

# Kluwer Copyright Blog

## The concept of quotation according to the Italian Supreme Court: yet another example of the failure in the harmonization of EU copyright exceptions

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On 8 February 2022, the Italian Supreme Court (the *Corte di Cassazione*) issued an order that intervened on the interpretation of the quotation exception under Article 70 of the Italian Copyright Act (l.aut.).<sup>[1]</sup> While the outcome was foreseeable and great part of its reasoning may be embraced without criticism, the core arguments of the decision largely conflict with the path followed by the CJEU's most recent case law. In this sense, the case represents yet another evidence of the weak impact of the CJEU's harmonizing efforts on national copyright flexibilities, and highlights, once again, the pressing need for a legislative intervention to realize a greater convergence between Member States' copyright laws in action.



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### Facts and arguments raised by the Court

After the death of a famous Sicilian painter, Mario Schifano, a non-profit foundation was constituted to archive and preserve his works. A few years later, Schifano's wife left the Foundation to constitute the "Archivio Mario Schifano", and the painter's heirs successfully sued the Foundation to prevent it from using the painter's name and from presenting itself as the only entity authorized to certify the authenticity of Schifano's works. In 2008, the Foundation published a six-volume work that illustrated in details the Foundation's computer-based cataloguing of data related to the painter's works. The volumes, which also contained 24.000 reduced-size reproductions of all of Schifano's works, were sent for free to several art galleries, auction houses and public institutions. Schifano's heirs sued again the Foundation, claiming violation of their economic and moral rights over the works. While the Tribunal of Milan sided with the defendant, the Court of Appeal of Milan issued a permanent injunction to block the Foundation from further exploiting Schifano's works, and condemned it to compensate the heirs with 20.000 euro for the

unauthorized use of the painter's name.

Interestingly, however, the Court of Appeal of Milan ruled that the publication of the works was legitimate. While it excluded that the quotation exception may allow the reproduction of a work in its entirety, it also stated that each of the contested reproductions amounted to allowed free uses, since the volumes consisted in a study on the computer-based cataloguing of Schifano's works performed by the Foundation, and not in a work of art criticism that had the goal of allowing the artistic enjoyment of the painter's collection. For a number of reasons (e.g. no trace of profit in the Foundation's books, no payment received for the distribution of the volumes), the appellate court also excluded that the production and distribution had a commercial purpose, thus confirming that all the requirements of the quotation exception were met.

The heirs and the Archive challenged the appellate decision before the Supreme Court, which reversed the decision of the Court of Appeal, offering quite a controversial interpretation of Article 70 l.aut.

First, the *Corte di Cassazione* argued that the quotation exception provision, per definition, allows only *partial* reproductions of protected works. If applied to figurative art, this implies that paintings and the like cannot be reproduced in full but only in some of their details. Without considering the latest indications provided by the CJEU, the Italian Supreme Court confirmed its previous case law (Cass. 19 December 1996, n.11343), according to which integral reproduction of works of art, whatever the scale of reproduction may be, never constitutes a free use. The different reading proposed by the Court of Appeal of Milan, which referred the notion of "partial reproduction" not to a single work but to the entire artistic production of the author, was rejected on the basis of the principle of strict interpretation of exceptions.

Second, the *Cassazione* subordinated the legitimacy of the act of quotation to the pursuance of the goal of criticizing and/or engaging in a discussion with the work cited, on the basis of Article 10 of the Berne Convention ("measure justified by the purpose"). This conclusion was also supported by the fact that the work embedding the quotation should have a completely autonomous and different purpose from the target of the cited work, so that fragments of the latter reproduced by the former do not create any competition – not even potential – with the exploitation rights of the author of the quoted work (as in Cass. 7 March 1997, n.2089).

Third, the *Corte di Cassazione* required courts to verify whether the amount of original work quoted does not exceed the quantity strictly needed for the purpose justifying the free use – a check the appellate court omitted to perform.

Fourth, and last, it criticized the Milan Court of Appeal's conclusion that the focus on computer-based cataloguing was enough to exclude a competitive use and thus the violation of the author's exclusive rights, for it argues that the right of reproduction covers not only identical copies of protected works, but also any other reproduction and format that may have a market, and therefore be potentially exploited by the rightholder.

### **Relationship with the CJEU case law: a step back in time?**

While one may understand and agree with the outcome of the decision, the arguments used by the *Corte di Cassazione* to justify its conclusions are only partially consistent with the guidance

provided by the CJEU on the quotation exception, particularly in the Grand Chamber trio of July 2019 (*Funke Medien, Pelham and Spiegel Online*). In this sense, the Italian Supreme Court made a substantial step back in time, remaining anchored to its previous case law and thus opposing the CJEU's harmonizing push.

In *Pelham* (C-476/17, paras 70-71) the CJEU, with a contestable interpretation of Article 5(3)(d) InfoSoc based on the everyday meaning of the term, the legislative context and the purpose of the provision, affirmed that the essential characteristics of a quotation are the use of a work or an extract thereof for the purposes of illustrating an assertion, defending an opinion or allowing an intellectual comparison between the work and the assertions of the user. This entails that to have a quotation, the user should have the intent to enter into a dialogue with the work cited. The statement substantially limited the potential scope of the exception and its safeguarding role for freedom of expression, introducing yet another element of subjectivity and uncertainty within the tangles of its interpretation. Unfortunately, this is the only indication from the CJEU that the *Corte di Cassazione* seemed to build on, without even citing it. On the contrary, the Italian Supreme Court completely disregarded two other key doctrines advanced in the Grand Chamber trio, recalling instead more traditional and opposite arguments coming from its earlier case law. And while it is true that not even the newest CJEU's doctrines would have allowed the Foundation to prevail, their blatant disregard still represents a dangerous precedent against the alignment of the Italian exception to its EU counterpart.

The first CJEU maxim ignored by the *Cassazione* refers to the maximum amount of work that can be quoted under the exception. This is particularly important *vis-à-vis* works that must be reproduced in their entirety for the quotation to effectively perform its function, such as works of visual art, but may well be applied to other creations. In *Spiegel Online* (C-516/17) the CJEU qualified as quotation a hyperlink to a file that could be downloaded independently, arguing that what matters is that the user establishes a direct and close link between her opinion and the quoted work, which enables an intellectual comparison, and not that the quote is embedded into her piece. At the same time, the CJEU also stated that quotation entails "the use of a work or, more generally, of an extract of the work", thereby implicitly admitting that, when requested to fulfill the purpose of the exception, a full reproduction of the work may still be considered a legitimate quotation under Article 5(3)(c) InfoSoc. This stands in clear conflict with the assumption on which the Italian Supreme Court decision relied, *id est* that only partial reproductions may amount to a legitimate quotation, even in realms, such as visual arts, when this is very hard to realize without hurting the effectiveness of the exception.

The second CJEU doctrine that is fully disregarded is the caveat against the strict interpretation of exceptions, which represents one of the *traits d'union* of the Grand Chamber trio. Exceptions – the CJEU states – must be read in a manner that does not prejudice their effectiveness and realization of their purpose, and particularly the overall InfoSoc goal of striking a fair balance between rightholders' and users' interests and fundamental rights. Since quotation is mostly conceived to protect users' freedom of expression, this objective should be taken into account when interpreting and applying the provision. Once again, the defendant would have not prevailed in any case. Yet, the fact that the Italian Supreme Court only recalled the principle of strict interpretation of exceptions to support its reading of Article 70 l.aut. is another step back in time, moving Italian copyright law towards a direction that is not consistent with the most recent indications provided by the CJEU. Yet another evidence of the failure in the harmonization of EU copyright flexibilities.

[1] “The summary, quotation or reproduction of excerpts or part of a work and their communication to the public are free if performed for purposes of criticism and discussion, to the extent that are justified by such objectives and are not in competition with the economic exploitation of the work. If performed for teaching and scientific research purposes, the use should be non-commercial and for illustration only.”

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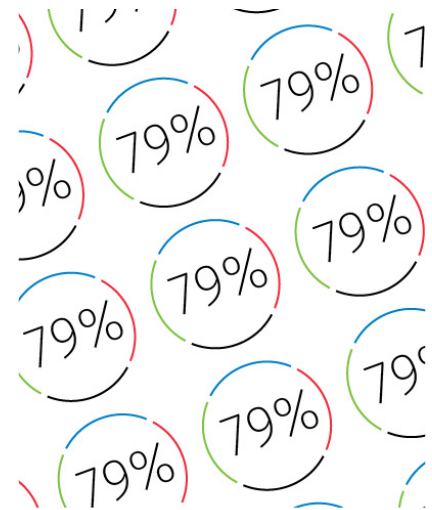
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