

Copyright and Free uses: The Unbearable Case of Italian Law from a European and Comparative Perspective

Abstract:

This study focuses on the legal treatment of free uses of copyrighted works under Italian law. Considering the very narrow room for free, unauthorized uses under Article 70 of the Italian Copyright Act, one would expect a large recourse to rights clearance mechanisms ensuring a wide and legitimate use of copyrighted works for free purposes (especially when such works are communicated through digital networks and are used on internet platforms).

Unfortunately, this is not the case in Italy, where neither stakeholders nor competent authorities have taken steps to create an effective system of licenses for free uses.

A comparative analysis of exceptions for free uses in a countries like Europe, and United States reveals solutions and contractual patterns that show possible solutions for Italy to escape from the present impasse.

Fair use is a limitation and exception to the exclusive right granted by copyright law to the author of a creative work.

In US copyright law fair use is a doctrine that permits limited use of copyrighted material without acquiring permission from the rights holders. Examples of fair use include commentary, criticism, news reporting, research, teaching, library archiving and scholarship. It provides for the legal, unlicensed citation or incorporation of copyrighted material in another author's work under a four-factor balancing test

Fair Use 4 factor:

§ purpose and character of use

§ nature of the copyrighted work

§ amount and substantiality of the original used in proportion to the whole

§ effect of the use on the potential market for, or value of, the copyright work

The term *fair use* originated in the United States. A similar principle, [fair dealing](#), exists in some other [common law](#) jurisdictions. [Civil law](#) jurisdictions have other [limitations and exceptions to copyright](#).

a similar but more restrictive concept found in the United Kingdom and other Commonwealth nations (including Australia and Canada)

Italian copyright law does not have an equivalent to fair use or fair dealing provisions. Limitations and exceptions are set out individually and are interpreted restrictively by the courts, as one would expect in an author's rights regime

Being the second directive on the enforcement of "**intellectual property rights**", it is sometimes called **IPRED2 (Second Intellectual Property Rights Enforcement Directive)**.

The first directive on the enforcement of IP rights, Directive **2004/48/EC** deals with civil enforcement of intellectual property rights. It was hastily passed before the Fifth Enlargement of the European Union of **May 1, 2004**. It did originally include criminal sanctions provisions, but this rather controversial part was omitted in order to be able to meet the deadline of **May 1, 2004**.

2007: Second Intellectual Property Rights Enforcement Directive

The fair use of a protected work, including such use by reproduction in copies or audio or by any other means, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, does not constitute a criminal offence.

Specifically, exceptions and limitations provided by Chapter V of the law no. 633/1941 are related to: Provisions related to **Italian copyright law** (*diritto d'autore*) are found in Law no. 633 of 22 April 1941 (along with its various amendments).

The abridgment, quotation or reproduction of fragments or parts of a work for the purpose of criticism or discussion, or for instructional purposes, shall be permitted within the limits justified for such purposes, provided such acts do not conflict with the commercial exploitation of the work; if they are carried out for educational or research purposes their use must be illustrative and not for commercial ends (art. 70, par. 1);

Permission is granted for the free publication on the internet, without restriction, of images and music of low or degraded quality, for educational or scientific use and only if there is no commercial gain. A decree of the Ministry for Arts and Culture, approved by the Ministry of Education, the Ministry of Universities and Research and the competent Parliamentary commissions, limits the aforementioned educational and scientific use (art. 70, par. 1/bis);

Copyleft is a *play on the word copyright* to describe the practice of using copyright law to offer the right to distribute copies and modified versions of a work and **requiring** that the same rights be preserved in modified versions of the work. In other words, copyleft is a general method for making a program (or other work) free (*libre*), and requiring all modified and extended versions of the program to be free as well.

Wu Ming (extended name: **Wu Ming Foundation**) is a pseudonym for a group of Italian authors formed in 2000 from a subset of the [Luther Blissett](#) community in [Bologna](#).

In their pre-Wu Ming days, the group wrote the novel [Q](#) (first edition 1999).

Unlike the open name "Luther Blissett", "Wu Ming" stands for a defined group of writers active in literature and popular culture. The band authored several novels, some of which have been translated in many countries.

Their books are seen as part of a body of literary works (the "nebula", as it is frequently called in Italy) described as the [New Italian Epic](#), a phrase that was proposed by Wu Ming themselves.^[1]

Meaning of the name

In Chinese, "wu ming" means "anonymous" ([simplified Chinese](#): 无名; [traditional Chinese](#): 無名; [pinyin](#): *wú míng*) but the collective initially adopted the name as a pun, for "wu ming" also means "five people" (五名) when the first syllable is pronounced with another tone^[2]. The name of the band is meant both as a tribute to dissidents ("Wu Ming" is a common byline among Chinese citizens demanding democracy and [freedom of speech](#)) and as a rejection of the celebrity-making machine which turns the author into a star. "Wu Ming" is also a reference to the third sentence in the *Dàodéjīng* ([Tao Te Ching](#)): "Wu ming tian di zhi shi" (無名天地之始), "Nameless is Heaven's and Earth's Origin"

Members and public personae: Luther Blissett (nom de plume) dal 1994, del Luther Blissett Project, personalità senza persona, pseudonimo collettivo adottato da menti effervescenti, hacker, intellettuali sui generis, sbeffeggiatori che agivano sotto l'identità di un giocatore di calcio britannico con ascendenze asiatiche.

Luther Blissett is a [multiple-use name](#), an "open reputation" informally adopted and shared by hundreds of artists and activists all over Europe and the Americas since 1994. The pseudo-name first appeared in [Bologna](#), Italy, in mid-1994, when a number of cultural [activists](#) began using it for staging a series of urban and media [pranks](#) and to experiment with new forms of authorship and identity. From Bologna the multiple-use name spread to other European cities, such as Rome and London, as well as countries such as Germany, Spain, and Slovenia.^[1] Sporadic appearances of Luther Blissett have been also noted in Canada, the United States, and Brazil.

For reasons that remain unknown, the pseudonym was borrowed from a real-life [Luther Blissett](#), a notable [association football](#) player, who played for [A.C. Milan](#), [Watford F.C.](#) and [England](#) in the 1980s.^[2] In December 1999, the Italian activists who had launched the Luther Blissett Project in 1994 decided to discontinue usage of the name by committing symbolic ritual suicide, or [seppuku](#).^[3] After authoring the best-selling historic novel *Q* as "Luther Blissett", five of them went on to found the writers' collective [Wu Ming](#).

OpenCola is a [brand](#) of [cola](#) unique in that the instructions for making it are freely available and modifiable. Anybody can make the drink, and anyone can modify and improve on the [recipe](#) as long as they, too, license their recipe under

the [GNU General Public License](#). Since recipes are, by themselves, not copyrightable, the legal basis for this is untested.^[1]

The original version 1.0 was released on 27 January 2001. Current Version is 1.1.3. Although originally intended as a promotional tool to explain [free and open source software](#), the drink took on a life of its own and 150,000 cans were sold. The Toronto-based company [Opencola](#) founded by Grad Conn, [Cory Doctorow](#), and John Henson became better known for the drink than the software it was supposed to promote. Laird Brown, the company's senior strategist, attributes its success to a widespread mistrust of big [corporations](#) and the "proprietary nature of almost everything."

Il libro

Nel momento in cui appare chiaro che la produzione di cultura non è più solo campo d'azione di case editrici e intellettuali, è interessante iniziare un viaggio tra gruppi informali, associazioni e aziende che fanno della propria professionalità strumenti per veicolare informazioni. Il libro si articola dunque in capitoli dedicati ad alcune di queste realtà sottolineando motivazioni di partenza, risultati raggiunti, consolidamento di network, strumenti software. E lo fa dando voce ai diretti protagonisti di questo genere di produzione culturale. Protagonisti accomunati dalla scelta delle licenze Creative Commons o della nota del copyleft letterario in modo che i contenuti siano quanto meno liberamente riproducibili.

sono

Wu Ming,
iQuindici,

Inoltre un bookmark

finale traccia una linea di partenza per chi voglia intraprendere un viaggio autonomo nel mondo della libertà di cultura che parla italiano. Infine ¶\Permesso d'Autore¶ non è un progetto cristallizzato nelle pagine di questo libro, ma intende rappresentare anche un cantiere in costruzione attraverso il sito [permessedautore.it](#). Qui, infatti, altri produttori di cultura libera potranno proseguire ed estendere la linea tracciata dall'autrice.

Antonella Beccaria, giornalista e scrittrice, si occupa in particolare

All'Ex-Asilo Filangieri di Napoli, attuale Asilo della conoscenza e della creatività, il 28 Aprile si svolgerà il Naples Copyleft Day, una giornata di dibattiti, film e musica che metterà al centro il tema del copyright, della proprietà intellettuale delle licenze Creative Commons, che stanno fornendo nuovo fermento culturale alla musica indipendente italiana e che sono utilizzate già da qualche tempo da network internazionali come Wikipedia ed Al Jazeera.



In 1994, hundreds of European artists, activists and pranksters adopted and shared the same identity.

They all called themselves **Luther Blissett** and set to raising hell in the cultural industry. It was a five year plan.

They worked together to tell the world a great story, create a legend, give birth to a new kind of folk hero.

In January 2000, some of them regrouped as **Wu Ming**.

The latter project, albeit more focused on literature and storytelling in the narrowest sense of the word, is no less radical than the old one.

The Way of the Guerrilla / 1

A selection of Luther Blissett Pranks

Luther Blissett's media hoaxes were crowded with imaginary artists, because the art world is crowded with gullible people and makes for a perfect target.

January 1995. HARRY KIPPER, a British conceptual artist, disappears at the Italo-Yugoslavian border while touring Europe on a mountain bike, allegedly with the purpose of tracing the word 'ART' on the map of the continent. The victim of the prank is a famous missing persons prime time show on the Italian state television. They send out a crew and squander taxpayers' money to look for a person that never existed. They go as far as London and make fools of themselves until "Luther Blissett" claims responsibility for the hoax.

June 1995. LOOTA is a female chimpanzee whose paintings are going to be exhibited at the Venice Biennale of Contemporary Arts. Formerly a victim of sadistic experiments in a pharmaceutical lab, Loota was saved by the Animal Liberation Front, then became a talented artist. Some newspapers announce the event. Unfortunately, Loota doesn't exist. No problem, disappointed visitors of the Biennale may turn their attention to a lot of garbage created by humans.

1998-99. DARKO MAVER is a controversial Serbian sculptor and performance artist. His works are life-size dummies looking very much like brutalized, maimed, blood-covered corpses. His art is the target of state censorship, and he's locked in a Serbian prison for anti-social conduct. In Italy, pictures of Maver's works are exhibited in Bologna and Rome. Prestigious, high-brow art magazines publish a solidarity appeal. Some respected critics even claim to know the artist personally. When "Darko Maver" dies in prison during a NATO bombing, pictures of the body appear on the web. Only, that man isn't "Darko" at all, he's a Sicilian member of the LBP. The truth is revealed a few weeks after the Seppuku. The "works" were

pics of actual corpses, found on rotten.com. It's the last big hoax by the LBP, and the debut of a new group, 0100101110101101.org.

Specifically, exceptions and limitations provided by Chapter V of the law no. 633/1941 are related to:

☒ Articles of current interest published in magazines or newspapers (art. 65, par. 1);

☒ for use in judicial or administrative proceedings (art. 67);

☒ for personal use of the reader (art. 68, par. 1);

☒ Permission is given for the free photocopying of works found in public and scholastic libraries, public museums and public archives (art. 68, par. 2);

☒ Except for the legal responsibilities of internet service providers set out in e-commerce law, exemption from the right of reproduction is granted to acts of temporary non-commercial reproduction of a transitory or accessory nature and an integral and essential part of a technological procedure, carried out with the sole aim of allowing the network transmission between third parties by use of an intermediary, or the legal use of an intellectual work or material. (art. 68/bis);

☒ Loans from libraries and record libraries belonging to the State or to public authorities, made exclusively for purposes of cultural promotion and personal study, shall not require authorization by the right holder, to whom no remuneration shall be due, and shall exclusively concern: (a) printed copies of the works, except for music scores; (b) phonograms and videograms containing cinematographic or audiovisual works or sequences of moving images, with or without sound, provided that at least 18 months have elapsed since the first exercise of the right of distribution or, where the right of distribution has not been exercised, provided that at least 24 months have elapsed since the making of the said works and sequences of moving images (art. 69, par. 1);

☒ The departments of the libraries and record libraries belonging to the State or to public authorities shall be permitted to reproduce a single copy of the phonograms and videograms containing cinematographic or audiovisual works or sequences of moving images, with or without sound, which are held by those same State libraries and record libraries and by the public authorities (art. 69, par. 2);

☒ The abridgment, quotation or reproduction of fragments or parts of a work for the purpose of criticism or discussion, or for instructional purposes, shall be permitted within the limits justified for such purposes, provided such acts do not conflict with the commercial exploitation of the work; if they are carried out for educational or research purposes their use must be illustrative and not for commercial ends (art. 70, par. 1);

☒ Permission is granted for the free publication on the internet, without restriction, of images and music of low or degraded quality, for

educational or scientific use and only if there is no commercial gain. A decree of the Ministry for Arts and Culture, approved by the Ministry

15 www.comparazionedirittocivile.it

of Education, the Ministry of Universities and Research and the competent Parliamentary commissions, limits the aforementioned educational and scientific use (art. 70, par. 1/bis);

☒ Bands of the armed forces of the State may perform musical pieces or portions of musical works in public without payment of any fees in respect of copyright, provided the performance is not made for profit (art. 71);

☒ Permission is granted for disabled people to reproduce, for their own personal use, protected works or material or their public transmission, as long as this reproduction is directly connected to their handicap, has no commercial ends and is limited to a use necessitated by the handicap (art. 71/bis);

☒ Permission is granted for the communication or availability to the individual user, for research or private study, on dedicated terminals situated in public libraries, educational establishments, museums and archives, of the works and other material contained in their collection and not subject to binding transfer or licence agreements (art. 71/ter);

☒ The reproduction of television broadcasts carried out by public hospitals and penitentiary institutions, solely for internal use, provided that the rights holder receives the fee laid out in a decree of the Ministry for Arts and Culture, is permitted (art. 71/quarter);

☒ According to art. 71/quinquies, technical protection measures must be removed, by public authority request, for public security or to allow the correct course of administrative, parliamentary or legal proceedings, as well as to allow the exercise of the exceptions provided by the law.

☒ Lastly, articles 71/sixties-71/octies regulate private reproduction and personal use, which consists of “private reproduction of phonograms and videograms on any equipment, carried out by an individual exclusively for personal use, provided there is no direct or indirect commercial gain”.

As general “closing” regulation on the subject of exceptions and restrictions, art. 71/nonies provides that all the exceptions/limitations to author’s rights “must be

interpreted in a way as to not impinge upon the normal use of the work or other material, nor cause

an unjustifiable prejudice to the interests of the rights holders”.

In addition to the exceptions and restrictions laid out in Chapter V of law no. 633/1941, further exceptions are regulated in other parts of the copyright law:

☒ in particular, regarding databases, the following activities are not subject to the authorization of the rights holder: “access to or consultation of the database for purely teaching or scientific research purposes outside the framework of a

company, as long as the source is mentioned and to the extent justified by the

noncommercial

purpose to be achieved; in the case of access or consultation, however, the permanent reproduction of all or a substantial part of the contents on another medium shall be subject to authorization by the owner of the rights” and “use of a database for public security purposes or for the purposes of an administrative or judicial pr