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THE NEW INTELLECTUAL PROPERTY RULES IN THE NET

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SUMMARY: 1) Advent and development of Internet; 2) The WIPO Treaties on Copyright and Performances and Phonograms; 3) The Digital Millennium Copyright Act; 4) The Directive n° 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society; 5) The Directive n° 2000/31/EC on Electronic Commerce; 6) The Italian law: current situation and consequences.

1) Advent and development of Internet

1.1) Internet can be defined as a "*global communication network made available by current technology which makes services and contents of all possible kinds available to any without geographical limitations*".

In its present configuration, Internet is in fact a gigantic network that makes it possible to interconnect an infinite number of more limited groups of computer networks connected with one another. Today it is one of the most significant systems in the world, means of interactive communication, used by always more numerous and differing categories of users.

As we all know, Internet was born at the end of the 1960s as an experimental military project, developed by a U.S. intergovernmental agency, ARPA[1], with the aim of making it possible, by means of a series of decentralized and independent connections between computers and computer networks, to

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rapidly transmit messages and communications without direct human participation or control. The ambitious project was based on two assumptions: use of an extremely flexible network without a central point, made of a series of irradiation nodes, where each node was made by a server connected to another server as well as the use of package switching protocols, with which it is possible to fragment and divide each message into smaller message "packages" that are recomposed at destination once they arrive at the receiving computer.

By virtue of easy connection and the potentials inherent to the project, within a very short time it developed from a phenomenon limited to organizations and enterprises working in the field of defense (called "Arpanet"), and began to spread to the university environment and institutions. In the mid-80s it went beyond the boundaries of the university environment and entered the major public institutions and large companies. In 1993, with the introduction of the "www" ("World Wide Web"), Internet became what it is today: a mass communication tool on a worldwide scale.

It is bound to become increasingly successful in a dimension that is ever more accessible to the large public also because it is part, or perhaps it would be better to say a consequence, of that more general phenomenon of liberalization of telecommunications and globalization of markets that is changing the way of living everywhere and is a new challenge, not only technological but also socio-economical and therefore juridical.

1.2) As far as we are concerned, Internet offers the possibility of spreading, searching for, accessing information of the most varied nature without appreciable space and time limits. It acts simultaneously as a means of publication and of communication.

Therefore, as a means of communication and expression without historical precedent, it brings into relief a whole series of problems, especially with regard to the legal framework governing intellectual property.

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[1] The "Advanced Research Project Agency". The aims of Arpa, a U.S. government agency, was to guarantee the security of computer communications against the risk of nuclear attack.

If the quest for an adequate balance between copyright and the interests of the broad public has always been the aim to which copyright legislation has striven, today that quest arises once again under a new required form.

To better understand this statement it should be considered that:

a) computer media evolution has made Internet accessible to an exponentially unlimited number of users (it could be defined as "access globalization");

b) Internet is easily shared at low cost by users;

c) users may surf through the Internet nodes and view text, images and films within a single medium. This convergence of differing communications tools is often brought about by a digitization process which, in computer and electronics terminology, indicates the conversion of an analogue or continuous signal to numerical format, expressed as a decimal number, or as a rule, a binary number (in fact, we talk of conversion to a single format: binary language[2]);

d) Internet offers the possibility of combining, superimposing, integrating data and works of different kinds (so-called multimedia works which include text, images, music).

With regard to digitization, it must be stressed that, while on the one hand it permits increasingly fast and sophisticated communications, on the other it poses considerable problems of legal protection. Indeed, over and above the technical definitions, in practice digitization of intellectual creations principally means "dematerialization" and "reproducibility". "Dematerialization" since digital technology permits the separation of the content of the intellectual creation ("corpus mysticum") from the material support ("corpus mechanicum") that has always been its means of communication and diffusion, with the consequent possibility of directly accessing the content of the work. "Reproducibility" since digital works may be reproduced in an unlimited number of copies, at insignificant cost, maintaining the level of quality almost equal to the original.

[2] Digitization involves in the first place conversion of "analogue" data (images and sounds) to numerical format; these numbers are then coded into binary – electronic – language. This conversion permits computers to store and handle this data. It thus follows that it is the digital image or sound of the work and not just a copy that is read by the computer.

This means that all kinds of works protected by copyright, whether they are texts, images, films or a musical file, can be reproduced, without effort and at low cost, in an unlimited number of copies almost identical to the originals.[3]

They can be reproduced even without material copies and in non-permanent forms, since it is the party concerned who chooses these characteristics. The cost of reproduction is practically nil, each copy may be perfect, from the point of view of quality, as the original and the party to whom the first copy is transmitted may in turn transmit it to others without depriving him or herself of possession thereof.

No obstacle then prevents the conversion of a reproduction, originated for the purposes of study or research, to a reproduction enjoyed for the purposes of entertainment or to a copy to be sold for a consideration[4].

It is clear then that an author who today makes a work available on the net exposes him or herself to the risk (or rather, cannot prevent) that the work is further reproduced in several copies, transmitted over the web, partially or fully used in other works and even elaborated to give rise to a new derived work, and this may occur, obviously, without his or her knowledge and permission and without the possibility of a real protection.

In the light of these preliminary remarks, it appears clear that in a correct perspective and context of the Internet phenomenon, regulation of copyright aspects takes on a central and extremely delicate role.

1.3) It has in fact been stressed that *"Intellectual property ..... is very much put at risk by the fact that it is no longer the possession of a book, a record, a patented product of pharmaceutical or whatever other kind or, lastly, any kind of software that defines its purchase or violation, but simply* ***the possibility of access to the web.*** *This possibility has no comparison with the legal situation that protected property of material goods. The goods here belong to everyone and everyone may consume them, therefore access to the web becomes the new, strange and unexpected legal circumstance that must be regulated to prevent property rights from being trampled upon".*[5]

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[3] A danger indicated by C. Gattei "European proposals for copyright of digital works on the Internet", report presented at the Second Meeting of the Multimedia Forum "*The Information Society, the Law and the Network*", Rome 12th November 1997.

[4] On this subject, the famous "Napster" case is a lesson to us. An incentive, in fact, to audio file piracy on the Internet came from the recent development of the "MP3" audio compression protocol, which made transmission of increasingly large-sized and high quality files particularly easy.

[5] From Il Corriere della Sera dated 4th May 2001: "**The rights of Cyberspace**" by Guido Rossi

This inescapable reality moreover is fuelled by the modern mentality of the web surfer who, without controls, has come to believe that nothing is prohibited or illicit or even that whatever can be found on the web belongs to everyone and no-one. In this way, individuals are given a chance to violate with impunity and with extreme ease, the national laws and international regulations on copyright.

The widespread nature of Internet inevitably leads to the need to nationally and internationally review and update the legal framework regarding the protection of works of the intellect as well as the elements safeguarded by the neighboring rights.

While in fact, on one side, one can speculate that the "old" copyright regulations (Berne and Rome Conventions, to mention the most important ones) are no longer able to ensure control of the use of works and must therefore be reconsidered in detail and modified, on the other side, not only at national level but also at European Union and international level, the prevalent thinking is that the existing laws are still able to serve their traditional purpose, even if adjustments are required to regulate the new forms of usage in digital environment[6].

This new drive towards redefinition of the traditional institutions of the rights of intellectual property as well as regulation of the telecommunication networks has nevertheless been opposed for a long time by the telecommunication networks themselves and by their users, who champion the free circulation of information, without limitations and above all free of charge. After all, there are great interests involved.

This has led, especially with regard to Europe, to a very long delay in issuing rules, which, it must not be forgotten, are in any case the result of a new compromise that modifies the traditional balance between just recognition of the expectations of authors and the legitimate desire of the general public to obtain information and knowledge.

2) The WIPO Treaties on Copyright and Performances and Phonograms

[6] In this sense, the follow-up to the Green Paper on Copyright and Related Rights in the Information Society (20.11.1996) states that "*..our existing copyright legislation will form a basis for the information society*".

2.1) In December 1996 an important diplomatic conference was held in Geneva by the WIPO (World Intellectual Property Organization), an intergovernmental organization sponsored by the United Nations the aim of which is to promote respect, protection and use of intellectual property in the world.

The declared objective of the Conference was to update the Berne and the Rome Conventions in the light of the problems posed by diffusion of Internet as well as the issue of a new treaty to regulate databases.

The Conference resulted in two new treaties which innovate the previous regulation and extend copyright and neighboring rights protection to digital works: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, which introduce a protection of works of intellect higher than the minimum guaranteed by the Berne Convention.

Concerning the content of the WIPO Copyright Treaty, on which we will prevalently focus our attention, it sets down a number of provisions clearly intended to strengthen copyright protection in two ways: on the one hand by extending the prerogatives granted to the authors, on the other by providing measures aimed at preventing circumvention of the right.

The Right of Communication to the Public

2.2) Art.8 of the WIPO Copyright Treaty is of great importance and states that "*Authors of literary and artistic works shall enjoy the exclusive right of authorizing 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 these works from a place and at a time individually chosen by them*".

While its formulation partially differs, **art.14** of the WIPO Performances and Phonograms Treaty appears entirely similar to the above provision and states that "*Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them*".

On this subject, it should be remembered that the right of communication to the public set down in the WIPO Copyright Treaty has a precedent in **art.11-bis** of the above mentioned Berne Convention which states that *"Authors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images; (ii) any communication to the public by wire or by rebroadcasting of the work, when this communication is made by an organization other than the original one ……".*

With regard to Italy, within this category the Law n° 633/1941 makes a distinction between the right of communication to the public (**art. 15**) limiting it to musical, dramatic and cinematographic works and the right of diffusion (**art.16**), which recognizes the author's exclusive right of diffusion by the use of any means of diffusion at a distance.

In fact, the choices made in the WIPO Treaties are designed to bring into the field of communication to the public, following an already consolidated trend on the part of the international literature, some circumstances regarding diffusion and enjoyment of works on the Internet, where it was debated whether they belonged to the traditional right of diffusion or communication at a distance or rather to the right of distribution, even if dematerialized (that is digitalized on line distribution).

This issue, as we shall see, was also discussed when the recently approved European Union Directive n° 2001/29/EC on the Harmonization of certain Aspects of Copyright and Related Rights in the Information Society was set down although, on this point, the EU has opted for a solution different to the one chosen in the two WIPO Treaties.

The main problem encountered when studying operations that take place on the web and which concern works subject to copyright protection is that it is difficult to legally frame the new modes of use and enjoyment of intellectual works made possible by Internet and the information infrastructures. Such forms will in fact certainly replace the forms of economic exploitation of the work that are based on the traditional distinction between the "*Corpus mysticum*", or the work considered as immaterial good belonging to its author by virtue of the original title of creation, and the "*Corpus mechanicum*", made of

copies of the book or work of figurative art, belonging to the purchaser of the material object which expresses or reproduces the work.

Also this distinction made easy to divide the exclusive faculties of use of works of the intellect granted to the right-owner into two basic categories:

i) the faculty of public performance, recitation and execution (belonging to the category of communication to the public); and

ii) the faculty of reproduction which includes all modes of reproduction of the intellectual creation.

While the first necessarily implies a mere enjoyment of the work, the second one occurs by hand-over of the work or of a copy thereof, i.e. by "traditio" of the material media incorporating the intellectual work.

Precisely because digitization and the Internet have made it possible to separate the content of a work from its hard expression, which served as a means of transfer and diffusion, there was a need to establish whether transmission and enjoyment of protected works over the Internet should be considered as a mode of exercising the right of communication to the public of the work or the right of distribution[7].

Attributing these operations to the one or the other category of rights is no trifling matter when one considers the principle of independence of the rights of economic exploitation, by virtue of which the right-owner of the distribution right may not be the owner of the right of diffusion, and when one pays attention to the fact that while the right of distribution is subject to the EU exhaustion principle, each single act of diffusion is subject to the authorization of the right-owner.

The Right of Reproduction

2.3) It is important to note that in an initial draft **art.6** of the WIPO Copyright Treaty, on the subject of right of reproduction ("*Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and of copies of their works through sale or other transfer of ownership*"),

[7] It should not be forgotten, moreover, that the technology upon which Internet is based permits enjoyment of the work only if it is temporarily memorized in the receiver's computer.

accepted a notion of copy that was so broad ("*.....in any manner or form including direct and indirect reproduction of their works, whether permanent or temporary*") that it would have been easily extended to the electronic copies that are created in computer RAM memories during transmission of works on the web.

This article gave rise to strenuous protest by telecommunication companies and Internet Services Providers (ISP) who feared that the protection granted to temporary copies would result in an increase of liability for them, and therefore this version of art. 6 was withdrawn.

Nevertheless the Parties to the Treaty thought it advisable to add a statement separate from the main text of the Treaty (concerning Article 1(4)), by virtue of which "***The reproduction right****, as set out in Article 9 of the Berne Convention,* ***and the exceptions permitted thereunder fully apply in the digital environment****, in particular to the use of works in digital form*".

The phenomenon of diffusion of works or recordings via Internet is therefore defined in the WIPO Treaties as the exercise of the right of communication to the public, granted exclusively to authors and phonogram producers, clearly stating that the digital environment does not prejudice the exercise of the right of reproduction, which finds full application therein.

2.4) Lastly, with regard to the provisions of the second type, aimed at introducing measures of a preventive nature, it is enough to remember **art. 11** of the WIPO Copyright Treaty, which commits the Contracting Parties to providing adequate legal protection and effective legal remedies against the circumvention of technological measures that are used by authors to protect their rights and **art. 12** of the same Treaty that commits the Contracting Parties to providing adequate and effective legal remedies against practices that result in an alteration of the information regarding the legal status of a given work.

For information, it should be mentioned that the European Union Commission, as part of its policy for harmonization of the legislation of Member States, on 27th April 1998 presented a proposal for a decision to approve the two WIPO Treaties on behalf of the European Community.[8]

3) The Digital Millennium Copyright Act

3.1) The Digital Millennium Copyright Act was approved by the United States Congress on 28th October 1998. It is a very detailed law divided into five parts, each of which substantially represent a distinct body of laws.

They are:

a) Title I: "*WIPO Treaties Implementation*";

b) Title II: "*Online Copyright Infringement Liability Limitation Act*", which generates limitations to the liabilities of Internet Service Providers (ISPs);

c) Title III: "*Computer Maintenance or Repair Copyright Exemption*", containing a series of exemptions designed to permit the copying of computer programs for the purposes of maintenance or repair;

d) Title IV: "*Miscellaneous Provisions*", containing a series of various provisions concerning the Copyright Office, education from a distance and exemptions from the provisions of this law;

e) Title V: "*Protection of Certain Original Designs*", regarding new forms of protection of industrial design.

Title I (WIPO Treaties Implementation), containing a series of regulations designed to harmonize the federal regulation with the provisions of the two WIPO Treaties, and Title II (Online Copyright Infringement Liability Limitation) are worth being analyzed briefly.

3.2) Title I revolves around three fundamental provisions: the first (the so-called "Basic Provision") prohibits anyone to circumvent a technological measure the main function of which is to control access to a protected work. The second (the so-called "Ban of Trafficking") prohibits anyone to make, import or market equipment or tools of which the primary function, or the function effectively performed, is to circumvent a technological measure that controls access to a protected work. Lastly, the third (the so-called "Additional Violation") prohibits anyone to make, import or market equipment or tools of

[8] As far as the United States are concerned, the US Senate ratified the two WIPO Treaties on **21st October 1998**. The

which the primary function, or the function effectively performed, is to circumvent a technological measure designed to protect a right reserved to the copyright holder. In addition to a detailed system of civil remedies, the law states that intentional non-observance of these three prohibitions, for the purposes of profit, shall be punished by very high penalties. Some exceptions are established for non-profit libraries, educational institutions or dictated by needs related to technological development, the protection of minors or of privacy and national security.

3.3) In Title II, on the other hand, the lawmakers expressly defined a system of liability on the part of the ISPs (Internet Service Providers) and they did so by putting forward specific and detailed cases in which this liability does not apply (in this regard it is interesting to note that the very exemptions defined in the United States law have been subsequently adopted in the European Directive on electronic commerce, which is clearly based on the DMCA.)

By virtue of what is stated in the Digital Millennium Copyright Act, an ISP is held liable for violation of copyright unless:

a) the ISP acts as a **mere means of transmission**: in this case the ISP is not liable to pay compensation nor, as a general rule, subject to a inhibitory measure if the content transmitted or even momentarily stored in the memory during transmission constitutes a copyright violation;

b) "**caching**" occurs, whereby copies containing material created by a third party which are intended to be retransmitted to the subscriber at his request and at the discretion of the Internet Service Provider are made or stored for a limited time;

c) the ISP provides a data **hosting** service and:

(i) cannot have any knowledge of activity taking place on its system in violation of copyright;

(ii) or, should it be aware of such activity, does not derive any benefit from it;

(iii) lastly, it takes action to remove or prevent access to the infringing material when it is informed of the violation according to a specific procedure analytically regulated by the law;

Copyright Treaty has also been ratified by Moldavia, Belarus, El Salvador, the Republic of Kirghiz and Indonesia.

d) the service provided by the ISP consists of connecting or re-routing users to a site containing material which violates a copyright (**link**). As in the previous case, the benefit of the liability limitations is conditioned to the absence of knowledge and of economical benefit as well as to the prompt removal of the infringing material.

It should also be considered that the liability limitations (the so-called Safe Harbors) are operative if two further conditions are present:

a) the first demands that the ISP adopts and puts in place means by which the service to subscribers who have repeatedly committed copyright violations may be interrupted;

b) the second demands that the ISP hosts, and does not interfere with, all the ordinary technological measures designed to protect copyright.

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

4.1) Decidedly late if compared to the action taken at international level by the adoption of the two WIPO Treaties, which we have just discussed, and if compared to the United States laws, the European Union also has adopted an instrument to regulate copyright and neighboring rights in relation to the expansion of Internet.

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 modernity 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, 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

4.2) 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

4.3) 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[9]). 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.

[9] 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.

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.

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.[10]

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

4.4) 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[11].

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 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[12]. 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.

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

[11] 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.

[12] 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.

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*".[13]

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 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*".

[13] 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.

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.

4.5) 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.

4.6) 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.

5) The Directive n° 2000/31/EC on Electronic Commerce

5.1) A further contribution to the subject that we are discussing comes from the rules introduced by the Directive n° 2000/31/EC, adopted by the European Parliament and by the Council of the European Union on 8th June 2000 and published in the Official Journal of the European Communities (L. 178) on 17th July 2000, with the aim of liberalizing on line services, including promotion and distribution of music on the Internet. Such activities are liberalized on the basis of the Country of origin principle: when a service is set up in a Member State, it may be used throughout the European Union and the legislation of the Country of origin, where the *content provider* has its offices, shall apply to that service (Art. 3). An exception to this rule is introduced for copyright (Art. 3, third paragraph) for which

therefore the principle of territoriality (*lex loci*), i.e. the law of the country where protection is sought, shall continue to apply. Within the European Union therefore, content providers must respect the copyright regulations in force in each Member State, in consideration of the fact that the contents of their site may be accessed throughout the European Union without territorial limitations.

5.2) The Directive outlines the liability of service providers (Articles 12, 13, 14 and 15) basing this liability on the model set down in the United States Digital Millenium Copyright Act, excluding from direct liability any activities that are limited to a mere passive conduit on the part of the service provider.

In particular it should be remembered that the service provider is not liable for information transmitted when it acts as a "mere conduit" (Art. 12 , paragraph 1) and therefore:

a) does not originate the transmission;

b) does not select the receiver of the transmission; and

c) does not select or modify the information contained in the transmission.

With regard to so-called "caching" (the temporary storage of data along the network) the rules exclude the liability of the service provider for automatic, intermediate and temporary storage of information performed for the sole purpose of making more efficient the onward transmission of the information to other recipients of the service upon their request, on condition that:

a) the provider does not modify the information;

b) the provider complies with conditions on access to the information;

c) the provider complies to the rules regarding the updating of the information;

d) the provider does not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data on the use of the information; and

e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a Court or an administrative authority has ordered such removal or disablement (Art. 13, paragraph 1).

With regard to the service of data storage at the request of the receiver ("Hosting", Art. 14), liability on the part of service providers is excluded only when they have no actual knowledge of illegal activity or information and, as regards claims for damages, are not aware of the facts or circumstances from which the illegal activity or information is apparent; lastly, upon obtaining such knowledge or awareness, act expeditiously to remove or disable access to the information. (Art. 14, paragraph 1).

Lastly, it is important to note that the Directive also established that Member States must ensure that Court actions available under national law concerning the activities of information society services allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved (Art. 18).

6) The Italian law: current situation and consequences

6.1) Italy still has to ratify the two WIPO Treaties and implement the two above mentioned Directives. In doing so, it will be necessary to proceed to harmonize the above mentioned principles within the Italian legal framework, among which specifically the right of communication to the public and the right of reproduction.

In the WIPO Treaties, in fact, the diffusion of the works and recordings on the Internet is defined as exercise of the right of communication to the public, an exclusive right recognized to authors and phonogram producers, with the specification (contained in the separate statement) that the digital environment does not prejudice the exercise of the right of reproduction, which finds full application therein.

On the contrary, according to the definition provided by the Directive on Certain Aspects of Copyright and Related Rights in the Information Society the same phenomenon, as we have seen, is regarded as the exercise at the same time of both rights (communication to the public and reproduction), but it specifies that, of these rights, only the first one, i.e. the communication to the public, is fully and exclusively recognized to authors and phonogram producers, while for the second one, i.e. the right of

reproduction, although expressly recognized, an *ex lege* exception has been configured and the right may therefore be exercised without the consent of the right-holder.

Therefore, when both sets of rules will be implemented in Italy, there will be the problem of determining whether prevalence should be given to the provision contained in the separate statement of the WIPO Treaties, from which the exclusivity of the right of on line reproduction would follow, or the definition given in the Directive, from which its non-exclusivity would follow.