AIDA 2019

ABSTRACT DEGLI STUDI DI PARTE I

IL TEMA: LA DIRETTIVA DIGITAL COPYRIGHT

LUIGI MANSANI, ***Le eccezioni per estrazione di testo e dati,didattica conservazione del patrimonio culturale***
2/2019

The debate on the digital copyright directive has focused mostly on Articles 15 and 17, respectively regarding the protection of press publications concerning online uses and the use of copyrighted content by Internet Service Providers. The exceptions and limitations to copyright for Text and Data Mining, as well as those for digital teaching activities and preservation of cultural heritage, dictated by articles from 3 to 7 of the directive, however, appear to be even more relevant, both from an economic point of view and for the theoretical profiles involved. Also in these matters, the solutions offered by the directive appear to be the result of a compromise between the positions of the users and the right holders on the works used. The rules traced by the directive appear in some cases unbalanced in favour of the right holders, especially in comparison with the regulations in force in other le
the right holders, especially in comparison with the regulations in force in other legal systems. The wide discretion left to Member States in implementing certain measures, however, suggests that the debate on the scope of those exceptions will continue, and probably will require that the Court of Justice clarifies their effective scope.

GIUSEPPE CARRARO, ***Le eccezioni per le opere fuori commercio***
22/2019

This paper focuses on the exceptions or limitations to the Copyright Package Directive, in order to allow cultural heritage institutions to make available out-of-commerce works, and doubts such exceptions still comply with a proprietary system. Furthermore, it aims at demonstrating that they seem to conflict with some of the author's moral rights, such as the right to withdraw.

MARCO RICOLFI, ***La tutela delle pubblicazioni giornalistiche in caso di uso online***
33/2019

The paper explores the provision of the DSMD concerning the new "publishers' right" as a puzzle. Why on earth should publishers, who already own their journalists' copyrights, want to double with an overlapping neighbouring right, considering that until now they never were able to cash in from digital platforms? The exploration proceeds from a discussion of data on the decline of newspaper income to an illustration of the building blocks of the new regime, dealing, in sequence, with the international and EU legal framework, the identification of the holders of the new right and of the entities subjected to it and of the applicable law, with its subject matter, scope and term. When it comes to analyzing the consequences of the violation, a possible explanation is put forward: if the damages which digital platforms are liable to pay to newspaper editors for unauthorized online use of their publication encompasses, as it is reasonable to hold, also restitution of the relevant profits made by platforms, the new right turns out to be less toothless than initially imagined.

ALESSANDRO COGO, ***Online content-sharing platforms as users of copyrighted contents***
68/2019

At first sight, Art. 17 of the CDSM Directive seems to introduce a Copernican revolution, particularly if one looks at this new provision with the approach developed by national courts in mind. They have assumed that operators of online content-sharing platforms are not users of works made available by their clients, at least until they have specific knowledge of the presence of infringing content on their servers. Art. 17(1) of the CDSM Directive states just the opposite. If one keeps reading, however, this initial impression falters. While Art. 14 of the E-Commerce Directive states that hosting service providers may become liable if they do not cooperate with rightholders and take down infringing content, Art. 17(4) of the CDSM Directive relieves online content-sharing service providers of liability if they cooperate with rightholders to make infringing content unavailable. "For everything to stay the same, everything must change", as Tancredi said in Tomasi di Lampedusa's The Leopard. But are we sure that this is the right conclusion? We should be rather cautious, as I attempt to explain in this paper.

PHILIPP FABBIO, ***Il diritto del creativo ad una remunerazione adeguata e proporzionata nella Direttiva Digital Copyrigh***
88/2019

This essay comments on the rules concerning authors' compensation set forth in Article 18 of EU Directive 790/2019, and elaborates on the practical criteria that ought to be used in assessing the fairness of such compensation. Special attention is paid to the point of view of intermediaries as well as to current practices.

ROSARIA ROMANO, ***L'obbligo di trasparenza nella Direttiva UE2 019/790 sul diritto d'autore e i diritti connessi nel mercato unico digitale***
112/2019

The article analyses the rules of the Directive dedicated to the obligation of transparency, focusing on the main problem areas that will arise during the Italian implementation. Particular attention is paid to cases of derogation from this obligation and to the ways in which it could be made more effective and advantageous for the rightholders.

MASSIMILIANO GRANIERI, ***Right of revocation of authors and performers in the European online copyright directive***
128/2019

This article provides an initial comment of the two provisions of the digital copyright Directive that introduced the best-seller clause and the use-it-or-lose it principle in agreements between authors and performers (as weaker parties) and intermediaried. After analyzing in details how the two mechanisms work, the article focuses on the revocation right and its rationale and it advances a theory of quasi-moral nature for such remedy, whose impact alters significantly some basic principles of contract law in favor of authors.

DAVIDE SARTI***, Il licensing collettivo***
148/2019

Collective licenses are considered by the DSM directive in articles 8-12. The directive provides for an extended collective licensing system (ECL system). The introduction of such a system is mandatory for the Member States in respect of the use of out of commerce works by cultural heritage institutions. Member States may also provide for such a system in defined areas of uses, where obtaining authorizations from rightholders on an individual basis is impractical. According to the ECL system, licensing agreements concluded by collective management organizations (CMOs) are extended to the rights of rightholders who are not represented by the CMO: provided the organizations is sufficiently representative of rightholders in the relevant type of works, an equal treatment is guaranteed to all rightholders, and rightholders may at any time exclude their works from the licensing mechanism (opt-out clause). The ECL system has been originally introduced in the Nordic countries, and is traditionally considered as an instrument to lower transaction costs of licensing: when users are interested in the exploitation of a vast repertoire of rights, individual licensing is extremely onerous, and at the same time is inconceivable that every rightholder has mandated a CMO. An ECL fosters a wide and extensive use of creative works, as licensees can reasonably be confident they will not be responsible for acts of counterfeiting. The article suggests a different approach. According to this approach, the ECL system appears essentially as an instrument to negotiate and set a price for the value of cultural heritage. In such a system collective negotiations coexist with individual negotiations and two distinct markets are formed: a (non competitive) market of collective negotiations, where a price for a cultural heritage is set; and a (competitive) market of individual negotiations, where prices are set according to the market value of individual investments in creation and promotion of cultural works. The suggested "cultural heritage" approach makes the ECL system consistent with the Berne and WIPO conventions, at least to the extent that an opt out is guaranteed. Besides, this approach explains the reasons for legislative choices which would be inconsistent with the traditional "transaction costs" approach: namely the hoice to allow only CMOs, and not independent management entities, to grant ECL. The cultural heritage approach is also consistent with the cross-border effects of ECL of out of commerce works, and with the principle that such licenses are granted only by organizations established in the Member State of the cultural heritage institution. At the same time, the "cultural heritage" approach suggested in the article offers valid solutions to interpret some (disputed) rules of the directive: such as the meaning of the "sufficiently representative" requirement and the limit of the "well defined" area of use licensed according to art. 12. A CMO should be deemed as sufficiently representative when it has sufficient market power to set the price of the cultural heritage in the absence of significant competition of individual licenses offering. An area of use should be deemed as well defined to the extent that the included uses show the same demand elasticity.

ROBERTO PENNISI, ***L'applicazione della Direttiva Copyright in Digital Single Market ai diritti connessi***
179/2019

The Directive on Copyright in the Digital Single Market (Directive CDSM) rules, in addition to certain aspects of copyright, also neighbouring rights. The effects of transposing the new rules in European Countries are examined. The Directive creates a situation in which neighbouring rights multiply and are strengthened. In light of the need to balance copyright against competing interests, in particular freedom of expression and information, the Author propose a flexible interpretation, that excludes the rules concerned exceptions and limitations being applied to neighbouring rights in the same strictly and abstract way as they are applied to copyright.

SIMONA LAVAGNINI, ***La direttiva digital copyright: evoluzione normativa e interessi in campo***
208/2019

The digital copyright directive is part of a more complex strategy of the European Commission, aimed at promoting the development of the digital market, seen as a crucial key to revitalizing Europe in international competition, in a context in which the old continent has, over the course of the years, lost many positions to the benefit of markets in other countries, including in particular the United States of America. The delay accumulated in Europe is not small, and partly due to the difficulty and slowness with which the issue has been dealt with in legislation: first initiatives aimed at innovating the subject of copyright in the light of digital development (including in particular the Ecommerce Directive and the Directive on Copyright in the Information Society of 2001), ten years passed before concrete reforms began to be discussed, and almost another ten years for the approval of the directive in question. The contribution analyzes the main initiatives adopted between 2010 and 2016, which led to the issuing of the digital copyright directive proposal, with particular regard to the key issues addressed in the same proposal, and therefore: a) the provision of exceptions to the right to author for the extraction of texts and data for research purposes, or for scientific teaching; b) the tools to allow greater transparency of information for authors and artists, and to allow them to participate in the remuneration deriving from the use of their works; c) the neighbouring right granted to publishers, providing for a compensation in case of use of short fragments of their text, d) the obligation falling on internet service providers that mainly host content published by users to adopt "effective and proportionate" measures to prevent the making available of unauthorized content protected by copyright. These two last pillars of the proposal have however proved particularly controversial. The contribution then illustrates the debate following the issue of the proposal, representing the positions taken by the various stakeholders, as well as the protest and / or awareness initiatives adopted by them. This debate has been reflected in the divisions that have been recorded among the Member States (some of which have continued to declare themselves dissenting, and therefore have also expressed themselves negatively with respect to the approval of the directive, including Italy and Germany in particular) and within of the European Parliament, which in fact rejected the first version of the directive proposal in July 2018, finally voting for a modified version in September 2018. This version was negotiated (almost surprisingly) in the trialogue, to then arrive at the final vote of the European Parliament on March 26, 2019, and finally to the Council of the European Union, where it received final approval on April 15, 2019, followed however by the appeal brought by the Republic of Poland and by controversies and uncertainties concerning times and methods for the implementation (in particular in Italy).

GIUSEPPE ROSSI, ***Opere dell'ingegno come dati: il text and data mining nella direttiva 2019/790***
235/2019

The essay analyzes the rules on text and data mining of the Directive 790/2019. The essay takes as a starting point that text and data mining activities use copyrighted works merely as data, i.e. without interfering with their actual value as creative expressions of ideas. This was the key issue in the Authors' Guild v. Google and Authors' Guild v. Hathi Trust litigations in the United States. At the outcome, the US Courts stated that mass digitization of literary works for data mining is a transformative use, covered by the fair use doctrine, notwithstanding the eventual commercial aims of the defendant. On the contrary, the 2019/790 directive provides for different regulations of the text and data mining activities carried out by research organizations and cultural heritage institutions for purposes of scientific research, on the one

hand (art. 3) and of similar activities aimed at different tasks, including commercial ones. Such different treatment of commercial and non-commercial text and data mining activities raises various interpretative issues, and does not seem to match with the actual nature of algorithmic research. Finally, the essay compares the legal techniques for the protection of personal data and of copyrighted works vis-à-vis "big data".

CARLO MEO, ***Operatori digitali e licenze collettive nella direttiva 2019/790/UE: le licenze ad effetto esteso***
257/2019

Collecting societies are licensing hubs which gather the copyright of a large number of rightholders, thus facilitating the clearing of copyright for digital users. However, not all rightholders mandate collecting societies for the administration of their rights. In some sectors of the market collective management is not common. Furthermore, even where collecting societies are present, some rightholders prefer to manage rights directly, with no collective intermediation. Directive 2014/26/EU aims at liberalizing the collective management market, providing authors with freedom of movement from one society to another and facilitating entry of new independent management entities. Therefore, the collective management scenario is still complex and digital users could face serious difficulties in identifying rightholders and in negotiating with managers of all the rights required. In this regard, art. 12 of directive 2019/790/EU introduces a system of extended collective licensing in EU copyright law. In other words, member States may provide that the licence concluded between a representative collective management organisation and a user could produce its effect not only for rightholders already represented by the organisation, but also for those who did not mandate the organisation concerned. The contract thus extends its effects beyond the limits of the repertoire of the organisation, granting a potentially complete licence. Art. 12 raises however several interpretative uncertainties, concerning, for example, the meaning of the word "representative" and the exclusion of independent entities from the scope of art. 12. The aim of this paper is to face these questions, taking also into account principles introduced in EU law by the previous 2014/26/EU directive on collective management of copyright.

DANIELA CATERINO, ***Prime osservazioni sul trattamento degli User Generated Contents nella direttiva UE Digital Copyright***
282/2019

The essay analizes the key issues related to the newly adopted and still embryonic EU discipline of User Generated Contents, and to its application to fan films, multimedia creations made by fans particularly, film sagas). For the first time in EU law, the Digital Copyright Directive takes into account the case of contents generated and uploaded by users on online platforms; but doesn't provide for a general exception covering those acts of communication to the public. Instead, the Directive confirms lawfulness of those activities (liable to be considered as acts of infringement of original works) under the general arrangement of exceptions and limitations according to Information Society Directive, § 5. This solution leaves many questions unanswered, about the effectiveness of legal protection; more generally, the Directive does not address the issue of moral rights of the author of original works, particularly because of an improper and incomplete reference to the "three steps test" laid down in the Berne Convention.

FRANCESCA LOCATELLI**, Il sistema di risoluzione delle controversie in materia di trasparenza ed equa remunerazione degli autori ed artisti nella direttiva UE Digital copyright: riflessioni in punto di dirito applicabile**

313/2019

This paper starts explaining why the issue of transparency and fair remuneration of authors and artists is at the heart of the Digital copyright directive's dispute resolution system, to then lean into the relationship existing between the Digital copyright directive and the Collecting directive, in order to compare the methods of disputes resolution envisaged by the Collecting directive and trying to draw a systematic classification of them and the subject of such protection, pointing out some critical profiles. The paper then delves into the coordination of the two directive to figure out which mechanism / body for resolving disputes is more suitable in application of the Digital copyright directive and with what kind of adr procedure, to conclude with some «de iure condendo» remarks on a flexible adr procedure model.

STEFANIA ERCOLANI, **Eccezioni e licenze collettive estese nella direttiva diritto d'autore nel mercato unico europeo**
339/2019

The paper analyzes some of the exceptions introduced by Directive (UE) 790/2019, in particular the exception for in digital and cross-border teaching activities (art. 5) and the one for the Use of out-of-commerce works by cultural heritage institutions. The paper highlights the relation between the various exceptions outlined by the directive and the envisaged alternative option of collective licensing with extended effect (art. 12), considering also the relationships with the Berne Convention. An overview of various types of collective licenses contributes to explain this alternative. The analysis shows that, unlike the regime of mandatory collective rights management, the envisaged mechanism of extended collective licenses (ECL) leaves intact the possibility for the right holder to opt out easily and effectively and exercise her rights directly. In accordance with the EUCJ decision in the Doke Soulier case, appropriate publicity measures must be taken to ensure adequate information on the opt-out right. The actual test for the newly regulated ECLs will concern their application; where EU member states decide to replace exceptions/limitations to exclusive rights with ECLs,in fact, the intended balance between exclusive rights and the circulation of protected materials is achieved only provided that right holders' voluntary opting out is not massive or exceedingly frequent.

MELANIE BROWN, **Exploring Article 8 of the Copyright Directive: Hope for Cultural Heritage**
366/2019

Article 8 of the EU Copyright Directive addresses an issue that cultural heritage institutions ("CHIs") have been struggling with for a long time: providing public access to of out of commerce works. Article 8(1) enables CHIs to agree non-exclusive licenses for non-commercial purposes with collective management organisations ("CMOs") for copyright works which are out of commerce, and this extends to works for which the right holders have not mandated the CMO. Article 8(2) expands this, and enables CHIs to make out of commerce works available for non-commercial purposes without seeking the rightholder's permission where there is no representative CMO. This article will address the rationale behind Article 8 of the Copyright Directive, focusing on the issue of out of commerce works for CHIs; the legal issues that are likely to arise for CHIs seeking to utilise the Directive, focusing on the legal uncertainty of terms within the Directive; and whether Art 8 signals a fundamental change within copyright law and conflicts with the Berne Convention; and the practical implementation issues, including the prior publication requirement and how rightholders opt-

out, as well as issues with CMO mistrust, and a lack of CMOs in certain sectors. The motivation and hope behind Art 8 is that it will significantly transform the manner in which CHIs can exploit the out of commerce works in their collections. This will hopefully widen public access considerably to these historically "lost" collections. There is concern, however, that there are legal and practical issues in relation to Art 8 that could result in effective implementation by CHIs being difficult. The article will recommend that the definitions of "out of commerce works", "customary channels of commerce", "reasonable effort" and "non-commercial purposes" need to be clarified, for CHIs to be able to benefit from Article 8, as the current terms are vague. Copyright will also need to address the meaning of "commercial" and "non-commercial" for Art 8 to be effective, as this understanding sits at the core of the provision. It would be unfortunate for a lack of clarity of key terminology to impact upon the implementation of Art 8, when it offers legal mechanisms that CHI need to enable public access to these vast collections of cultural heritage.

ALTRI STUDI

FRANCESCA BENATTI, ***Il supporto dell'opera tra fissazione e creazione***
398/2019

The paper exames the question of the "medium of the expression" in copyright law, particularly in relation to the concept of "work". It exposes different legal framework adopted in common law (like the requirement of "fixation" in Uk law or "fixation on a tangible medium of expression" in US law, necessary for copyrightable works) and civil law systems (without fixation). Furthermore, it exposes the harmonization of the concept of "work" by the European Court of Justice's case law. It concludes that the "medium" could attribute peculiar characteristics to the work, like in case of Street Art.

FRANCESCA LOCATELLI, ***Su arbitrato e mediazione nelle direttive Digital copyright e Collecting***
417/2019
Unlike the Digital Copyright directive, which remains extremely generic, the Collecting directive dictates some element of detail, suggesting mediation or arbitration as possible examples of proceedings, requiring that they are administered by bodies with specific competences of intellectual property rights. In the case of the Collecting Directive, the applications that have taken place, despite the rather clear indications in terms of mediation or arbitration, although with some exceptions, have taken the path of atypical procedures, while everything is still to be defined in relation to what will be the indications of the internal legislation to be issued in implementation of the Digital copyright directive. It is therefore worthwhile to spend some brief considerations in relation to arbitration and mediation as adr procedures to be used in this area, with the hope of an option that is as clear and stringent as possible towards these institutions, which already enjoy an adequate theoretical and systematic framework and therefore are less harbingers of problems.