

New cinema law affects IP rights

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Aims of new law

Use of copyrighted work

IP rights and competition rules have been affected by the recent changes to legislation on cinematic works. Law 220/2016 concerning cinematic and audio-visual works establishes special rules for works that benefit from state grants, as these works must be made available to the Italian Film Library and the Ministry of Cultural Heritage for non-profit purposes. Further, the law also introduces protection against unfair competition in the film distribution field.

Aims of new law

The legislature's aim with Law 220/2016 was to create a clearer framework for the financial rules in the forthcoming implementing decree-law, which will translate general guidelines into concrete legislation. The government aims to make Law 220/2016 a starting point, which is reflected in the establishment of the Superior Council for Cinema and Audiovisual Sector – entrusted with proposal and advisory functions – which replaces the Governmental Performing Arts Board's cinema section. A cinema and audiovisual fund has also been established, which will be financed by at least €400 million per year drawn from an 11% share of corporate tax and value added tax raised from the "distribution of films, videos and television programs, film projection, programming and television programs, internet access services provision, fixed telecommunications, [and] mobile telecommunications".

Law 220/2016 also introduces an automatic and improved funding selection criteria and increases the existing tax credit regime. Further, Article 26 of the law introduces a generic priority rule for funding. Priority is given, without distinction, to:

- a director's first and second films;
- young directors;
- "difficult films" and those of "particular artistic quality"; and
- cinematic and audiovisual works "that are supported by and in which the contributions of several companies converge".

Newly established companies, start-ups and micro-enterprises will be favoured. The general criteria for choosing specific works which can take advantage of the law's benefits include 'artistic quality' and 'cultural value', which will be evaluated by a commission of five experts who will be "well-known internationally and have proven international qualifications in the field".

Use of copyrighted work

Law 220/2016 provides for the free use of intellectual works protected by copyright. Article 7 of the law provides a derogation from the Copyright Act's rules concerning:

- collaborative works and producers' IP rights for cinematographic works (Article 10); and
- compensation for directors, composers and screenwriters (Articles 46 and 46*bis*).

Under the new rules, copies of cinematographic works filed with the Italian Film Library can be used for three years after filing for "cultural and didactic purposes, arranged directly or with other

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agencies, and not for profit". The Italian Film Library may also make additional copies of said films, which represents a derogation from Article 78ter of the Copyright Act with regard to the exclusive rights of film producers. Further, the Ministry of Cultural Heritage and Tourism "may use the copy acquired by the Italian Film Library... for national and international film festivals and screenings in Italy and abroad, without commercial purposes".

In the latter case, the three-year limit from filing a copy of a cinematic or audiovisual work with the Italian Film Library is not expressly mentioned, but implied with reference to Articles 7(2) and 7(3) of the Copyright Act. Additional differences between Law 220/2016 and the Copyright Act include:

- the reference in Article 7(3) of the latter only to the copy of the work acquired by the Italian Film Library and not to additional copies created; and
- the replacement of the word 'profit' in Law 220/2016 with 'commercial purposes', which cannot be considered to have the same meaning, unless interpreted as corresponding to the EU Copyright Directive's (2001/29/EC) concept of 'non-profit'.

According to this concept, free use is "applied only to some special cases which are not in conflict with a normal exploitation of the work or with other subject-matter and do not unreasonably prejudice the legitimate interests of the rights holder". This reference would inevitably narrow the scope of possibilities of use granted by the new rules.

However, there is doubt regarding the category of free use and therefore the limits set by the directive in that regard. The use contemplated by Law 220/2016 does not cover all films filed with the Italian Film Library, but only those that producers must file as a precondition to receive benefits from the law. This makes it possible to interpret the new rules as a partial waiver of rights instead of a free use subject to the limitations set out by the directive. This interpretation of Law 220/2016 would open the way to a broader interpretation of the powers provided to the Italian Film Library and the Ministry of Cultural Heritage and Tourism and allow the non-profit use of cinematic and audiovisual works.

A possible objection against this interpretation is that it weakens the exclusive rights of producers and the rights of other parties that have participated in the creation of cinematographic works to compensation. A provision whereby these parties can benefit, at least in part, from the advantages afforded to producers would be appropriate.

Therefore, the scope of Law 220/2016's application will not be clear until the implementing decree-law is passed within 120 days from the law's entry into force. The implementing decree-law will also establish the procedures for setting up "a national network of public film archives" linked to "private film archives, with particular reference to those members of the International Federation of film archives", which will benefit from the free use of "incentivised works". This appears to confirm that the legislature intends to allow the broad use of cinematic and audiovisual works that benefit from Law 220/2016.

Finally, Article 32 of the new law establishes the Public Registry of Films and Audiovisual Works with which Italian films and audiovisual works that "had regional, national or local benefits or funding granted by the European Union" must be registered. This information should be made freely available on the Ministry of Cultural Heritage and Tourism's website. In order to avoid duplication, the newly established register replaces the existing register provided by Article 103 of the Copyright Act, which has been amended accordingly.

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