SEPTEMBER 2001

ENTERTAINMENT ON THE INTERNET – RECENT DEVELOPMENTS

Avv. Gianluca Pojaghi

SUMMARY: 1) The Directive n° 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society; 2) The Italian situation;

1) The Directive n° 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society

1.1) The current year 2001 has seen the birth of an important European legislative act; the Directive n° 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, finally approved on 29th April 2001.

The approval of the mentioned Directive brings to conclusion a series of initiatives taken at international level with the adoption of the two WIPO Treaties[1], that took place in Geneva on 20th December 1996, by the United States with the adoption of the Digital Millennium Copyright Act, on 28th October 1998, as well as at the European level with the adoption of the Directive n° 2000/31/EC of 8th June 2000 on the Electronic Commerce.

The Directive is the final act of a long and laborious process which began with the Green Paper on Copyright and Related Rights in the Information Society dated 19th July 1995, in which the Commission

reaffirmed the adequacy of the international regulations then in force and called for harmonization of these regulations in order to prevent any disparity of treatment under differing regulations in Member States.

In December 1997 the European Union Council approved the "Draft of a Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society", put forward by the Commissioner for the Single Market, Mario Monti, with the objective of contributing to the development of the Information Society within the European Union by means of a new regulatory framework.

On 14th February 2001, the European Parliament discussed and voted a series of amendments to the text, which was then passed on to the EU Council for examination and was finally approved on 9th April 2001. The Directive bears the number 2001/29/EC of 22nd May 2001.

The main aim of the EU action is to create a harmony and consistency between the various laws on copyright that exist in the Member States as well as, as stated in Whereas 15 of the Directive, the application at EU level of the international obligations that derive from the two WIPO Treaties.

The harmonization that the Directive aims to achieve does not concern all aspects of copyright but only those which are considered to be pertinent to Internet and the Information Society.

The motives which have prompted European institutions to set down the lines of new rules and regulations on the above subjects are explained in detail in some of the Whereas of the Directive.

It is stated first of all that "*A harmonized legal framework on copyright and related rights, …, will foster substantial investment in creativity and innovation*" (**Whereas 4**).

It is also stated that "*Without harmonization at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating,*

[1] Also known as the Internet Treaties, as they constitute the development of the previous regulation in connection to the issues posed by the information society.

or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency" (**Whereas 6**).

In particular the Directive states that "*If authors and performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work*" (**Whereas 10**).

Therefore the underlying objective of the Directive was not to define "copyright on the Internet" (indeed the term "Internet" never appears in the text of the Directive) but to extend and remodel the existing categories to ensure that intellectual property laws may be applied to all the activities performed on the Internet.

Art. 1 entitled "**Scope**" gives a detailed list of subject-matters which, being already subject to regulation by previous Directives, are in no way involved or modified by this Directive.

Similarly, in **Whereas 19** it is expressly stated that moral rights are outside the scope of this Directive, and are on the contrary governed according to the legislation of each Member State in full compliance with what is established by the Berne Convention and the two WIPO Treaties. Just as moral rights are outside the scope of the Directive, so are issues regarding liability for violation of copyright, the question of the applicable law and the management of rights.

The Right of Reproduction

1.2) On this point, the Directive gives a detailed definition of reproduction, stating in art. 2 that Member States shall grant to the right-owners "**the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part"** of their works.

The wording "*direct or indirect reproduction*" and "*by any means*" as well as numerous references made in the Whereas (for example, the Whereas 33 on the subject of temporary reproduction) make clear the intent to expand the concept of reproduction to include all immaterial and digital copies. The new definition of reproduction thus covers all relevant activities performed on the Internet.

The Right of Communication to the Public

1.3) Art. 3, granting authors and other right-owners the exclusive right to authorize or prohibit any communication to the public of their work, is also very important.

Technological evolution, in fact, permits new forms of exploitation of intellectual work and modes of making material protected by copyright available to the public which differ from traditional methods of exploitation (for example *on line* transmissions[2]). The particular nature of such forms of exploitation has raised the problem of identifying which provisions of copyright law govern the so-called "on line" transmissions. Amongst the various rights granted to authors, that of communication to the public seemed to be the most appropriate for regulating such new forms of exploitation.

These issues were already dealt with in the Copyright Treaty approved by WIPO which, in art. 8, established that on demand transmissions should fall within the scope of communications to the public.

While what is meant by communication to the public was not exactly defined, nevertheless it was established that "communication to the public" occurs when the work is transmitted by wire or wireless means and also includes reception of the transmissions made from a place and at a time individually chosen by the recipient (i.e. on demand).

Similarly art. 3 of the Directive does not contain any exact definition of the right of communication to the public, but is limited to the granting to authors and holders of neighboring rights "*the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them*".

The expression "communication to the public" of a work includes all modes and procedures different from distribution of material copies.

---

[2] A tangible example are *on line* transmissions on demand. These are particular modes of exploitation of work by which digitally memorized works are made available to third parties in an interactive way that is in such a way that the users may individually ask to consult material and have it transmitted to them at any time and in any place that they wish.

The second part of the provision is the one which most closely concerns telecommunication networks in that it regards interactive environments. The provision explains that the right of communication to the public also includes *on line* and *on demand* transmissions. In this way, it is specified that communication to the public also takes place when various people not connected to each other may gain individual access from different places and at different times to a work that is available on a site accessible to the public. The work is considered to be made available to the public by its publication on a site that may be accessed by the public, even though exploitation of the work may, in fact, take place individually.

In other words, by using the category of communication to the public already included in the Berne Convention (art. 11-bis) and in the WIPO Copyright Treaty (art. 8) the Directive rules that the above communication also exists when enjoyment of the work takes place in a place and at a time chosen by the users themselves, which is exactly what happens on the Internet and differentiates this tool from television.

When the author's or right-owners' authorization is not given, as required by the Directive, communication to the public must be held as illicit even if this operation is performed by parties who qualify as a legitimate user.[3]

As already mentioned, in fact, the principle of exhaustion of the exclusive right does not apply, since this only regards the exclusive right to distribution of copies of the protected work but not its diffusion at a distance for the benefit of an indefinite public.

Exceptions

1.4) The strict solution adopted by the Directive which has recognized, in principle, the full and exclusive right of the authors has nevertheless been mitigated by the recognition of a number of exceptions to their economical rights. It was, that is, established that some types of usage, while being acts of reproduction and communication, may take place without the authorization of the legitimate right-holder.

The definition of the content of these exceptions appears to be of great importance especially in a technological environment where an excessive expansion of the rights of users might jeopardize the earnings deriving from creative activities. For this reason, the Directive has harmonized not only the content of copyright regulations but also the exceptions that may be applicable thereto.

Art. 5 therefore sets down a series of exceptions which are applicable to the sole right of reproduction (first and second paragraph) and those (third paragraph) applicable without distinction to both the right of reproduction and the right of communication to the public.

Save the exception foreseen by Art. 5.1, the exceptions set down in art. 5 are facultative, in the sense that Member States are free to introduce them or not, but they constitute an exhaustive list, in the sense that Member States may not introduce any new possibilities further to those expressly set down in the Community Directive.

The first paragraph of art. 5 is of particular importance and states that *"Temporary acts of reproduction referred to in Article 2, which are transient or incidental, which are an integral and essential part of a technological process whose sole purpose is to enable:*

a) *a transmission in a network between third parties by an intermediary or*

b) *a lawful use*

of a work or of other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2".

The first paragraph of Article 5 defines an exception that is particularly important for Internet and helps to clarify one of the issues most widely discussed in the legal literature[4].

The exception in question concerns all temporary reproductions required by transmission on the web or in any case for a legitimate use of the work. It includes, that is, all acts of temporary or incidental reproduction which form an integral part of the technological process of transmission. Precisely

---

[3] Because, for example, they have purchased the work.

[4] There was in fact disagreement as to whether the act of temporarily memorizing a work in the volatile memory (RAM) of a computer should also be included in the right of reproduction. This was not a trifling matter when you consider that one of the major activities carried out on the Internet which is known as browsing always implies temporary reproduction of the material to be consulted.

because of the importance that it has in fact, this exception is compulsory and not merely facultative like all the others.

In technical terms, the acts of reproduction considered in the first paragraph fall into the category of "caching", which consists of the necessary temporary memorization that permits each computer to visualize web pages[5]. Whereas 33 gives a detailed explanation of the concept of temporary reproduction and of "cache" copies, identifying these as exceptions to the right of reproduction.

It is worth remembering in this regard that IFPI (International Federation of the Phonographic Industry), representing over 1300 producers and distributors in the phonographic world, requested the Commission to recognize that digital copies should be considered as equivalent to material copies and should not therefore be considered as temporary reproductions covered by the exception.

The difference that is made between temporary and permanent copies, with consequent exemption from authorization for the former, is considered negatively by the above mentioned Federation since in this way it is ignored that Information Society technologies have eliminated the differences between permanent and temporary copies.

As far as the other exceptions are concerned, it should be said that many of them are similar to those already contained in our Copyright Law in articles 65 and onwards under the heading of "*Free uses*".

In particular, it is worth mentioning the possibility provided for in article 5.2, letter b), where limitations are established for all that regards "*reproductions on any medium made for the private use of a natural person and for non-commercial ends, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned*".[6]

This exception was provided for since almost all Member States provide for an exception to the exclusive right of reproduction with respect to copying for private use, normally accompanied by a

[5] It is well-known in fact that the individual files related to an HTML page, images, music, animation, are memorized in the "cache" memory, which temporarily contains the files required to compose the page then visualized on screen.

[6] A request for clarification with reference to digital copies has also been put forward by the associations of industries concerned according to whom the Directive should have limited or more precisely defined the exceptions for private copies for the digital environment.

system of levies to be made on the sale price of the recording media in favor of the authors (in Italy, regulated by Law n° 93 dated 5.2.1992).

The Directive therefore confirms the possibility of making reproductions as private copies in digital format provided that (a) they are not made for commercial ends, because otherwise such reproduction would constitute a true form of economic exploitation for which the transfer of the relevant right would be necessary, and (b) that a fair compensation is paid to right-holders. The amount of this compensation is additionally linked to whether a form of technological protection has been applied or not.

As is made clear by Whereas 35 "…*When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valid criterion would be the possible harm to the rightholders resulting from the act in question*".

The Directive also makes provision for Member States to agree other limitations or exceptions to the regulations on intellectual property for use for educational or scientific purposes, by public organizations such as libraries and archives, for the purposes of newspaper information, for quotations, for use by disabled persons, for the purposes of public safety and for administrative and legal procedures. In some cases this type of exception shall be granted on condition that the right-holder receives a fair compensation, in other it is sufficient to give the name of the author as the source.

1.5) The Directive moreover establishes (art. 6) that Member States must set up an adequate system of legal protection against mechanisms for the circumvention of technological measures. In particular they must provide adequate legal protection against the manufacture, import, distribution, sale, rental and advertisement of products and services primarily designed to circumvent or to enable circumvention of technological measures.

1.6) Lastly, Article 7 of the Directive sets down a series of obligations on information concerning the rights recognized therein. The provision establishes that Member States must provide measures to guarantee the presence and permanence of rights-management information, that is information

identifying the protected work or subject-matter, the author or any other related information regarding the terms and conditions of use of the work.

Browsing

1.7) A few words should finally be dedicated to the browsing activity. A good definition of browsing could be "to read something by selecting passages at random". Computers use browsing to be able to read, scroll and consult the HTML pages of websites, or any other text in digital format, and this involves a temporary reproduction of the text and graphic content of the pages in their memory.

Browsing must therefore be intended as involving the temporary and incidental memorization of a program in the RAM memory of the computer (the so-called working memory, as distinct from the mass fixed memory on the hard disk), which normally lasts the time required for consultation (when the computer is switched off, the reproduction is cancelled from the memory). For that reason, temporary reproduction was initially defined as "*ephemeral*" reproduction.

The issue has been taken into consideration at European level during the setting down of the Directive n° 2001/29/EC lastly approved. In one of the Whereas of the text of the Draft Directive dated 25th May 1999, in fact, it was stated that the temporary reproduction exception should have also been applied "*to the creation of cache copies or to* ***browsing"***. In the same Whereas (33) of the final version of the Directive, however, all reference to browsing has been removed from the description of the exception to the right of reproduction while reference to cache copies remains.

2) The Italian situation

The position of SIAE

2.1) As far as the Italian legal situation is concerned, pending the implementation of the Directive mentioned above, it should be noted that, with the exception of a number of recently introduced amendments[7], Italian copyright law has remained substantially unchanged with respect to last year.

[7] Some amendments to Law n° 633 dated 22nd April 1941 have been made with Law n° 248 dated 18th August 2000 (in Gazzetta Ufficiale n° 206 dated 4th September 2000), the so-called "Anti-piracy" Law, dictating new rules to protect copyright with specific reference to some forms of piracy which are not relevant for on-line uses.

It is worth mentioning, on the contrary, the position of SIAE (the Italian collecting society) which, as is known, is the public body to which Article 180 of our copyright law exclusively confers "*the right to act as an intermediary… (*for*) the exercise of the rights of performance, recitation, broadcasting, including communication to the public by satellite, and mechanical and cinematographic reproduction of protected works …*".

With respect to the previous one dated 1999, SIAE introduced a new version in the year 2001 of its "experimental license for the use on telecommunication networks of musical works".

According to what is indicated therein, the purpose of the license is the diffusion to the public on the Internet or on other telecommunication and/or telephone networks, also with reference to interactive services in which the programming is chosen directly by the user (on demand), of works or fragments of works with or without words that are part of the repertoire of the SIAE Music Section, which includes works by Italian authors and those by foreign authors for whom SIAE is authorized to collect and distribute royalties.

In particular SIAE grants the Licensee the non-exclusive right to:

a) **reproduce** the works of the musical repertoire protected by SIAE by means of loading the files of its databank (uploading) for the exclusive use of programmed diffusion;

b) **diffuse** these works and/or fragments of works on telecommunication networks, making the works transmitted from the site owned by the Licensee available to the public, even in such a way that users may access them from the place and at the time individually chosen;

c) **use** the reproduced works as in point a) making them available to the public on an individual basis – free of charge or upon payment – by picking the relevant files by means of computer or telecommunication devices connected to the site using any data transmission protocol, and subsequently downloading those files onto the hard disk of the personal computer or any other mass memory or again onto the compact flash memory (or equivalent devices) of portable players.

On their part, Licensees undertake to indicate for each work used the title, the authors, the publishers and the artists performing it in the visual spaces of their site, referring also to the License, its serial

number and the date on which it was granted, as well as ensuring the hypertextual link to the SIAE website.

In compensation for the use of musical works, the License provides for payment of a sum that varies according to the type of use, i.e. whether the piece is reproduced partially or fully and whether it is diffused free of charge or upon payment of a fee and whether its making available to the public takes place by subscription services.

Compared to the previous version, in addition to a number of formulas which are differentiated for sites that make use of the protected repertoire for periods of less than one month, a number of reductions are provided for in the following cases:

a) commercial sites the main activity of which is not the diffusion of music on networks,
b) sites not featuring advertising,
c) sites that use no more than three pieces of music each month in streaming, and lastly
d) sites recognised by SIAE (subject to approval of the company organs) to be of particular value in promoting Italian music or of particular social value.

The "notice and shut down" procedure

2.2) Furthermore in Italy (as in the rest of Europe and the United States) the procedure mentioned last year of "*notice and shut down*" has been consolidated, which even so is not yet part of the legal system, stemming as it does from the Directive on electronic commerce which has not yet been implemented in our Country.

In this regard, it must be said that the Italian Federation against Musical Piracy (FPM) carries out constant monitoring of the net to identify sites that distribute or favor the diffusion of music reproduced without authorization.

Once the existence of such sites has been discovered, FPM sends a letter of notice to the service provider, demanding that they immediately cease their illicit action and the shut down of the site. Normally the Service providers notified spontaneously shut down the sites, also because FPM often

stipulates in advance co-operation agreements with the aim of making the "notice and shut down" tool more effective.

The procedure has to date permitted action against 700 sites with music by Italian artists, eliminating from the network over 8 thousand pirate copies of illicitly reproduced music tracks (figures for the years 1999 and 2000).

The "notice and shut down" procedure is similar, as mentioned, to the one used in the United States by means of the Digital Millennium Copyright Act (DMCA), with the difference that the latter provides a uniform legal framework for the procedure in question, by means of the imposition for intermediaries of obligations to designate a party appointed for the receipt of notifications and by the setting of requirements for the validity of the notification.

2.3) The "notice and shut down" procedure is a valid tool in the battle against music piracy, which finds an ideal environment on the Internet.

On-line music piracy must therefore be added to the long list of acts of music piracy, which includes simple piracy[8], counterfeiting[9], boot-legging[10] and rental without authorization[11] which to date have made the traditional forms of piracy. It is expressed in a series of diversified behaviors, above all depending on the reasons upon which they are based, that it appears reasonable to divide into two main categories, linked to the type and purposes for which digital music is used as much as those for which Internet is used:

a) individual piracy for personal use, and

---

[8] Simple piracy means unauthorised duplication, generally for gainful intent, of an original recording, without the consent of the rights-holders. These are medium to poor quality recordings, the illicit origin of which is also made clear by the poor quality of the packaging which is in any case different from that of the legal copies.

[9] Counterfeiting is the unauthorised reproduction of an original recording, contained in packaging so perfect that it is difficult, if not impossible, to tell the illicit origin of the product. Infringement of the copyright law, therefore, is accompanied by the counterfeiting of brands and distinctive signs, as well as the logos and authenticity holograms required for sale of the originals. Cases of reproduction and counterfeiting of CDs on a large scale are becoming increasingly numerous.

[10] Bootleg recordings are those made without authorisation at live concerts or in any case of live artistic performances transmitted by radio and television. It should be specified that this is a fairly limited phenomenon, especially due to the poor audio quality of the products that make them difficult to market; generally the market for bootleg recordings is made of fans of some specific kinds of music and collectors.

[11] The unauthorised rental of music products includes those cases in which there is some form of handing over of copies and original audio media protected by copyright, for a limited period of time for the purpose of gaining a direct or indirect

b) organized piracy for gainful intent.

The first one (individual piracy) is characterized by the fact that its purpose is to listen and memorize music found on the Internet and it is committed by private individuals for their own personal use. From one very recent survey conducted by the Federation against Music Piracy (FPM) in conjunction with Vendomusica, the Association of Italian Retailers of Recorded Music, an extremely significant fact emerged: during the year 2000 there was a significant shift in acts of piracy from commercial enterprises (26% of the total, against 37% in the previous year) to private copiers who cut and then distribute recordings (24% of the total, against 2% in 1999). This means that, as was rightly pointed out in the research, in Italy piracy is shifting towards the private side.

The second one (organized piracy) includes more or less complex behavior patterns, with the purpose of obtaining considerable profits from the sale of the pirate material. Organized crime groups are often involved in this form of piracy, which may have various forms and methods.

If the kinds of behavior attributable to music piracy differ, unfortunately the social reaction to it appears to be univocal. Despite the fact that it is now well known that piracy is a profitable form of financing more dangerous criminal activities, there is a kind of collective indulgence for it. In some cases this activity is perceived as one which can level social differences and lower unemployment. Public opinion tends to identify downloading of music from the Internet and the cutting of copies for gainful intent as the natural alternative to the excessive cost of CDs or in any case as a form of reaction to the monopolistic organization of the record market.

A number of anti-piracy raids made by the police in Rimini, with the arrest of 10 illegal immigrants and seizure of over 10 thousand pirate CDs was the subject of a recent news item. The whole operation was examined by the municipal council where, amongst the declarations against the raids the following is worth reporting: *"They were not selling drugs or property stolen from our homes but* ***only counterfeit CDs …..***".

---

financial benefit. It is a trade practice that has considerably increased over recent times and which, in some cases, is part of rather complex organisational systems.

In Italy computer piracy is a phenomenon that is constantly increasing: in Europe our country holds the unhappy leadership both in consumption and in production mainly by virtue of the presence of criminal organizations devoted to production and trafficking of not original material: figures for 1999 give 870 thousand CDs and over 215 thousand audio cassettes, plus 268 CD burners and computers seized.

Yet in relation to international piracy the role played by Italy should not be underestimated: from a survey recently conducted indicating figures for the year 2000, it emerges that Italy is amongst the leading five countries, along with China, Russia, Mexico and Brazil, where the so-called “private” or “domestic” piracy has reached considerable levels, amounting to about 25% of the global piracy market.