

THE EUROPEAN RELEVANCE OF THE SIAE V. META CASE

Starting from March 16, 2023, most of the Italian music repertoire was removed from Instagram and Facebook preventing the users of these platforms to create posts, stories and reels with as a background Italian music. This was caused by a deadlock in the negotiations of the new license agreement regarding the use on social platforms owned by Meta, the tech company owner of Facebook and Instagram, of musical works managed by Società Italiana degli Autori ed Editori (SIAE), the Italian copyright collecting society for authors and editors.

Following the introduction of Article 17 of Directive 2019/790/EU (Copyright Directive), which in Italy has been implemented through Article 102-*septies* of Law No. 633/1941, in the absence of a licence agreement, online content sharing service providers are now directly liable for the unlawful uploading by their users of copyrighted material. In order to exclude their liability, online content sharing service providers must prove that: (i) they have made best efforts to obtain a licence; (ii) they have made best efforts to ensure that specific works and other materials are not available; and (iii) they have acted promptly to disable access to or remove from their sites the works or other materials that are the subject of the report.

Since the previously existing license agreement between Meta and SIAE expired on December 16, 2022, due to the novelty introduced by Art. 17 of the Copyright Directive, Meta could have been held liable for the use on its platforms of copyrighted musical works managed by SIAE during the negotiations in absence of a new agreement. In any case, to move the negotiations forward the parties agreed on a covenant not to sue which would have lasted until March 17, 2023. As the deadline approached and the parties could not find an agreement on the new license and on how to regulate the period of the negotiations, Meta, after the refusal of SIAE to accept a last offer for the conclusion of the license agreement, on March 16, 2023, began to remove the relevant musical works to avoid a possible litigation. After the songs' removal enacted by Meta, most of the Italian music has become unavailable on Instagram and Facebook since, even after the liberalization of the collective management organizations through the Directive 2014/26/EU, SIAE still represents the majority of Italian songwriters.

The main disagreement between Meta and SIAE during the negotiations concerned the calculation of the so-called flat fee, *i.e.* a fixed component of the fee due to SIAE for the use of the protected material corresponding to a lump sum for all uses of the music included in short videos. SIAE's reason for considering Meta's offer unacceptable was that Meta had not provided the data required to verify whether the offer was proportionate to the revenues actually earned by the tech company through the use of protected music on its platforms.

It is necessary to underline that the negotiations took place in the context of the implementation of the Copyright Directive, which introduced several provisions to

rebalance the value gap phenomenon, *i.e.* the asymmetry between revenues collected by online content sharing service providers and those actually distributed to artists. Indeed, even though music consumption is currently at an all-time high, the remuneration received by artists has never been so low.

Article 18 of the Copyright Directive directly addresses this issue by providing that when authors and performers license or transfer rights for the exploitation of their works, they are entitled to receive appropriate and proportionate remuneration. To ensure that remuneration is fair, Article 19 of the Copyright Directive provides that right holders have the right to regularly receive relevant and complete information on the exploitation of works and the revenues obtained from the parties to whom they have licensed or transferred rights. Information on the commercial use of copyrighted materials is crucial to understand whether the remuneration granted is proportionate to the revenue derived from their use. The disagreement between SIAE and Meta on the amount due as remuneration and the release of certain information is evidence of the growing importance of data in the correct determination of royalties.

The obligation under Article 19 of the Copyright Directive has been implemented in Italy through Article 110-*quater* of Law No. 633/1941. The latter provides that on a semi-annual basis licensees of rights are obliged to communicate to their respective owners updated, relevant and complete information on the exploitation of their works. The fulfilment of this obligation is monitored by the Communications Guarantee Authority (AGCOM) which, in the event of non-compliance, may apply a fine of up to one per cent of the turnover achieved by the obligated party in the last fiscal year preceding the notification. Moreover, pursuant to Article 110-*quater* of Law No. 633/1941, the failure to provide adequate information constitutes a legal presumption of inadequacy of the remuneration in favour of rights holders. However, since AGCOM has still to issue the implementing regulation, it is not clear whether this transparency obligation is currently in force in Italy.

The Italian Antitrust Authority, after initiating a preliminary investigation on April 4, 2023, to assess whether Meta had acted in abuse of a dominant position during its negotiations with SIAE pursuant to Article 9 of Law No. 182/1998, commenced precautionary proceedings pursuant to Article 14-*bis* of Law No. 287/1990, which, on April 20, 2023, ended with the adoption by the Authority of precautionary measures. Pursuant to these measures, Meta must now resume negotiations with SIAE, provide all the information necessary to re-establish a balance in its commercial relations with SIAE and, with SIAE's consent, make the entire music repertoire in question available again on its platforms. Consequently, on May 13, 2023, the parties signed a new provisional agreement, due to expire on October 6, 2023, allowing the uploading of SIAE's music repertoire on Instagram and Facebook pending the conclusion of a final agreement.

The fact that almost the entire Italian music repertoire was removed from two of the most used social media platforms in the world was an incredible loss for the entire Italian music industry. It is crucial to consider that today, social media are a central tool for the promotion of artists. Indeed, through these platforms the works created by Italian authors are used and reproduced by users all over the world, and not only by Italian ones. Moreover, the phenomenon of content "virality" is only possible on social platforms and gives artists instant and global visibility that could not be achieved otherwise.

This case has relevance for all Europe as it tests whether the different mechanisms introduced by the Directive could help to address the issue of fair remuneration for

artists and whether it could establish an equilibrium in the bargain powers when one of the parties is a big tech corporation.

Depending on how the matter settles there could be positive implications for all the European collecting societies once they will have to negotiate a new license agreement for the use of their repertoire on social media platforms.

DISCLAIMER

The sole purpose of this newsletter is to provide general information. Consequently, it does not represent a legal opinion nor can it in any way be considered as a substitute for specific legal advice.

Marco Blei, Counsel
Via Dante, 9
20123 Milano
Email: marco.blei@grplex.com

Elisa Maria Babbini, Junior Associate
Via Dante, 9
20123 Milano
Email: elisa.babbini@grplex.com