

**THE REVIEW OF COPYRIGHT
IN THE FRAMEWORK OF A NEW DIGITAL SINGLE MARKET STRATEGY
FOR EUROPE**

ITALIAN POSITION

This paper aims at further developing the position already expressed by Italy on a new Digital Single Market strategy for Europe, in consideration of the key role played by copyright in supporting cultural diversity, artistic creation and freedom of expression, that are - in Italy's view - drivers for competitiveness, growth and employment in Europe. A deeper analysis of challenges in this sector and proposals for solutions could thus help ensuring support to creativeness and innovation, crucial for the European culture to play its traditional role as global leader.

COPYRIGHT IN THE DIGITAL ERA

In an increasingly digital universe, there is a strong need for clarification about the real boundaries of artistic and literary work's exclusive rights and of the intellectual property of ITC products. The need to ensure effectiveness in respecting the authors' rights and in rewarding their intellectual work is felt all the same. Investments by those who make this work accessible to the wide public are also to be encouraged.

Italy recognizes the need to reach a balance of interests, on the one hand, to expand as much as possible access to knowledge and information in an increasingly interconnected society, on the other hand, the interest that such access and the consequent use of intellectual property can develop in such a way to encourage and reward creativity and innovation, while promoting economic growth.

Even if the EC Digital Agenda's major objective has been - since 2010 - that of promoting the creation of a single market, which is more and more focused on digital creative contents, such a balance of interests is not easy to reach, due to persisting differences both in trade practices and in the approach of national legislators to fundamental legal questions, that the European *acquis* has not yet removed completely.

Furthermore, promotion of creative industry is inevitably intertwined with the opportunity to redistribute profits within digital markets: as a matter of fact, in the new business models considerable gaps are appearing between the earnings of service providers (internet providers, search engines, aggregators, social networks) and those of content providers. This could seriously affect the future of creative industry, mainly made of SME. The priority objective should be therefore to look -, in the current framework - for solutions that can ensure adequate remuneration to all players of the cultural industry.

In particular, this paper is focused on three issues, as set by the European Commission, as follows:

- **Territoriality**, as regards individual and collective management of copyright;
- **Exceptions and limitations** to these rights, as for their definition and adaptation at European level;
- **Enforcement** of copyright.

Territoriality

Copyright and related rights are governed by international treaties. In particular, copyright territoriality derives from the Convention of Bern, which establishes mutual recognition of copyright among participating countries, while recognizing and protecting the principle of cultural diversity.

In respect of such international rules, relevant harmonization at EU level was achieved. Nevertheless, such measures have not yet resulted in final remedies to the fragmentation of the European market of cultural products, a fragmentation that mainly stems from restrictions to free trade. Furthermore, number of regulations and practices at national level (e.g. different tax systems), cause additional costs for cross-border trade of digital contents, with consequent distortions in the competition among service providers. For this reason, particular attention is due to copyright also in the framework of discussions on internet governance.

Nowadays, in compliance with international treaties, copyright is acquired in the same manner across Europe and its legal regime has been extensively harmonized by the EU legislation. What matters now is that the licensing systems be able to provide users with the same opportunities to use them throughout the Union.

A uniform framework on competition and taxation, could also help in the choice of a legal regime on basis of the country of origin of uploading or, of the destination country, bearing in mind, however, that the question of content portability is approachable - and solvable – also by encouraging the development of appropriate forms of contracts (licensing systems) between the parties.

The whole licensing system being based on remuneration of exclusive rights of holders, Directive 2001/29 / EC regulates primarily individual exclusive rights vested in the holders. Among these rights most exposed to be abused on the network are the rights of reproduction and offer to the public.

With respect to ITC networks, a debate is going on, on a possible merger of these two rights, which is not compatible with the provisions of international treaties. The growth of legal online offer confirms, however, that the licensing system placed upstream of these services demonstrates that the current legal system does not hinder online dissemination of original works and merging the two rights would not allow to take due account of the different forms of use of a work, to the detriment of the variety of possible kinds of offer. In fact, not all acts of making a work available to the public determine, as a final result, the retention by the user of a copy of the work (streaming); not all acts of distance- selling of the copy of a work necessarily lead to making it available to the public (private copy).

The modernization of legislation on copyright should thus continue by fostering contractual solutions, as already provided with multi-territorial licensing in the music industry.

Finally, a strong single position would allow the EU to better stand dominant competitors from outside Europe.

Exceptions and limitations

The framework of exceptions and limitations to intellectual property rights (art.5 of Directive 2001/29/CE) is set according to the “three step test”, a principle directly deriving from international law and transposed at EU level: (1) exceptions are applied only in specific and special cases; 2) they should not harm normal exploitation of the work or other materials and 3) must not cause an unreasonable prejudice to the legitimate interests of rights holders.

Furthermore, the framework drawn by international law is aimed on the one hand, to a national use of exceptions and limitations consistent for all States, while - on the other hand – it establishes a necessary flexibility related to cultural diversity.

Nonetheless, the current EU framework needs further harmonization, as many differences persist in the scope of exceptions and limitations - optional for Member States- ; but harmonization must go hand in hand with a prior assessment of its economic impact on the various stakeholders and, in particular, on the cultural industry players.

We need to improve and simplify the licensing system, which should remain based on the rights holders' consent, in compliance with the principles established by international treaties. Any introduction of mandatory exceptions should cover specific cases, be adequately justified and evaluated, even through effective and targeted impact assessments and taking in due consideration the actual needs of harmonization. In practice, Italy deems that the current application of the "three step test" principle is effective and does not need to be reviewed.

As for the exceptions on libraries, learning, research (Text and Data Mining), the need for a more extensive harmonization at European level is not to rule out, especially in terms of cross-border effects, being the current European *acquis* already consistent with a regulation on single study cases.

With regard to user-generated contents, protection is already granted on basis of correct application of the principles and rules already existing on several categories of intellectual work. The introduction of a specific exception seems, therefore, not necessary.

As for private copies it seems appropriate to move towards greater harmonization of the criteria forming the basis for fares schemes, maintaining, however, the principle of subsidiarity, which is connected to the different production/distribution systems operating in EU countries. This, because of the close links with national commercial and consumer trends and, above all, in consideration of the still different taxation systems in force in EU countries.

Rather than assuming that only the system of exceptions and limitations can ensure the balance between copyright holders and content users, we should seek, instead, adequate technical tools such as the possibility for rights holders to grant more easily licenses to content distributors.

To this purpose, Internet service providers and other intermediaries entitled with rights of license are to be called to give their contribution in a spirit of "responsible cooperation". It is clear, in fact, that operators should manage licensed contents responsibly and, consequently, collaborate to prevent unlicensed, illegal, or even pirated uses of the net.

Enforcement of copyright

One of the main limitations to the development of a digital single market is the increasing number of different solutions for online infringement of copyright by consumers. Investments in new cultural products, in fact, demand effective implementation of the rules on copyright.

Italy has expressed on several occasions the need to adjust civil law measures ensuring IPR fulfilment to the specific challenges of the digital era, in particular encouraging Internet service providers to play a proactive role, of "responsible cooperation", in line with the decisions of the Court of Justice and with copyright and privacy protection regimes, also with the aim to combat piracy, without censorship or unmotivated criminalization of Internet users.

Any review of Directive 2001/29 / EC, is to be made, then, in combination with effective review of Directive 2004/48 / EC on enforcement - for an effective protection of these rights-, and of Directive 2000/31/ EC on e-commerce -for better establishing roles and responsibilities of different categories of intermediaries.

The current liability regime is an exception to the traditional principle of the economic operators' responsibility for damages caused by their activities and, on basis of Directive 2000/31/CE, should be applied only in case of provision of technical operations due to improve the flow of data between users. Since online service providers actually operate on the market, it would be appropriate to regulate the role of those "active" intermediaries who have knowledge or control of the stored data.

In order to create a more favorable environment for the development of a digital single market, promoting investment and the development of new services, it could also be appropriate to address the possible intervention of other intermediate stakeholders, such as those operating in the financial and advertisement fields, or as registers of domain names, which also play a crucial role in the Internet supply chain.

In order to achieve a better implementation of European provisions, a further option to test could be that of "co-regulation", through direct involvement of associations and organizations of professionals and consumers, operating in the internet world.

Finally, it would be desirable to further identify the categories of ITC services, according to the effective role they play, so as to make the appropriate distinctions and have greater chances to establish responsibilities in case of infringement. In particular, there is a need to explicitly involve those subjects that, even if not directly responsible of unlawful acts, appear to be the closest to the dissemination of online works and should therefore be active in the protection of intellectual property rights.

Time is now for such a reform, which could allow to fine-tune prudent but efficient tools, including innovative ones, able to meet the challenges of technological progress, which has so dramatically changed our societies, not with the aim to limit "knowledge sharing" but on the contrary in view of establishing a really performing European Single market, in particular, in the digital sector.