



StudioLegalePojaghi
ASSOCIAZIONE PROFESSIONALE



OCTOBER 2008

THE ROLE OF COPYRIGHT IN THE INFORMATION SOCIETY

Avv. Gianluca Pojaghi

Introduction

Under the umbrella of the European Commission's policy on the European Single Market, the role of the Directorate General is to remove obstacles to free movement of services and capital and to freedom of establishment, thus ensuring that the opportunities offered by the Internal Market are fully exploited.¹ Within the ambit of this mission, and with regards to the need to adjust copyright to new digital technology, the Directorate General is charged with the development and implementation of a European legal framework in the sectors of Copyright, intellectual property and Electronic commerce.² In light of the explosion of internet use and the mass of resulting case law, this paper intends to offer a few remarks on the development and harmonization of copyright protection in the information society and the challenges posed by the new technologies.

Legal Background

The Berne and Rome Conventions

Pre-dating the advent of the internet, the Berne Convention for the Protection of Literary and Artistic Works of 1886³ first brought copyright into the international arena. The aim of the Convention was to help nationals of its member States obtain international protection of their right to control, and receive payment for, the use of their creative works.

The Berne Convention, as described by the World Intellectual Property Organization (WIPO), "...rests on three basic principles and contains a series of provisions determining the minimum protection to be

¹ http://ec.europa.eu/dgs/internal_market/mission_en.htm

² Other sectors include Financial services; Postal services; Media; Public procurement; Recognition of professional qualifications; Patents and industrial property; Accounting and auditing; Commercial communications and unfair competition; and Contract law.

granted, as well as special provisions available to developing countries which want to make use of them”.⁴ The three basic principles are: (i) national treatment; (ii) automatic protection; and (iii) independence of protection. The first, and most important, principle is the principle of “national treatment”, meaning that works originating in one of the contracting States must be given the same protection in each of the other contracting States as the latter grants to the works of its own nationals. Second, the principle of “automatic protection” refers to the fact that such protection must not be conditional upon compliance with any formality. Finally, the principle of “independence of protection” translates as protection independent of the existence of protection in the country of origin of the work. The only condition being where a contracting State provides for a longer term than the minimum prescribed by the Convention and the work ceases to be protected in the country of origin, then protection may be denied once protection in the country of origin ceases. Within the meaning of the Convention, the term "work" is defined as, “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression”.⁵

As for the duration of the protection afforded under the Berne Convention, the general rule is that protection must be granted for 50 years *post mortem auctoris* (after the author’s death). There are, however, exceptions to this general rule. In the case of anonymous or pseudonymous works, the term of protection expires 50 years after the work has been lawfully made available to the public, except if the pseudonym leaves no doubt as to the author’s identity or if the author discloses his identity during that period; in the latter case, the general rule applies. In the case of audiovisual (cinematographic) works, the minimum term of protection is 50 years after the making available of the work to the public (“release”) or - failing such an event - from the creation of the work. In the case of works of applied art and photographic works, the minimum term is 25 years from the creation of such a work.

The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961 secures protection in: (i) performances of performers; (ii) phonograms of producers of phonograms; and (iii) broadcasts of broadcasting organizations.

Under the Rome Convention, performers are protected against certain acts they have not consented to. Such acts include the broadcasting and the communication to the public of their live performance; the fixation of their live performance; the reproduction of such a fixation if the original fixation was made without their consent or if the reproduction is made for purposes different from those for which they gave their consent.

³ The Berne Convention, concluded in 1886, was revised at Paris in 1896 and at Berlin in 1908, completed at Berne in 1914, revised at Rome in 1928, at Brussels in 1948, at Stockholm in 1967 and at Paris in 1971, and was amended in 1979.

⁴ http://www.wipo.int/treaties/en/ip/berne/summary_berne.html

⁵ Article 2(1) of the Convention.

As for the producers of phonograms, they enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.⁶ When a phonogram published for commercial purposes gives rise to secondary uses (such as broadcasting or communication to the public in any form), a single equitable remuneration must be paid by the user to the performers, or to the producers of phonograms, or to both; contracting States are free, however, not to apply this rule or to limit its application.

Finally, broadcasting organizations enjoy the right to authorize or prohibit certain acts, namely: the re-broadcasting of their broadcasts; the fixation of their broadcasts; the reproduction of such fixations; the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

The Rome Convention allows exceptions in national laws to the above-mentioned rights as regards private use, use of short excerpts in connection with the reporting of current events, ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts, use solely for the purpose of teaching or scientific research and in any other cases - except for compulsory licenses that would be incompatible with the Berne Convention - where the national law provides exceptions to copyright in literary and artistic works. Furthermore, once a performer has consented to the incorporation of his performance in a visual or audiovisual fixation, the provisions on performers' rights have no further application.

The duration of the protection lasts for at least a 20 year period computed from the end of the year in which: (a) the fixation was made, for phonograms and for performances incorporated therein; (b) the performance took place, for performances not incorporated in phonograms; (c) the broadcast took place, for broadcasts.⁷

The WIPO Treaties on Copyright and Performances and Phonograms

Adopted in Geneva in 1996, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty intend to extend copyright and neighboring rights protection to digital works, introducing a protection of works of intellect higher than the minimum guaranteed by the Berne Convention by (i) extending the prerogatives granted to the authors and (ii) providing measures aimed at preventing circumvention of their right.

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

⁶ Phonograms are defined in the Rome Convention as meaning any exclusively aural fixation of sounds of a performance or of other sounds.

⁷ However, national laws ever more frequently provide for a 50-year term of protection, at least for phonograms and for performances.

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”.

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 re-broadcasting of the work, when this communication is made by an organization other than the original one

According to a statement separate from the main text of the Treaty (concerning Article 1(4)), “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 diffusion of works or recordings via Internet is therefore defined as the exercise of the right of communication to the public, granted exclusively to authors and phonogram producers, while clearly stating that the digital environment does not prejudice the exercise of the right of reproduction, which finds full application therein.

Finally, art. 11 of the WIPO Copyright Treaty commits the Contracting Parties to providing adequate legal protection and effective legal remedies against the circumvention of technological measures used by authors to protect their rights and art. 12 of the same Treaty 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 (DRM).

The Term Directive

The first initiative to harmonize copyright within the European Union was Council Directive 93/98/EEC⁸, made under the internal market provisions of the Treaty of Rome. In the European Union, there had been a concern about a lack of harmonization in copyright standards between member nations. The copyright term for works of natural authors ranged from life of the author plus 50 years in some countries, to life of the author plus 60 years in Spain, to life of the author plus 70 years in Germany. Therefore, the principal goal was to ensure that there was a single duration for the

⁸ Directive 93/98/EEC has been repealed and replaced by Directive 2006/116/EC.

protection of copyright and related rights within Europe. The 50 year term of the Berne Convention was amended and extended to 70 years. The roots of the decision can be found in German Law which afforded protection for 70 years after the death of the author, in contrast with Italian and other Laws which only afforded protection for 50 years after the death of the author.

The reasoning behind the decision can be found in the Recitals of the Directive. Recital 5 noted that "the minimum term of protection laid down by the Berne Convention, namely the life of the author and 50 years after his death, was intended to provide protection for the author and the first two generations of his descendants." The Recital noted that "the average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations." Recital 6 then acknowledged that "certain Member States have granted a term longer than 50 years after the death of the author in order to offset the effects of the world wars on the exploitation of authors' works." Recital 9 stressed that "a harmonization of the terms of protection of copyright and related rights cannot have the effect of reducing the protection currently enjoyed by right-holders in the Community; whereas in order to keep the effects of transitional measures to a minimum and to allow the internal market to operate in practice, the harmonization of the term of protection should take place on a long term basis". Therefore under Recital 11 it is established that in order to attain a high level of protection, which at the same time meets the requirements of the internal market, the term of protection for copyright should be harmonized at 70 years after the death of the author or 70 years after the work is lawfully made available to the public.⁹

The Information Society Directive

The 2001/29/EC Directive was the first instrument adopted by the European Union to regulate copyright and neighboring rights specifically in relation to the expansion of the internet. It has proved to be a long and laborious process beginning with the Green Paper on Copyright and Related Rights in the Information Society dated July 19, 1995. 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. A series of amendments to the text were discussed and voted by the European Parliament on February 14, 2001. This was then passed to the EU Council for examination and was finally approved on April 9, 2001.

⁹ For neighboring rights at 50 years after the event which sets the term running.

With this directive, the European Commission attempted to harmonize author's rights to control: (i) use of their works with respect to reproductions; (ii) communication to the public by electronic means; and (iii) distribution of hard copies.

With regards the right of reproduction, the Directive states under article 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. This new definition of reproduction was designed to cover all relevant activities performed on the Internet.

Article 3 of the Directive concerns the right of communication to the public, granting authors and other right-owners the exclusive right to authorize or prohibit any communication to the public of their work. This issue was already dealt with in the Copyright Treaty approved by WIPO, in article 8, and is also included in the Berne Convention, under article 11 bis. However, the Directive rules that the above communication also exists when enjoyment of the work takes place in a place and time chosen by the users themselves (i.e. on demand).

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. 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 exception in question concerns all temporary reproductions required by web transmission and all acts of temporary or incidental reproduction which form an integral part of the technological process of transmission.

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 and 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.

Lastly, Article 7 of the Directive establishes that Member States must provide measures to guarantee the presence and permanence of rights-management information, i.e. 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 (DRM).

The Electronic Commerce Directive

A further contribution to the subject matter comes from the Directive n° 2000/31/EC, aiming at liberalizing on line services, including promotion and distribution of music on the Internet, on the basis of the principle of the Country of origin: 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.

The Directive also 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 Millennium Copyright Act and, at European national level, the footsteps of Art. 5 of the German law of July 22, 1997 on the information and communication services¹⁰.

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

- a) it does not originate the transmission;
- b) it does not select the receiver of the transmission; and
- c) it 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 with 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

¹⁰ “*Informations und Kommunikationsdienste Gesetz*”

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).

Jurisprudence

The issue of the responsibility of the service providers in the information society in connection to the use (or abuse) that the users sometime make of contents protected by copyright has been debated for quite some time. Here are just a few of the decision that have been rendered in the past year and a half.

Social Networking Sites, Peer to Peer

Jean Yves L. dit Lafesse Vs Myspace

On June 22, 2007, the Tribunal de Grande Instance of Paris expressed itself on the claimed reproduction of sketches on a page of a website organized in customizable frames (www.myspace.com), structured according to a scheme established by the service provider and intended to be used for exchange and sharing of data by the users. The novelty of the decision, worth noting, was that the Court did not held applicable to the matter under discussion the mentioned legal provision of exclusion of responsibility for hosting activities, on the contrary dictating the principle that the service provider that offers a display structure of frames evidently made available to the contributions of the hosted users and disseminates, on the occasion of every access, advertisements from which a profit derives holds the qualification of publisher of the site, with every consequent responsibility for the content thereof.

Sabam Vs Scarlet

A few days later the Paris decision was followed by a second one, given on June 29, 2007, by the Tribunal de Première Instance of Brussels, called to examine the case of internet exchange, not authorized by the right-owners, of musical recordings made through an electronic system (so called peer to peer), and the consequent request that the site provider (www.scarlet.be) be imposed to adopt measures to prevent the use of the file sharing program. According to the defendant, the measure appeared to be unjustified, as the provisions of the mentioned European Directive on electronic commerce did not imply a general obligation to monitor; would prejudice the exemption of

responsibility pertaining to the provider according to the law and would violate the person's rights to confidentiality, secret of correspondence and freedom of expression. Disregarding the defense argument, the Court held that the community law provision on the exemption from the general obligation to monitor intends to avoid that the national Judge deducts a responsibility of the provider for the sole fact of the presence in the net of an illegal communication, but does not limit the same Judge from imposing measures of prevention, especially when considering that the same Directive foresees the possibility to adopt technical measures of prevention (whereas 40) and to impose injunction of different kind (whereas 45). Nor the Court held that the said measures would imply an invasion of the personal sphere of the users, consisting in mere technical and general interventions as an anti-virus or an anti-spam would be, that do not lead to the identification of the user.

Christian C., Nord Ouest Production Vs Dailymotion, UGC Images

On July 13, 2007, again the Tribunal de Grande Instance of Paris dealt with a case of unauthorized streaming and download of a motion picture work, available through the site www.dailymotion.fr. According to the defendant, provider of the on line services of access to the communication to the public, the latter would have limited itself to making available the spaces from which the users have the possibility to download and store personal videograms and to access videograms of others, sharing their contents, with exclusion of any own responsibility if not within the limits set forth by the provisions of the electronic commerce regulation (the Directive n. 2000/31, implemented in France with Law n. 2004-575 of June 21, 2004, and following provisions), noting to have already proceeded with the removal of the film, according to the law, after having been informed of its illegal use on the site. Again, the Court held that the mentioned provisions of law do not imply an exclusion but only a limitation of responsibility in the case in which the provider does not have actual knowledge of the infringement. Should instead the provider aim at the income deriving from the commercial management of the site through the making available to the public of well known works, the principle of freedom of the electronic communication must find its limit in the need to respect the intellectual property of others, with the consequence that, in such case, the service provider must bear the burden of adopting technical measures that prevent the access to contents by illegal means and the absence of such measures implies the responsibility of the provider.

Zadig Productions Vs Google Inc.

With decision of October 19, 2007, the Tribunal de Grande Instance of Paris has addressed the issue of the responsibility for hosting services referred to the "Google video" service, through which a documentary entitled "Les enfants perdus de Tranquility Bay" ("Tranquility Bay", in the international

version) had been repeatedly made available on line by several users, and this notwithstanding the sending of several cease and desist letters by the right-owner Zadig Productions. In application of the rule set forth by articles 14 and 15 of the Directive under discussion, Google Inc. was held responsible, and condemned, for not having timely adopted the necessary measures for the removal of the infringement. The defense of the search engine (Google) was in the sense of having performed activities of mere information hosting according to the mentioned Directive and to have timely conformed to the demands to proceed with the removal following the cease and desists letters received. So, however, has not held the Court noting that, if it is true that the activity of mere hosting does not entail a general obligation to monitor the net contents, it is also true that the mentioned provisions entail not an exemption but rather a simple limitation of responsibility, with the consequence that the intermediary, having been for the first time informed of the illicit character of the video, should have acted promptly also to remedy to further uploads without waiting to receive, for each of them, the renovation of the cease and desist letter from the right-owner.

Google Inc. Vs Benetton

Again, with decision of December 12, 2007, the Court of Appeal of Paris has affirmed the responsibility of the same search engine (Google) for hosting activities, noting that the “immunity” (this time so defined) of the intermediaries is subject to two conditions: (i) that such intermediaries had no knowledge of the illegality of the data and (ii) that they promptly proceeded with the their removal. In the matter at hand, it was therefore held the responsibility of the intermediary for both having proceeded with the removal only with faulty delay and not having conserved the identifying data of the infringer.

Marianne B. Vs Wikimedia Foundation

To opposite conclusions, as a matter of fact, came instead the already mentioned Tribunal de Grande Instance of Paris with order of October 27, 2007, this time by examining the issue of the responsibility of the defendant for the information contained in the famous universal multilingual encyclopedia (Wikipedia), however excluding such responsibility for having hold the foundation not the publisher of the collective work but a the mere provider of hosting services, therefore exempt from the obligation to monitor set forth by the Directive under discussion. In this case, the judge still excluding the subsistence of a general obligation to monitor the contents, it was therefore held that the illegality of the data was not existing nor knowledgeable by Wikimedia, also for the unsuitability to the purpose of the cease and desist letters sent by the right-owner.

Les Arnaques.com Vs Editions régionales de France

Along the same negative line, but still in application of the same principles, also came the Court of Appeal of Versailles that, with decision of December 12, 2007, after having noted that the French law of implementation of the Directive under discussion introduced a regime of responsibility of the “hosting” intermediaries aimed at favoring the development of information exchanges through the guarantee system of the preemptive cease and desist letter, held that the company organizing a forum (www.lesarnaques.com) actually exercises hosting activities and, however, rejected the claims filed against it by a third party (Editions régionales de France) for not having the latter sufficiently specified the facts and circumstances held as violating its rights.

Jean Yves Lafesse Vs Daily Motion

Nor, on the other hand, should be taken for granted the protection of the rights of the author of the works illegally reproduced. With decision of December 18, 2007, still the Tribunal de Grande Instance of Paris has, in fact, rejected the claims proposed by a French humorist (Lafesse) against the Internet Service Provider (ISP) of a website (www.dailymotion.fr) in relation to the alleged illegal making available on line of videos containing reproduction of his works, for having the former missed to offer to the Court the evidence of the correspondence between the same works and the material published on the site.

Copyright Vs Privacy protection

Scpp, Sacem Vs J.P.

From a different viewpoint, the issue has been examined also with reference to the privacy regulation. The Court of Saint-Brieuc (France), with decision of September 6, 2007, voided the preliminary ascertainment of the exchange of musical files (peer to peer), as the identification of the infringer through the de-codification of his IP address took place in violation of the personal data protection regulation, that allows the acquisition thereof for purposes of justice only by judiciary police agents and not, such as in the case at hand, by sworn officers of the claimants (the French publishing and phonographic collective companies).

Techland, Peppermint Vs Telecom Italia, Wind (part 1)

The French decision followed two decisions given by the Tribunale di Roma on July 14, 2007, called to examine the case of unauthorized on line sharing (through the internet accesses made available, respectively, by Telecom Italia and Wind) of an electronic game and musical recordings, still made through peer to peer programs. During the litigations, the Privacy Protection Authority intervened into

the processes, objecting the claim by arguing that the data object of the petitions according to art. 156 bis of Copyright Law (that grants the party that suffered the copyright violation the right to obtain from the Judge the order that the opposite party supply elements to identify the individuals implicated in the infringement) could not be treated against the provisions of law concerning privacy protection. The Court substantially endorsed the exception raised by the Authority, noting that the mentioned art. 156 bis meets the limit dictated by the regulation ruling the protection and confidentiality of personal data as resulting from the internal, primary and constitutional (Constitutional Court Decision n. 372/2006) legislative frame, as well as from community law, according to the contents of the Directives for the protection of privacy in the electronic communications and for the enforcement of intellectual property rights, the latter holding safe the former. From which the prohibition to use and process data for purpose of justice, if not for crimes of particular gravity, derives. From a different viewpoint, the Court held the mentioned art. 156 bis contrary to the regulation for the protection and confidentiality of personal data according to art. 121 and following of the privacy Code (legislative Decree n. 196/2003), in the sense that in the sector of electronic communications, such as (according to the Court) the one under discussion, the listening, storing and other forms of surveillance of the communications and of the relevant traffic data for purpose of private interest must be held illegal in the absence of the consent of the user.

The decisions summarized above came to different conclusions with regards to the responsibility of the provider for the different relevancy given to the rules on the protection of personal data, which for the (sole) roman judges result as an obstacle to the use of the data in a civil proceeding. It should be noted, however, that the difference is only that and does not touch other aspects which are more specifically relevant to the merits of intellectual property protection, it does not entail the legalization of systems of enjoyments of the rights of others without the consent of the right-owners, which are and remain illegal, nor cancels the responsibilities of the providers foreseen by the Directive on electronic commerce, as mentioned above.

Promusicae

More recently, however, came a significant decision of January 29, 2008, of the European Court of Justice, upon the initiative of Promusicae, an association of producers and publishers of audio and audiovisual recordings that had required the commercial Court of Madrid to order Telefonica, an internet access service provider, to reveal the identity of users of a software for the exchange of musical recordings (peer to peer); such use constituting, according to the claimant, an act of unfair competition and violation of intellectual property rights. Once introduced the proceeding, the case has been referred

to the European Court by the Madrid Court on whether the community rules allow member States to limit to criminal, public security and State security investigations, therefore excluding civil litigations, the obligation to disclose data on electronic network communications. In other words, if the community legislation require the member States to institute the obligation to communicate personal data in the context of a civil proceeding. With ample and detailed motivation, the incidental Judge declared that some recent Directives in the subject matter of intellectual property (2000/31/EC, 2001/29/EC and 2004/48/EC) and the Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, do not require the member States to lay down such obligation; and that, however, member States must guarantee a fair balance between the various fundamental rights protected by the Community legislation.

Techland, Peppermint Vs Telecom Italia, Wind (part 2)

Back in Italy, the Personal Data Protection Authority, with decision of February 28, 2008 at the end of the investigation on the "Peppermint" case (see above) reaffirmed its earlier opinion and confirmed the prohibition to the service providers "to make (further) use of personal data illegally gathered" within the factual circumstances object of the proceedings examined by the Court of Rome, interpreting the mentioned Court of Justice decision in the sense that "community legislation allows member States to limit to criminal, public security and State security investigations – therefore excluding civil litigations - the obligation to store and disclose data on electronic network connections and the traffic generated during communications made in the course of a service rendered in the information society". Along the same line, with decision of March 17, 2008 the same Court of Rome rejected a further request for an order to the service provider to disclose data relating to network communications, considering that the balance between intellectual property rights and confidentiality had been implemented by the Italian legislator by "holding that the prevalence of the formers on the latter be justified solely if combined with the infringement of collectivity interests protected by criminal law".

With no doubt, the decision of the European Court (Promusicae) marks an important step in the evolution of the subject matter. We believe, however, that it is also important to stress that the Court expressed itself both in the sense (recalled already) that the latest directives in the field of intellectual property do not require the member States to institute any obligation to communicate personal data in the context of a civil proceeding, and in the sense that member States must guarantee a fair balance between the various fundamental rights protected by the Community legislation. We should therefore also highlight passages where the Court observes that "Directive 2002/58 does not preclude the possibility for the member States of laying down an obligation to disclose personal data in the context

of civil proceedings" (par. 54); that both rights, intellectually property and privacy, are included in the list of fundamental rights of the Union (paragraphs 61 and 62); and that members States are called to interpret the directives in a manner consistent with the fundamental rights of the Union and the general principles of Community law such as the principle of proportionality (par. 68).