measure sufficient to restore the economic (art. 2056 of the Italian Civil Code<sup>41</sup>) and moral (art. 2059 of the Italian Civil Code<sup>42</sup>) losses of the aggrieved party. The economic loss is calculated in terms of actual damage and lost profit, limited to the damage that was foreseeable at the time of the breach, unless the act was done intentionally or due to gross negligence.

Punitive damages are not awarded under Italian law and are considered radically incompatible with fundamental principles of Italian Law. However, with the introduction of TRIPS, a limited version of punitive damages has been introduced for patent and trademark violations, under the name of "civil punishment". Similarly, in copyright violations an award of damages not directly related to the

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<sup>40</sup> Art. 158 of the Italian Copyright Law: "(1) Whoever is injured when exercising a right of economic utilization to which he/she is entitled, he/she may take legal action to obtain, in addition to compensation for the damages, at the expense of the infringer, the destruction or restoration of the status quo which the infringement resulted. (2) The compensation due to the injured party is paid according to the provisions of articles 1223, 1226 and 1227 of the Civil Code. The loss of profit is assessed by the court pursuant to art. 2056, second paragraph, of the Civil Code, also taking into account of the profits realized in violation of the right. The court may also dismiss the damages as a lump sum depending on at least the fee of the rights that would have been due if the infringer had requested the authorization to the holder for the use of the law. (3) Non-pecuniary damages are also due, pursuant to article 2059 of the Civil Code."

<sup>41</sup> Art. 2056 of the Italian Civil Code – Assessment of damages: "The compensation due to the injured party is to be determined according to the provisions of articles 1223, 1226 and 1227. (2) The loss of profit is assessed by the court with equitable appreciation of the circumstances of the case."

<sup>42</sup> Art. 2059 of the Italian Civil Code – Non-pecuniary damages: "The non-pecuniary damage must be compensated only in cases determined by law."

lost profits and the actual losses can easily be achieved by applying moral damages (art. 2059 of the Italian Civil Code, expressly mentioned in art. 158, paragraph 3, of the Italian Copyright Law).

Infringements of software copyrights follow the same regime as infringements of every other copyright. The above mentioned principle is therefore applicable in cases involving the infringement of software copyright and so the same applies to FOSS.

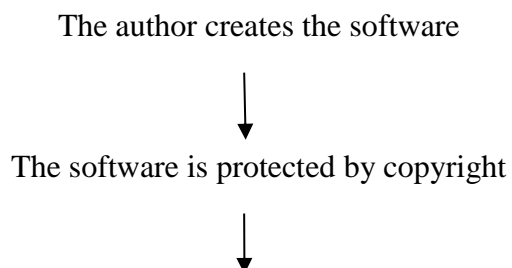
However, it may be assumed that the damage to the copyright owner will be in any case very limited if existing, as the author has made his work freely available and therefore no straightforward theory of damages for a FOSS licensing violation seems to exist.

### **3. Copyleft**

A considerable characteristic found in many FOSS licenses is the so-called “copyleft” principle: FOSS licenses, which incorporate the copyleft principle, lay down by contract that everyone in the chain of consecutive users, in return for the right of use that is assigned, has to distribute to other users the improvements the software and its derivative works, if he/she chooses to distribute such improvements or derivative works. In other words, the software that incorporates copyleft FOSS, must be distributed as copyleft FOSS. As a general statement, it is not possible to incorporate copyright protected parts of copyleft software in a proprietary licensed work.

Therefore, copyleft means making sure that software, as FOSS, remains free after the amendment and/or redistribution. In order to do this, the powers granted to the author by copyright have to be exploited.

#### Implementation of copyleft:



The author distributes it under a free license with the copyleft clause



The software remains free even if modified and redistributed

In conclusion, the author of the original work has no rights in the derivative work as a whole, but based on his rights in the original work he is able to permit or prohibit the distribution of the derivative work. A derivative work can therefore only be operated subject to the consent of the copyright owner of the original work.

#### **4. Open Source In The Italian Public Administration**

In May 2003, the Italian "Commission for the open source software in Public Administration"<sup>43</sup>, also known as the "Meo Commission"<sup>44</sup>, released the publication "Survey on the open source software" which, in addition to a general framework, had interesting proposals for the diffusion of the open source software within the Italian Public Administration (PA).

The results of the above-mentioned Commission strongly oriented the Italian legislature towards the so-called "Stanca Directive"<sup>45</sup>; indeed on 19 December 2003 the Innovation and Technology Italian Minister, at the time Lucio Stanca, adopted the Directive "Development and use of the computer programs by the public administrations" (*Direttiva "Sviluppo ed utilizzazione dei programmi informatici da parte delle pubbliche amministrazioni"*), the substance of which was later transfused into the Legislative Decree dated 7 March 2005 n.82 (the so-called "Digital Administration Code")<sup>46</sup> with the intention to benefit in the choice of the most efficient and effective computer programs, but also of the cost savings deriving from the reuse within the Public Administration.

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<sup>43</sup> *Commissione per il software a codice sorgente aperto nella Pubblica Amministrazione.*

<sup>44</sup> Professor Angelo Raffaele Meo, called by the Italian Minister of Technology to preside at the Commission entrusted with the task of promoting open source in the Italian Public Administration.

<sup>45</sup> See online: [http://www.interlex.it/testi/dirett\\_os.htm](http://www.interlex.it/testi/dirett_os.htm)

<sup>46</sup> See online: <http://www.altalex.com/index.php?idnot=51664#capo6>

The main contents of the "Stanca Directive" (in particular, articles 3<sup>47</sup>, 4<sup>48</sup> and 7<sup>49</sup>) were the following:

- Comparative analysis of the solutions. The Directive aimed at providing for the Public Administration the acquisition of the computer programs depending on a comparative technical and economic assessment between the different solutions available on the market.
- Technical criteria for comparison. The Public Administration, by acquiring the computer programs, should prefer information technology solutions which may ensure interoperability and cooperation between the various computer systems of the Public Administration, unless special and extraordinary security and secrecy circumstances occur.
- Computer systems not dependent on a single supplier or a sole proprietary technology.

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<sup>47</sup> Art. 3: "(1) Public administrations [...] acquire computer programs as a result of a comparative evaluation between the different solutions available on the market. (2) In particular, they assess their compliance with the requirements of each of the following technical solutions: a) development of computer programs ad hoc, on the basis of the requirements specified by the administration itself; b) re-use of computer programs developed ad hoc for other administrations; c) acquisition of proprietary computer programs through the use of a license; d) acquisition of computer programs as open source; e) acquisition through the combination of the modalities as indicated above in the previous letters. (3) [...]"

<sup>48</sup> Art. 4: "Public Administrations, in the preparation or the acquisition of computer programs, give priority to technological solutions that have the following characteristics: a) information technology solutions which may ensure interoperability and cooperation between the various computer systems of the Public Administration, unless there are special and extraordinary security and secrecy circumstances; b) information technology solutions which make computer systems not dependent on a single supplier or a sole proprietary technology; the reliance is evaluated taking into account the entire solution; c) information technology solutions that ensure the availability of open source code for traceability and inspection by the public administrations, the firm not to modify the code, subject to the rights of intellectual property of the supplier and without prejudice to the obligation of the administration to ensure secrecy or confidentiality; d) computer programs which export data and documents in multiple formats, including at least one open-ended".

<sup>49</sup> Art. 7: "(1) In order to facilitate the reuse of computer programs owned by the administrations, in the contracts or in the project specifications it must be provided for, if possible, that the developed ad hoc programs be easily accessible on other platforms.

(2) In the contracts [signed] for the acquisition of computer programs developed on behalf and at the expense of the administrations, the latter include clauses, agreed with the supplier and which take into account the economic and organizational characteristics of the supplier, designed to constrain the latter, for a certain period of time, at the request of other administrations, to provide for services that allow the reuse of the applications. The above clauses define the conditions to be complied with for the performance of the mentioned services".

- Ensuring the availability of the open source software for the inspection and traceability by the Public Administrations.
- Exporting data and documents in multiple formats, including at least one open-ended.

Other legislative measures that have through the years highlighted the importance of the Open Source Software in an economic and technical matter are the following:

(i) Law dated 27 December 2006 n. 296, on “Provisions for the preparation of the annual and multi-annual budget of the State” (Finance Act 2007)<sup>50</sup>, which established a 10 million Euro fund (see Paragraph 892 of the Law)<sup>51</sup>, in order to support the fulfillment of projects for the technology society, the target priority of which was pointed towards projects that would *“use or develop open source software applications”*; and

(ii) the above mentioned Legislative Decree dated 7 March 2005 n. 82, in particular, art. 68<sup>52</sup>, Paragraph 1, the “Digital Administration Code”<sup>53</sup>, and subsequent additions and amendments (Legislative Decree dated 4 April 2006 n.

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<sup>50</sup> Law dated 27 December 2006, n. 296 “Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato”. See online: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2006-12-27;296!vig=>

<sup>51</sup> Paragraph 892: *“In order to extend and support throughout the national territory the implementation of projects for the technological society, it has been authorized an expenditure of € 10 million for each year 2007, 2008, 2009. By decree of non-regulatory nature, within four months from the date of entry into force of this Law, the Minister for Reforms and Innovations in public administration, identifies the actions that must be implemented throughout the national territory, the areas that will be tested and the operational and administrative modalities of such projects”*.

<sup>52</sup> D.Lgs 7 March 2005, n. 82, art. 68: *“(1) Public administrations [...] must acquire computer programs or parts thereof as a result of a comparative assessment between the different solutions available on the market: a) development of computer programs on behalf and at the expense of the administration depending on the requirements specified by the administration itself; b) re-use of computer programs developed on behalf and at the expense of the same and of other administrations; c) acquisition of proprietary computer programs through the use of a license; d) acquisition of computer programs as open source; e) acquisition through the combination of the modalities as under letters from a) to d). (2) Public Administrations by preparing or purchasing computer programs, adopt solutions which ensure interoperability and cooperation, as provided for by Legislative Decree 28 February 2005 n. 42, and which allow the representation of data and documents in multiple formats, including at least one open one, unless there are special and exceptional circumstances. (3) [...]. (4) [...].”*

<sup>53</sup> See online: <http://www.camera.it/parlam/leggi/deleghe/05082dl.htm>



159<sup>54</sup> and Decree-Law dated 18 October 2012, n. 179 converted in Law dated 17 December 2012, n. 221<sup>55</sup>).

Paragraph 1 of art. 68 of the Digital Administration Code recites as follows:

*“(1) In accordance with the principles of economy and efficiency, return on investment, reuse and technological neutrality, public administrations must procure computer programs or parts thereof as a result of a comparative assessment of technical and economic aspects between the following solutions available on the market:  
a) develop a solution internally;*

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<sup>54</sup>See online: <http://www.camera.it/parlam/leggi/deleghe/06159dl.htm>

<sup>55</sup> Here is a complete version of the current wording of Paragraph 1 of article 68 of the Digital Administration Code:

*“(1) In accordance with the principles of economy and efficiency, return on investment, reuse and technological neutrality, public administrations must procure computer programs or parts thereof as a result of a comparative assessment of technical and economic aspects between the following solutions available on the market:*

- a) develop a solution internally;*
- b) reuse a solution developed internally or by another public administration;*
- c) adopt a free/open source solution;*
- d) use a cloud computing service;*
- e) obtain a proprietary license of use;*
- f) a combination of the above.*

*(1-bis) For this purpose, before procuring, the public administration (in accordance with the procedures set out in the Legislative Decree 12 April 2006, n. 163) makes a comparative assessment of the available solutions, based on the following criteria:*

- a) total cost of the program or solution (such as acquisition price, implementation, maintenance and support);*
- b) level of use of data formats, open interfaces and open standards which are capable of ensuring the interoperability and technical cooperation between the various information systems within the public administration;*
- c) the supplier's guarantees on security levels, on compliance with the rules on personal data protection, on service levels[,]* taking into account the type of software obtained.

*(1-ter) In the event that the comparative assessment of technical and economic aspects, in accordance with these criteria of paragraph 1-bis, demonstrates the impossibility to adopt an already available solution, or a free/open source solution, as well as to meet the requirements, the procurement of paid-for proprietary software products is allowed. The assessment referred to in this subparagraph [more correctly: “the above subparagraph”] shall be made according to the procedures and the criteria set out by the Agenzia per l'Italia Digitale, which, when requested by interested parties, also expresses opinions about the compliance with them”.*

- b) reuse a solution developed internally or by another public administration;*
- c) adopt a free/open source solution;*
- d) use a cloud computing service;*
- e) obtain a proprietary license of use;*
- f) a combination of the above.”*

Moreover, paragraph 2 of art. 68 of the Digital Administration Code has not been touched by the aforementioned recent reforms. However, its content is relevant and also noteworthy due to the fact that it establishes interoperability as a basic principle to achieve true openness in the public sector:

*“(2) In the preparation or acquisition of computer programs, public administrations, whenever possible, must adopt solutions which are: modular; based on functional systems disclosed as stated by Article 70; able to ensure the interoperability and technical cooperation; able to allow the representation of data and documents in multiple formats, including at least one open-ended (unless there are justifiable and exceptional needs).*

*(2 bis) The public administrations shall promptly notify the Agenzia per l'Italia Digitale the adoption of any computer applications and technological and organizational practices they adopted, providing all relevant information for the full of the solutions and the obtained results, in order to favour the reuse and the wider dissemination of best practices.”*

In 2007, the Open Source topic was brought before the Italian Parliament; a revival of the Open Source Commission, still chaired by Prof. Angelo Raffaele Meo<sup>56</sup> at the Ministry for the Reforms and Innovations within the Public Administration, established the “National Commission for Open Source Software in the Public Administration”. The ministerial decree, established by this

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<sup>56</sup> In 2007 Professor Angelo Raffaele Meo declared as follows: “Public administrations acquire the computer programs as a result of a comparative assessment of technical and economic nature. The whole country system would benefit from the open source software, by triggering a positive shock also in terms of real economy. The skills of each would increase, new jobs would be created for the maintenance of computer tools and the dispersion of millions of euro that every year Italy allocates to the giant U.S. industries would be avoided”.

See online: [http://www.corriere.it/economia/10\\_novembre\\_11/savelli-open-source\\_b96dbac0-edac-11df-bb83-00144f02aabc.shtml](http://www.corriere.it/economia/10_novembre_11/savelli-open-source_b96dbac0-edac-11df-bb83-00144f02aabc.shtml)

Commission (16 May 2007) and signed by the Minister, has defined three primary goals:

1. analysis of the European and Italian scenario in the technological industry;
2. definition of operational guidelines to support the administrations in the supplying of open source software;
3. analysis of the open source application to facilitate cooperation, interoperability and reuse.

Nowadays, the on-going debate regarding the use of free and open source software in the Italian Public Administration seems to be coming to a satisfactory conclusion. Italian public administrations are now obliged to give priority to free and open source software. This preference, however, shall not be given without a "*comparative assessment*", as the above specified legislation remarks. At this point enters a significant institution for the development of the public sector's "openness": the *Agenzia per l'Italia Digitale*<sup>57</sup> ("Agency for Digital Italy"<sup>58</sup>), which is in charge of defining practical rules for the above mentioned comparative assessment. Indeed, one of the Agency's tasks is to establish procedures and criteria that will help to justify the choices in the acquisition of the computer programs.

In light of the foregoing, on January 2013 the Agency for Digital Italy organized a workshop for all interested stakeholders and focused on implementing the new software comparative assessment requirements pursuant to the above mentioned art. 68 of the Digital Administration Code. The work was completed in October and the Agency decided to launch a public consultation and adopt a final text for the guidelines. The latter will provide the Italian PA with all the operational tools for the acquisition of the software.

Public administrations in Italy and elsewhere in the European Union are expected to provide efficient services to businesses and citizens, to share software solutions, to discuss best practices, and to generally share their experiences. Therefore, every public body has the same freedom that any non-public body has

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<sup>57</sup>See online: <http://www.agid.gov.it/>

<sup>58</sup>The *Agenzia per l'Italia Digitale* is an Italian government agency established by the Government Monti by Decree-Law dated 22 June 2012 n. 83 (the so-called "Development Decree"), converted into Law dated 7 August 2012 n. 134. The purpose of its establishment, according to the same entity, is to coordinate actions in the field of innovation in order to promote information and communication technologies supporting the Public Administration.

in determining whether to acquire, develop, and release software under conditions of free and open source software. This is due to the fact that all Italian public administrations are obliged to distribute to any other public administration all software which have been developed by or for them, in source code and without any charges.

The purpose of the Italian Public Administration is indeed to serve the community and citizens according to the PA's own goals and skills. For this reason, even when it engages or partners with external instrumental bodies, including those of non-public nature (i.e. joint ventures or wholly owned companies), the activity of the Public Administration is never directed at making profits or at the acquisition of a market position. The activity may be carried out only to achieve the satisfaction of the public interest.

## **Appendix Heading**

1. Software Protection Under Italian Law
2. Free Open Source Software (FOSS) under Italian Law
  - 2.1 License, Nature and Legal Framework
  - 2.2 Moral Rights
  - 2.3 Disclaimer Clauses
  - 2.4 How To Seek Legal Protection - Damages
3. Copyleft
4. Open Source In The Italian Public Administration

## **Bibliography**

L. C. UBERTAZZI, *Legge sul software, Commentario sistematico*, 4th Edition, Giuffrè editore, Milano, 1994, pages 17-18;

L. C. UBERTAZZI, *Diritto d'autore, estratto da Commentario breve alle leggi sulla Proprietà Intellettuale e Concorrenza*, 4th Edition, CEDAM, Milano, 2007, pages 62-63;

LAURA CHIMIENTI, *“La tutela del software nel diritto d’autore”*, Giuffrè editore, 2000, pages 48-50;

MARCO BERTANI, *“Software open source e diritto d’autore. Distribuzione e condivisione delle opere dell’ingegno”*, Politecnico di Milano, 2005.

SIMONE ALIPRANDI, CARLO PIANA, *“Il Free and Open Source software nell’ordinamento italiano: principali problematiche giuridiche”*, in Informatica e diritto, Edizioni Scientifiche Italiane, 2011.

## **Legislation**

Directive 91/250/EEC (Council Directive of 14 May 1991) for the Legal Protection of Computer Programs into Italian national law;

Directive 2009/24/EEC (23 April 2009) for the Legal Protection of Computer Programs into Italian national law;

Law n. 633 dated 22 April 1941, *“Protezione del diritto d'autore e di altri diritti connessi al suo esercizio”* (known also as “*L.d.a.*”);

Legislative Decree n. 518 dated 29 December 1992;

Directive dated 19 December 2003 on "Development and use of the computer programs by the public administrations" (the so-called “Stanca Directive”)

Legislative Decree dated 7 March 2005 n. 82 (the so-called “Digital Administration Code”);

Legislative Decree dated 4 April 2006 n. 159;

Law dated 27 December 2006, n. 296 on “Provisions for the preparation of the annual and multi-annual budget of the State” (Finance Act 2007);

Decree-Law dated 22 June 2012 n. 83 (the so-called "Development Decree"), converted into Law dated 7 August 2012 n. 134;

Decree-Law dated 18 October 2012, n. 179, converted in Law dated 17 December 2012, n. 221.

### **Italian Civil Code**

Articles: 1100-1116, 1223, 1224, 1225, 1229, 1321, 1322, 1421, 1424, 1429, 2056, 2059.