

# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

According to the Italian copyright law (Law No. 633 of April 22, 1941), **copyright** protects:

*Works of the mind having a creative character and belonging to literature, music, figurative arts, architecture, theatre or cinematography, whatever their mode or form of expression*

*Computer programs shall also be protected as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works<sup>1</sup>, ratified and enforceable pursuant to Law No. 399 of June 20, 1978, as shall databases that, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation.*

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(Art.1.1 Law No. 633/1941: hereinafter called “l.d.a.”).

Art. 2.2 l.d.a. gives some examples about the kinds of works which are protected by copyright, including:

*... computer programs, in whatever form they are expressed, provided that they are original and result from the author's own intellectual creation. Ideas and principles which underlie any element of a computer program, including those which underlay its interfaces, shall be excluded from the protection afforded by this Law. The term “computer program” shall include their preparatory design materials.*

# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## REQUIREMENTS FOR COPYRIGHT PROTECTION

The general requirements are **creative character AND expression**.

### ➤ **Creative character: originality and novelty**

**Originality** is the product of human intellectual creation, not banal. What is meant to be "not-banal" is not the content, the idea or the concept expressed, but rather the form of expression, namely the way in which the content is expressed.

**Novelty** has to be interpreted not in an objective and absolute sense, but rather subjective.

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## What about the form of expression?

Besides the creative character, it is required that the work of human ingenuity is expressed into a specific and concrete form: it must be disclosed from the author's mind, copyright does not protect ideas as such, which have not been "put into practice", either the basic forms of expression, procedures, methods of operation or mathematical concepts as such.

A computer program is endowed with **creative character AND expression if**: its expression (programming language for the user interface, processors) shows that it has been the product of a creative effort, and not merely a repetition.

A low degree of creativity will suffice. Nonetheless, the author must prove that he/she has had to make a choice between some different options so as to have that specific result.

## THE OBJECT OF COPYRIGHT PROTECTION, AS REGARDS COMPUTER PROGRAMS

According to the EU case-law (amongst others, Judgment of the Court (Grand Chamber), C-406/10, May 2, 2012; Judgment of the Court (Third Chamber), December 22, 2010, C-393/09), **copyright protects the following elements of computer programs:**

- the expression in any form of a computer program, such as **the source code and the object code**, which permits reproduction in different computer languages

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Any form of expression of a computer program must be protected since from the moment when its reproduction would engender the reproduction of the computer program itself, thus enabling the computer to perform its task, including:

- **the preparatory design materials**, provided that the nature of the preparatory work is such that a computer program can result from it at a later stage;
- the **user manual**, even though they are not protected as computer programs, rather as scientific/didactic works.

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## In the light of the above, which acts can be prevented, by the owner of a licensing agreement?

- The owner of the copyright in a computer program may not prevent, by relying on the licensing agreement, the person who has obtained that licence from determining the ideas and principles which underlie all the elements of that program, on condition that that person does not infringe the exclusive rights of the owner in that program.
- Decompilation does not permit the information obtained through its application to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright. It must therefore be held that the copyright in a computer program cannot be infringed where, as in the present case, the lawful acquirer of the licence did not have access to the source code of the computer program to which that licence relates, but merely studied, observed and tested that program in order to reproduce its functionality in a second program.

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## On the other hand, which parts of computer programs are NOT protected by copyright?

- the functionality of a computer program and of its parts;
- the programming language and the format of data files used in order to exploit certain functions;
- the general purpose of the computer program;
- ideas, procedures, methods of operation or mathematical concepts as such.



# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## Questions being debated

- **Interfaces (UI – user interface);**
- **Flowchart;**
- **Internal structure of a program;**
- **Videogames.**

# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## WHICH ARE THE CONSEQUENCES IN THE DECLARATORY JUDGEMENTS ON COUNTERFEITING?

**Trib. Roma Sez. IX, Sent., 10.24.2013**

*Protection is limited to the shape and expression of the software and does not extend to the ideas and principles that underlie any element of the program [...]:*

*If indeed, therefore, there were, between two programs, more or less important similarities as regards interface, functionality, programming languages, file format, this would not be enough to constitute counterfeiting in the face of the detected failure to play source code.*

**Trib. Bologna Sez. spec. propr. industr. ed intell., 03-01-2011**

The plaintiff has the burden to prove that the computer program is endowed with creative character.

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**Trib. Roma Sez. IX, Sent., 10.24.2013**

This is a consequence of the fact that copyright shall be acquired on the creation of a work that constitutes the particular expression of an intellectual effort (ART. 6 l.d.a.)

# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## LEGAL FRAMEWORK

Usa - Computer Software Amendment Act (l. 12-12-1980)	
Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs	
D.Lgs. 518 of December 29, 1992	It complies with the Council Directive 91/250/EEC in Italy and therefore amends Italian Copyright law No. 633/1941 (l.d.a.)
Copyright Law No. 633/1941 (l.d.a.)	It is the main Italian law on copyright
Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights	It repeal the term of protection of computer programs as set forth in Directive 91/250/EEC (fifty years after the death of the last surviving author; even if member states which already had a longer term of protection, were allowed to maintain it): Directive 93/98/EEC stipulates that Duration of authors' rights in 70 years after the (last surviving) author's death
DPCM No. 244 of January 3, 1994	It regulates the Italian Public Register on computer programs
Law No. 248 of August 18, 2000	It regulates the SIAE's sign branding on computer programs

## AUTHORSHIP

### How is copyright acquired?

Copyright shall be acquired on the creation of a work that constitutes the particular expression of an intellectual effort. It is not necessary to go through any kind of formality to acquire copyright: creation is the only requirement.

- The holder of the rights is the author.

# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## How to prove the authorship?

Any kind of evidence is admitted, including witness evidence. Anyway, Art. 8 l.d.a. provides for a very important presumption:

*A person who is shown, in the customary manner, as the author or is announced as such in the course of the recitation, performance or broadcasting of a work shall, in the absence of proof to the contrary, shall be deemed the author of the work.*

Moreover, there is a Public Registry on Computer Programs, which might be quite useful as evidence of the authorship. Anyway, the registration on the Public Registry is not a legal requirement for validity and effectiveness of copyright: it has just a probative value.

# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## What if there is more than one author?

The copyright shall be shared between the joint authors. There might be collective works, works in a joint ownership community, derived works.

### Works in a joint ownership community

#### **Art.10 l.d.a.**

*If the work has been created by the indistinguishable and inseparable contributions of two or more persons, the copyright shall belong to all the joint authors in common.*

*In the absence of proof of written agreement to the contrary, the indivisible shares shall be presumed to be of equal value.*

*The provisions that regulate property owned in common shall be applicable.*

# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## **Art.10 l.d.a.**

*Furthermore, moral rights may be asserted at any time by any one joint author; and the work, if unpublished, may not be published nor be modified or utilized in a form differing from that of first publication, without the consent of all the joint authors.*

*However, in the event of unjustified refusal by one or more joint authors, publication, modification or new utilization of the work may be authorized by the judicial authority upon such conditions and terms as that authority may order.*



# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## Collective works

Collective works are formed by the assembling of works, or parts of works; they are self-contained creations resulting from selection and coordination with a specific literary, scientific, didactic, religious, political or artistic aim. They shall be protected as original works, independently of and without prejudice to any copyright subsisting in the constituent works or parts thereof (Art. 3 l.d.a.).

According to art. 7 l.d.a, the person who organizes and directs the creation of the collective work shall be deemed the author.

In the event that the collective work is created for commission, the economic rights will belong to the publisher of the work, without prejudice to any right deriving from the application of Article 7 (Art. 38 l.d.a.).

The individual contributors to collective works shall have the right to utilize their own contributions separately, provided they observe existing agreements or, in the absence of agreements, the rules set out in Art. 38 l.d.a.

## COMPUTER PROGRAMS CREATED IN THE COURSE OF AN EMPLOYMENT CONTRACT

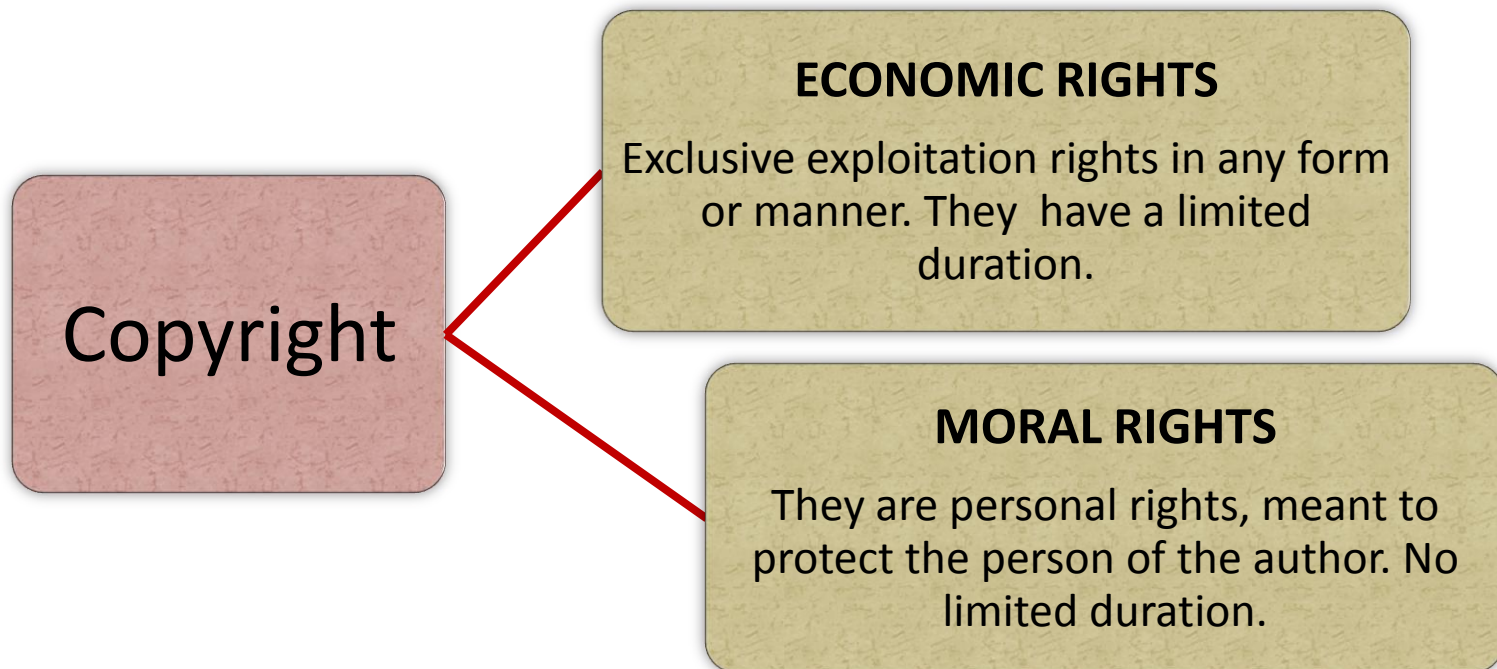
### Art. 12-bis l.d.a.

*Unless otherwise agreed, the employer shall be the owner of the exclusive right of economic use of the computer program or database created by his employee in the course of his duties or on instructions given by the said employer.*

# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## THE CONTENT OF COPYRIGHT

The author is the holder of economic rights and moral rights.



# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## ECONOMIC RIGHTS

L.d.a. recognises some economic exclusive rights to works endowed with the requirements for copyright protection. These “general” economic rights are regulated by Artt. 12 – 19 l.d.a.

On the other hand, there are some specific economic rights which are recognised to computer programs only, provided that they are endowed with the requirements for copyright protection.

# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

A very important principle is set forth by **Art. 19 l.d.a.:**

*The exclusive economic rights shall be independent of each other. The exercise of anyone right shall not exclude the exercise of the other rights.*

*They shall extend to the work in its entirety and to each of its parts.*

The duration of economic rights 70 years after the death of the last surviving author.

# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## ECONOMIC RIGHTS - GENERAL RIGHTS

The author has the exclusive right to use the work in any form, even if not expressly regulated by the law on copyright .

As a result , the list of rights belonging to the author under Articles . 12 - 20 l.d.a. is for example only.

The exclusive economic rights regulated by l.d.a. are: publication, reproduction, transcription of an oral work into a written work, public performance or recitation, broadcasting, distribution, translation, rental, lending.

## Specific rights on computer programs

### **Art. 64-bis l.d.a.**

*(1) Without prejudice to the provisions of Articles 64ter and 64quater, the exclusive rights afforded by this Law with regard to computer programs shall include the right to do or to authorize:*

*(a) the permanent or temporary reproduction of a computer program by any means or in any form, in part or in whole. In so far as loading, displaying, running, transmission or storage of the computer program necessitates such reproduction, such acts shall be subject to authorization by the right holder;*

*(b) the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program;*

## COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

*c) any form of distribution to the public, including the rental, of the original computer program or of copies thereof. The first sale in the European Union of a copy of a program by the right holder or with his consent shall exhaust the distribution right within the Union of that copy, with the exception of the right to control further rental of the program or of a copy thereof.*

Any kind of reproduction, including temporary reproduction, must be authorized by the author. The author can prevent anyone to reproduce the source code in any form and for any meaning, including encryption.

The exclusive rights include any kind of *alteration of a computer program and the reproduction of the results thereof*. This is a specification of the general right regulated by Art. 18 l.d.a., wherein the author has the exclusive right to make any modifications to his work.



## MORAL RIGHTS

Moral rights are inalienable. They cannot be transferred to third parties for acts between living person.

They do not have a limited duration.

There is no limitation period for taking action on the ground of the infringement upon moral rights.

# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

The author's moral rights are:

- ❑ the right to **claim the authorship**;
  - ❑ the right to **reveal his/her identity** (as regards anonymous or pseudonymous works);
  - ❑ the right to **object to any distortion, mutilation or any other modification** of, and other derogatory action in relation to, the work, which would be **prejudicial to his/her honour or reputation**;
  - ❑ the right to withdraw the work from commerce, for very serious reasons.
- ❑ The heirs and the legatees of the author have the right to publish unpublished works, unless the author has expressly forbidden publication or has entrusted it to other persons.

## FAIR USES OF COMPUTER PROGRAMS

### Art. 64-ter l.d.a.

- 1. In the absence of any agreement to the contrary, the acts referred to in Article 64bis(a) and (b) shall not require authorization by the right holder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including error correction.*
- 2. The making of a backup copy by a person having a right to use the computer program may not be prevented by contract in so far as it is necessary for that use.*
- 3. The person having a right to use a copy of a computer program shall be entitled, without the authorization of the right holder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do. Any contractual clause that is contrary to the provisions of this paragraph and of paragraph (2) shall be null and void.*

# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## FAIR USES OF COMPUTER PROGRAMS

As an exception to the author's rights under Art. 64-bis lett. a) and b), the lawful acquirer of a computer program is allowed to make:

- permanent or temporary reproductions,
- as well as translations, adaptations, arrangements and any other alteration of a computer program and the reproduction of the results thereof,

without the right holder's authorization, insofar as:

- a) they are necessary for the use of the computer program by the lawful acquirer;
- b) in accordance with the computer program intended purpose.

# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## FAIR USES OF COMPUTER PROGRAMS

In the event that the above exploitations by the lawful acquirer are not necessary for the use of the computer program, either in accordance with the computer program intended purpose, the right holder shall maintain the right to decide whether to allow them or not.

## FAIR USES OF COMPUTER PROGRAMS

### Art. 64-quarter I.d.a.

1. *The authorization of the right holder shall not be required where reproduction of the code and translation of its form within the meaning of Article 64bis (a) and (b) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met:*
  - a. *these acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorized to do so;*
  - b. *the information necessary to achieve interoperability has not previously been readily available to the persons referred to in subparagraph (a);*
  - c. *these acts are confined to the parts of the original program which are necessary to achieve interoperability.*

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2. *The provisions of paragraph (1) shall not permit the information thus obtained:
  - a. *to be used for goals other than to achieve the interoperability of the independently created computer program;*
  - b. *to be given to others, except where necessary for the interoperability of the independently created computer program;*
  - c. *to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.**
3. *Any contractual clause contrary to paragraphs (1) and (2) shall be null and void.*
4. *In accordance with the provisions of the Berne Convention for the Protection of Literary and Artistic Works, ratified and enforceable by Law No. 399, of June 20, 1978, the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the right holder's legitimate interests or conflicts with a normal exploitation of the computer program.*

## FAIR USES OF COMPUTER PROGRAMS

### Art. 68 – bis l.d.a.

*Subject to the provisions regarding the liability of intermediary service providers on e-commerce, are exempt from the reproduction right, acts of temporary reproduction devoid of an own economic significant which are transient or incidental and an integral and essential part of a technological process whose sole purpose is to enable a transmission in a network between third parties by an intermediary , or a lawful use of works or other materials .*



## FAIR USES OF COMPUTER PROGRAMS

### Art. 71 quinquies

Right holders who have made use of technological measures to protect their works, shall remove them to allow the use of protected works or materials, at the request of the competent Authority, for security purposes or in the course of judicial or administrative proceedings.

Right holders shall also adopt appropriate solutions, including through appropriate agreements with trade associations, to allow the exercise of the exceptions provided for in Articles 55, 68 par. 1 and 2, 69 par. 2, 70 par.1, 71-bis and 71-quater, at the express request of the beneficiaries and provided that the beneficiaries themselves have lawfully acquired possession of the copies of the work.

## FAIR USES OF COMPUTER PROGRAMS

### **Art. 71 sexies and septies l.d.a.**

Reproduction of phonograms and videograms for personal use is permitted to natural person and for personal use only, provided that they are non-profit and not for commercial purposes.

Authors and producers of phonograms, audiovisual works, performers and performers and producers of videograms, and their successors in title, shall have a fair compensation (from SIAE) for the private reproduction of phonograms and videograms which is permitted by Article 71 - sexies .

## FAIR USES OF COMPUTER PROGRAMS

### **Art. 71 nonies l.d.a.**

Fair uses listed by l.d.a., when applied to works or other materials made available to the public so that everyone can access them from a place and at a time individually chosen , must not be in conflict with the normal exploitation of works or other materials, nor unreasonably jeopardize the interests of the owners .

# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## COPYRIGHT/PATENT PROTECTION ON COMPUTER PROGRAMS

	<u>COPYRIGHT PROTECTION</u>	<u>PATENT PROTECTION</u>
Formalities for acquiring rights	not required	application required
novelty (in an objective sense), inventive activity and industrial applicability	not required	not required
the invention must lead to useful technical results	not required	not required
duration of protection	for the life of the author and for 70 years after his death	for 20 years starting on the date of filing of the application and may not be renewed.

## LEGAL ACTIONS AGAINST COPYRIGHT INFRINGEMENT

### CIVIL ACTIONS AGAINST THE INFRINGEMENT UPON EXPLOITATION RIGHTS (artt. 156 – 167 l.d.a.)

#### 1) Action for nullity and forfeiture

Any person having reason to fear the infringement of an exploitation right belonging to him under Copyright law or who seeks to prevent the continuation or repetition of an infringement which has already occurred, may institute legal proceedings to **ensure that his right be recognized and the infringement forbidden.**

The burden to prove the requirements for copyright protection lies with the right holder.

## COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

Nonetheless, if the right holder has provided serious clues that its claims are grounded and has identified documents, elements or information held by the other party that confirm those clues, it may request that the Court order their production or request the information from the other party.

Both in the course of ordinary civil proceedings and of proceedings relating to provisional measures, the party may also request that the Court order that information be provided on the origin and distribution networks of goods or the provision of services that violate copyrights.

## 2) Corrective and precautionary measures

Both in the course of the ordinary civil proceedings and in the proceedings ruling on precaution measures only, any person injured in the exercise of an exploitation right belonging to him may institute legal proceedings for the **destruction or removal of any item constituting the infringement.**

- The judicial authority may also order **description (inventory), seizure and expert appraisal** of any material which is supposed to constitute an infringement of the exploitation rights.

## 3) Compensation for damages

Any person injured in the exercise of an exploitation right belonging to him may institute legal proceedings for **payment of damages**.

### CIVIL ACTIONS AGAINST INFRINGEMENTS UPON MORAL RIGHTS (artt. 168 – 170 l.d.a.)

The actions against infringement upon exploitation rights shall be applicable in proceedings concerning the exercise of moral rights, due regard being had to the nature of moral rights.



# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## CRIMINAL PROCEEDINGS – CRIMINAL PENALTIES (ARTT. 171 – 174 QUINQUIES L.D.A.)

The Copyright law also provides for some criminal penalties for the infringement upon copyrights. The general rule is set forth in Art. 171 l.d.a. (fines and imprisonment for many acts of illegally using works protected by copyright for making profit purposes). Specific criminal penalties are set forth by art. 171-bis as regards computer programs.

**171bis.-** (1) Any person who unlawfully duplicates computer programs for profit making purposes or who imports, distributes, sells, holds for commercial or business purposes or rents programs embodied in media not bearing the mark of the SIAE shall be liable to a prison term of between six months and three years and to a fine of between 5,000,000 and 30,000,000 lire. The same penalty shall apply if the act involves any means intended solely to permit or facilitate the unauthorized removal or circumvention of any technical device applied to protect a computer program. For a serious offense, the penalty shall be a prison term of not less than two years and a fine of 30,000,000 lire.

## COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

(2) Any person who, for profit-making purposes, using media not bearing the mark of the SIAE, reproduces, transfers to another medium, distributes, communicates, presents or demonstrates in public the contents of a data bank in breach of the provisions of Articles 64quinquies and 64sexies, or extracts or reuses material from a data bank in breach of the provisions of Articles 102bis and 102ter, or who distributes, sells or rents a data bank, shall be liable to a prison term of between six months and three years and to a fine of between 5,000,000 and 30,000,000 lire. The penalty shall be a prison term of not less than two years and a fine of 30,000,000 lire if the offense is serious.

# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## **PUBLIC REGISTER FOR COMPUTER PROGRAMS (ART. 103 L.D.A.)**

The SIAE keeps a special public register for computer programs.

There shall be entered in the register the name of the holder of the exclusive exploitation rights and the date of publication of the program (where publication shall mean the first act of exercise of the exclusive rights; including by subscribing a license agreement, or delivering the support to the employer).

Computer programs might be registered after their publication.

In the absence of proof to the contrary, registration shall be accepted as proof of the existence of the work and of its publication.

## COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

It is NOT compulsory for the authors to register their work in the Public Register. Registration is not required for acquiring rights, but as evidence only.

The application for registration shall be filed before the SIAE, together with a copy of the program on the audio/video support.

According to Art. 4 of DPCM 244/94, contracts for the assignment/licensing of copyrights, between living parties or constituting rights of possession therein, common rights or security rights, or of association with respect to such rights, may also be entered in the registers in the form prescribed by the Regulations.

It is NOT compulsory to register the above contracts in the Public Register.

Registration is not required for the sake of effectiveness of these contracts, but as evidence only.

# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## PROTECTION OF TECHNOLOGICAL MEASURES AND RIGHTS-MANAGEMENT INFORMATION (ARTT. 102-QUARTER-QUINQUIES L.D.A.)

### Technological measures

Legal protection is also provided against the circumvention of any effective technological measures applied by right holders to their work, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

"Technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the right holder of any copyright or any right related to copyright as provided for by law.

# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## Technological measures

Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the right holders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## Rights-management information

Legal protection is provided against any person knowingly performing without authority any of the following acts:

- a) the removal or alteration of any electronic rights-management information;
- b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected from which electronic rights-management information has been removed or altered without authority,

if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law.

# COMPUTER PROGRAMS AS WORKS PROTECTED BY COPYRIGHT

## Rights-management information

The expression "rights-management information" means any information provided by right holders which identifies the work or other subject-matter, the author or any other right holder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.