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1. THE EU 2019 COPYRIGHT DIRECTIVE: BALANCING THE PROTECTION OF AUTHORS, PUBLISHERS AND SUPPLIERS OF SHARING SERVICES WITH FUNDAMENTAL RIGHTS

On 17th April 2019, concluding an ordinary legislative procedure pursuant to art. 294 of the Treaty on the Functioning of the European Union (TFEU), the President of the Council of the European Union and the President of the European Parliament signed, following the favorable vote already expressed by the European Parliament on March 26th, the proposal for a directive on the copyright in the digital single market (2016/0280 (COD)), which amends the directives 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases and 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

Let's recall that the proposal – which was based on the Communication published in December 2015 by the Commission "Towards a modern, more European copyright framework" (COM (2015) 626 final), which suggested targeted actions and a long term vision for an update of the EU rules on copyright – had already been approved by the Legal Commission of the European Parliament on 20th June 2018 and then, in a partially modified version, on 12th September 2018.

The directive, which finds its legal basis in the art. 114 TFEU, is among the measures aimed at completing the digital single market.

As known, with the latter expression, reference is made to the part of the internal market in which information technologies and online services are of decisive importance, and which the Union recognizes as promoters of economic growth and innovation (see the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "A Digital Single Market Strategy for Europe" of 6th May 2015, COM (2015) 192 final), and that is still unfortunately characterized by barriers and differences of regulation that produce a lasting level of fragmentation between member States.

The start of the procedure for the approval of the directive, moreover, had raised a heated debate among those who feared that the proposed text could lead to the violation of some rights protected by the Charter of fundamental rights of the European Union, such as the right to the protection of personal data (art. 8),the freedom of expression and information (art. 11), the freedom of enterprise (art. 16), and those who advocated the opportunity to adopt the directive, in order to reinforce intellectual property rights against

abuse and undue exploitation, especially in the context of the Internet, and thus to ensure a more effective implementation of the digital market.

It must be also reminded that the Charter, alongside the rights we just mentioned, in art. 17, par. 2 also provides for the protection of intellectual property, thus providing an important legal basis to the related secondary legislation, and equalizing the rank of the latter with respect to other potentially conflicting rights (as those we quoted) and therefore imposing, in the impossibility of using a hierarchical criterion, a balancing operation.

It is also appropriate to highlight how the opposing positions that emerged during the debate represent the concretization, with regard to the specific case, of the constant confrontation between freedom and economic rights, and so represent the typification of a dialectical relationship that the legal literature, and in some respects both internal and international case law, has long highlighted.

More specifically, let's recall that, on the one hand, the relationship between freedoms of expression and information and copyright is characterized by both points of contact and of conflict: if the aforementioned freedoms are, indeed, certainly instruments of development of the human personality, of which creation is an important form of manifestation, it's also true that even copyright aims to promoting and guaranteeing the creation and dissemination of ideas, and therefore constitutes itself a means of protecting the same freedoms.

On the other hand, it must also be considered how the massive diffusion of the Internet has accelerated the transformation of copyright, from its original form of means pf protection of the author of a creation, into a tool to protect the economic interests of the industries that commercially exploit the creation: this has entailed the exacerbation of the opposition between rights of liberty and copyright, among which there would therefore no longer be a common intent, since they would represent and protect, indeed, conflicting interests between them.

And both the European Court of Human Rights and the Court of Justice of the European Union (CJEU) have long been aware of this, although with different approaches.

As regards the first, let us recall that the art. 10 of the European Convention on Human Rights (ECHR) recognizes the right to expression which, however, is not by chance conceived in a relative manner, that is to say it is derogable in the presence of opposing interests, among which certainly can be included the copyright.

The latter, moreover, is also protected pursuant to art. 1 of Protocol 1 to the same ECHR.

So this paper aims at trying to offer, in the context briefly outlined, a first reading of some of the issues that the approval of the new copyright directive raises, in particular with reference to the forms of protection that it provides for the rights of authors and publishers of journalistic publications, which could negatively impact on the one hand on the development of service providers in the information society (the so-called Internet Service Providers, ISPs) and, on the other on the freedom of information and, to a lesser extent, of expression, of the public.

The new copyright directive lies at the intersection between the EU copyright law and the rules on the provision of services on the digital market, partially innovating both.

It starts from the consideration of the need to identify a balancing point between the opposing interests of some categories of holders of intellectual property rights, such as

newspaper publishers and authors of journalistic publications (on which we will concentrate), the ISPs, and the generality of the users of such services.

This need is expressed in recital 70 of the directive, which explicitly states that the measures online content sharing service providers take in order to protect copyright, which we will discuss later, should not affect the application of exceptions or limitations to copyright, in particular those intended to guarantee users' fundamental rights and freedoms. This in order to achieve a balance between the rights enshrined in the Charter of Fundamental Rights of the European Union, in particular freedom of expression and freedom of the arts, and the right to property, including intellectual one.

And the recital states that users should benefit from *uniform* protection in the Union.

It is appropriate to point out how it is peculiar that an instrument such as a directive, classically used to *harmonize* the discipline of a given sector, in a recital of its own, refers instead to the objective of guaranteeing *uniform* protection, which is achieved only through tools as regulations: in this sense, recital 3 of Directive 2001/29/EC, which aims at the *harmonization* of national laws on copyright and related rights while respecting fundamental rights, appears to be more compliant with the functions of the sources of secondary legislation.

Now, among the provisions of the new copyright directive, art. 15 and art. 17 mostly highlight the conflict between the protection of proprietary positions and of fundamental rights and freedoms.

We will try to analyze both, their regulatory content and their critical aspects.

Let us start from the first.

Art. 15, relating to the "*Protection of press publications concerning online uses*", includes many different rules, some completely innovative, some other instead aiming to broadening the subjective scope of application of pre-existing rights; it has to be said immediately, it does not shine for drafting quality and simplicity of reading.

In the first place, it requires the member States to adopt a discipline which, under a series of conditions and with some exceptions we will see later, recognizes newspaper publishers the right to authorize or prohibit "information society service providers" to reproduce their publications, directly or indirectly, temporarily or permanently, in any way or form, in whole or in part. It also gives publishers the exclusive right to authorize or prohibit the making available to the public of the same publications.

The same protection, however, does not apply in the case the making available to the public occurs through a mere link to the page of the publisher.

The par. 5 of the art. 15, moreover, with the aim of protecting the real authors of the creative activity subject of exploitation, imposes Member States to adopt rules that require publishers to pay the authors of the works included in a journalistic publication, an adequate proportion of the income received for their use by information society service providers.

The article, then, extends to the publishers of newspapers, in particular towards ISPs, the exclusive right to authorize or prohibit the direct or indirect, temporary or permanent reproduction, in any way or form, in whole or in part, of the works of their property, a right that is already contemplated, with regard to different categories of owners and activities, in the articles 2 and 3, par. 2 of the directive 2001/29.

The latter, in fact, originally and more generally concern artists, performers or performers, with regard to their performance; phonogram producers, as regards their phonographic reproductions; producers of a film, as regards the original and the copies

thereof; broadcasting organizations, with regard to the recording of their transmissions, including cable or satellite transmissions.

These are, as we can see, rather traditional categories of owners and activities, framed in an "analog" context, whose rights are now extended to digital market activities.

The new copyright directive also makes other provisions of the same directive 2001/29 applicable to newspaper publishers, such as those contained in articles 5 (which contemplates a series of limitations and exceptions to the reproduction right), 6 (which requires Member States to adopt measures of adequate legal protection against the circumvention of the technological measures adopted to prevent or limit exploitation not authorized by the holder of the copyright or related rights on works or other protected materials), 7 (which wants Member States to equip themselves with tools of adequate legal protection against anyone, knowingly and without having the right to, removes or alters the electronic information on the regime of intellectual property rights from published works) and 8 (which provides that Members must adopt legal mechanisms that contemplate effective, proportionate and dissuasive sanctions, and remedies against the violations of intellectual property rights).

In particular, as regards the exceptions' regime, it must be remembered that temporary acts of reproduction, which have no independent economic significance, are transient or incidental, and are an integral and essential part of a technological process, are exempted from the reproduction right, if they're performed for the sole purpose of allowing the transmission in a network.

Moreover, again according the dir. 2001/29, Member States may provide for exceptions or limitations to the reproduction right as regards reproductions on paper or similar support, made by any type of photographic technique or other process (one may think of the case of xerox copies), if the right holders receive fair compensation, with the exception of sheet music; any reproduction on any medium made by a natural person only for private use and for ends that are non commercial, on condition that the rightholders receive fair compensation; specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which aren't for economic or commercial advantage; reproductions of ephemeral recordings of works made by broadcasting organizations by means of their own facilities and for their own broadcasts.

Let us remind that Member States still have the right to make exceptions or limitations to reproduction rights in the event that: the use of protected works is for the sole purpose of illustration for teaching or scientific research, on the condition that the source, including the author's name, is indicated, unless it's impossible; when it's a use for the benefit of people with a disability, and of a non-commercial nature; in every case of reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated; for quotations for criticism or review purposes; in the case of use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings; in the case of use of political speeches or extracts of public lectures or similar works to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated; in the case of use during religious celebrations or official celebrations organized by a public authority; for every use of works, such as works of architecture or sculpture, made to be located permanently in public places; in the case of

incidental inclusion of a work or other subject-matter in other material; in the case of use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use; in every use for the purpose of caricature, parody or pastiche; in the case of use in connection with the demonstration or repair of equipment; in the case of use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building (it's interesting to see that this may be the case of the use of the graphics of the *UbiSoft* videogame "*Assassin's Creed Unity*", which contain a very detailed renderings of the Notre Dame cathedral, in order to reconstruct it after the fire of 15th april 2019).

As one may see, with regard to articles or broadcasts on topics of current economic, political or religious relevance, the previous directive legislation already contemplates the possibility for States of an explicit exception.

Now, art. 2 of the copyright directive excludes from its scope of application the online non-profit encyclopedias (one may think of the case of the so-called *Wikies*), the non-profit educational or scientific repertoires (an example could be platforms such as *Researchgate*), the development platforms of and sharing of *open source* software, the providers of electronic communication services pursuant to directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (in this case reference is made to the telecommunications sector), online markets, business-to-business (B2B) cloud services and cloud services that allow users to upload content for personal use (we may think of *GoogleDrive*).

The par. 4 of the art. 15 of the new copyright directive, again, sets a time limit to all the rights we have said of, providing that they'll expire two years after their first publication; the latter deadline is calculated as from 1st January of the year following the date of publication.

Now, as we have seen , the provision is certainly complex, and for this has suffered, during the procedure for its adoption, criticisms from both economic operators and the public opinion. Moreover, it raises some delicate issues, both as regards the normative technique which it was drafted by, and its substantive content.

On the one hand it must be said that art. 15 contains some rather vague expressions, whose definition is left to the Member States when transposing the directive. In particular, this occurs with both some of its constituent elements and with some of the criteria used to identify its exceptions. For the latter profile we have to recall that the publisher's rights cannot be applied to "private or non-commercial" uses of their publications made by individual users, to links, to the use of single words or "very short" extracts of the journalistic publications. In order to understand the scope of the exception concerning private uses, we must recall that the concept of journalistic publication to which the directive wants to be applied must have an economic relevance and constitute a provision of services in accordance with the UE law (see in this regard the recital 56 of the same directive); this excludes, for instance, blogs. In this regard it must be pointed out that the directive does not apply to websites, such as blogs, indeed, which provide information in the context of an activity that is not carried out on the initiative, editorial responsibility and control of a service provider, as may be a newspaper publisher (see again recital 56).

On the other hand, it must be said that the directive could also imply a risk of market concentration in the media sector: it could indeed happen that major publishers may grant each other the right to connect, what might not happen, on the contrary, with

smaller publishers or with those with an "alternative" approach, with the risk of a reduction in information pluralism which may lead to a subsequent limitation to the fundamental rights to expression and information.

It is, however, an issue that should be regulated by EU antitrust law.

The other provision of the copyright directive on which we'll focus is its art. 17, which regulates the "*Use of protected content by online content-sharing service providers*".

It qualifies as acts "of communication to the public" or "of making available to the public" all the activities by which a content hosting and sharing service provider grants public access to works protected by copyright or to other protected materials, uploaded by online users on its servers.

Let us recall that are hosting and sharing service all those Internet services in which a provider offers his machines, called servers, to store and make available for online access, content uploaded by users, as happens, for instance on *YouTube* or *Vimeo* for video content, or the audio ones of *SoundCloud* or, again, the texts from *Scribd*.

Now, in order such an operation is fully compliant with the directive, the provider must obtain (pursuant to art. 3, paragraphs 1 and 2, of directive 2001/29/EC which we already mentioned several times), an authorization by the holders of such rights, for example by concluding a license agreement.

It must be said that in order to balance IP rights with fundamental rights of expression and information, the latter authorization is unnecessary if the content has the nature of a mere quotation, a criticism, is incorporated in a review or, again, is used for the purpose of caricature, parody or pastiche (art. 17, par. 6; one may think of the case of so-called *memes* or *GIFs*) and that, in order to promote the development of the online services offer, the directive excludes from its regime all those online content sharing service providers that have been operating in the EU for less than three years and have an annual turnover of less than 10 million euros (art. 17, para. 6).

Except for the excluded cases, in the absence of such a license, the online content sharing service provider may be held liable for unauthorized acts of communication or making available to the public, of works and other materials protected by copyright, and this unless he demonstrate to have done everything possible to obtain the authorization and to have made, according to high standards of professional diligence, maximum efforts to ensure that such works are not available on his web pages.

Moreover, from a chronological point of view, the online service provider that receives a sufficiently motivated report from a copyright holder that on his site protected contents have been illegally published, must prove that he acted promptly to disable access or remove from his websites such contents, and have made the maximum efforts to prevent their loading in the future.

In order to establish whether the service provider has complied with all these obligations, the type, the public and the size of the service offered have to be be evaluated in the light of the principle of proportionality, as well as has to be don of the type of materials loaded, the availability of adequate and effective tools to prevent copyright infringement, and their cost to the service provider itself.

On the providers of online content sharing services, again, burdens also the obligation to inform their users of the possibility of using works and other materials only in accordance with the exceptions or limitations to copyright and related rights provided by EU law.

Providers are also required to set up fast complaint and appeal mechanism, through which users can challenge the legitimacy of the disabling or the removing of the materials they uploaded; Member States must guarantee, in this regard, out-of-court redress mechanisms, without prejudice to the right of users to use effective judicial remedies (on the function of the *judicial review* principle in as a tool to protect fundamental rights see L.B. TREMBLAY, *General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law*, in *Oxford Journal of Legal Studies*, 2003, p. 525 ss.).

Finally, it must also be clarified that the copyright directive does not involve the identification of individual users or the processing of personal data, and that it saves the provisions of the Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) and of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR).

In short, as can be seen, the directive entails, for providers of online content sharing services and with reference to works protected by copyright, an important restriction on the limitation of liability already provided by art. 14, para. 1, of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), transposed in Italy with the legislative decree n. 70/2003, the "E-Commerce Decree".

This provision exempts from the responsibility for the transfer of illegal contents provided by a third party - and this also with regard to copyright – the providers of IT hosting services that are mere *technical*, *automatic* and *passive* intermediaries.

The Court of Justice of the European Union has already ruled on these conditions of exemption from liability and has clarified they apply to the provider of a hosting service that has not played any active role that led him to knowledge or control of stored data; therefore, if he has not played such a role, the provider cannot be held responsible for the data he has stored at the request of a user, except in the case he, being aware of the illicit nature of such data or of the activity of a user, did not promptly remove such data or disable access to them (Judgment of the Court, Grand Chamber, 23 March 2010, joined cases C-236/08 to C-238/08, *Google France*).

In the Judgment of the Court, Grand Chamber, 12 july 2011, case C‑324/09, *L'Oréal SA*, the Court then clarified that the aforementioned exemption also applies to *digital market* providers who do not play any active role that allows them to have knowledge or control of stored data. There's an "active role", with the consequent inapplicability of the exemption, whenever the service provider guarantees his users assistance aimed at optimizing their presentation of the offers for sale or for promoting them. Moreover, according to the Court, even in the absence of such an active role, the online service provider could not in any case avail itself of the exemption from liability if he was aware of facts or circumstances on the basis of which a diligent economic operator would have had to establish the unlawfulness of the advertisements of his clients and, in the event that he was aware of them, he did not promptly act.

Now, it must be said that in the nineteen years that have passed since the adoption of the Directive 2000/31, hosting services have radically changed their characteristics, and their suppliers have exponentially increased the services they provide for, which, today, go far beyond the mere offer of space to upload contents, which are instead organized by the suppliers themselves to improve their use (one may think, just for example, of the search and indexing functions or the so-called *YouTube* channels).

It is also appropriate to recall that, precisely with regard to the application of the exemption from liability to such suppliers, the Italian domestic case law has adopted two opposing solutions.

According to a first approach, more faithful to the *littera legis* of the directive and its implementation rules, the evolved characteristics of which we have just said, would be a somehow "natural" consequence of the technological development of hosting services; so the ISPs could continue to benefit from the exemption from the responsibility for the contents illegitimately loaded by third parties, at least until the owner of the injured rights communicates to them punctually what contents are loaded in violation of his legal positions, or if there is an order of removal that is not complied with (see, *ex multis*, Court of Appeal of Milan, RTI v. Yahoo !, January 2015).

According to the other solution, more onerous for the suppliers, instead, the characteristics of the new hosting services prevent them from being considered still *neutral*, *passive* and *merely technical* and, consequently, even though they are not burdened by a general obligation to monitor the users uploaded works, as a result of the organization and systematization of the contents, the owner of the injured rights can limit himself just to addressing to the provider a generic removal request, which must not necessarily contain the precise indication of all the illegally uploaded contents.

Finally the Court of Cassation, with decision n. 7708 of 19 March 2019, expressed in favor of the latter solution, and, in the light of CJEU case law, confirmed the need to preserve the distinction between the so called active hosting providers, therefore subject to the ordinary rules on civil liability, and passive hosting providers, who alone can benefit from the exemption of liability pursuant to art. 14 of the e-commerce directive (2000/31 / CE) and 16 of Legislative Decree n. 70/2003 ("e-commerce decree").

Now, it must be said that, after the long debate that followed the publication of the first proposal of the copyright directive, and the protests raised during the procedure for its adoption, the approved text of the art. 17 no longer contains (as its old formulation did in what was the art. 13 of the original proposal) any reference to the obligation for ISPs to prepare software "filters" aimed at controlling in advance the legitimacy and ownership of users uploaded content.

It should also be said, however, that even in the absence of such an obligation, some sector operators have independently equipped themselves: one may think, for instance, to the *Google YouTube* portal, which, as known, has voluntarily provided with automatic verification content mechanisms (the so-called *ContentID*, whose development cost the Mountain View company over 100 million dollars).

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