

Innovation & Copyright

What lies ahead?



CREDA
Centro di Ricerca
di Eccellenza per
il Diritto d'Autore



IAIC
Italian Academy of the Internet Code



Ministero
dei beni e delle
attività culturali
e del turismo

Innovation & Copyright what lies ahead?

Conference proceedings
April 16th, 2015
Agis Rome

Cover :

Mozart POP ART Portrait by
Muhammad Ali Mudzofar

David Guetta POP ART Portrait
firman.alief98@gmail.com

Graphic Design:

Stefano Bucciero

© Assomusica 2016

Except as provided for individual co authors' rights for each contribution, rights of translation, electronic storage, reproduction and total or partial adaptation of any part of the volume, are reserved for all countries.

Printed in Italy, Februaray 2016, Grafiche G7 s.a.s - Via G.Marconi 18A - 16010 Savignone (GE)

Index

4 Preamble

by Vincenzo Spera

5 Introduction

by Lucia Marchi *and* Maria Letizia Bixio

7 Initial Greetings

Carlo Fontana

Vincenzo Spera

13 First Part

Giovanni Figà Talamanca

Alberto Maria Gambino

25 Panel Discussion

Alessandra De Marco

Leonardo Lascialfari

Ferdinando Tozzi

Guido Scorza

Alessandro La Rosa

Andrea Micciché

Rossana Rummo

Federico Bagnoli Rossi

Paolo Agoglia

Giordano Sangiorgi

Luca Vespignani

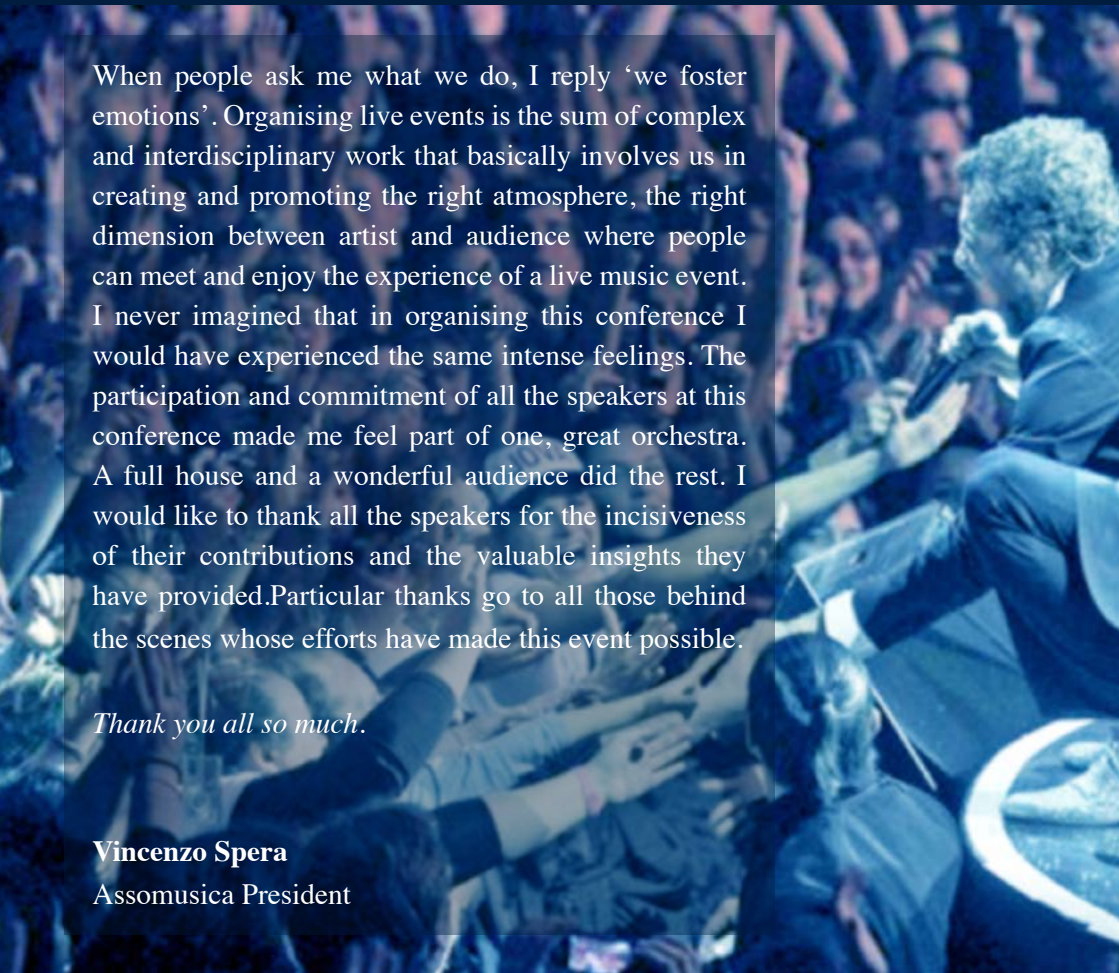
“We Foster emotions”

When people ask me what we do, I reply ‘we foster emotions’. Organising live events is the sum of complex and interdisciplinary work that basically involves us in creating and promoting the right atmosphere, the right dimension between artist and audience where people can meet and enjoy the experience of a live music event. I never imagined that in organising this conference I would have experienced the same intense feelings. The participation and commitment of all the speakers at this conference made me feel part of one, great orchestra. A full house and a wonderful audience did the rest. I would like to thank all the speakers for the incisiveness of their contributions and the valuable insights they have provided. Particular thanks go to all those behind the scenes whose efforts have made this event possible.

Thank you all so much.

Vincenzo Spera

Assomusica President



Introduction

The technological progress of the Internet continues to revolutionise the way we use creative works. The intangible form of these works and their digital use represents a significant challenge to existing copyright regimes.

The speed with which content can be transferred over the Internet, simultaneous accessibility and the absence of territorial barriers are just some of the features of Web 2.0. These features require a revision of current intellectual property right strategies.

In Europe, there has been for some time debate over the need to review Directive 2001/29/EC and in particular, to harmonise copyright and related rights connected to information societies, so equipping the Directive for the challenges posed by digitalisation. Such a revision must necessarily tie in with the other two Directives closely linked to web regulation, i.e. the E-Commerce Directive (2000/31/EC) and the Enforcement Directive (2004/48/EC), the latter regulating the enforcement of intellectual property rights.

Close coordination amongst EU Member States with a traditional approach to copyright has produced substantially similar positions. However, these countries will need to find some common ground in talks with other States seeking greater flexibility in the area of exclusive rights in copyrighted works.

With regards to an overhaul of existing copyright law, studies carried out in major European countries have revealed three problem areas in a digital environment: territoriality and its role in the individual and/or collective management of copyright; the definition and refinement of the exceptions and limitations

foreseen by Directive 2001/29/EC with the aim of making some of these mandatory; copyright enforcement measures that restrict access to unauthorised content thanks to the spontaneous (or not) cooperation of intermediaries, such as connectivity providers, user generated content management systems, search engines, etc..

The digital single market (DSM) must represent an opportunity where the legal use of cultural content at improved conditions stimulates creativity and guarantees cultural diversity. To favour the changes needed to achieve this objective, debate over reform should strive, firstly, for a refinement of copyright rather than a distortion of the founding principles that come from international treaties and, secondly, a fair balance amongst constitutionally guaranteed rights.

Discussions with experts, scholars and the principal players in the categories involved can provide possible solutions to the various problems facing Italian market operators and intermediaries and hopefully offer some answers to the question 'Innovation & Copyright: What lies ahead?'

Lucia Marchi

(Deputy Director, Copyright Office, DG-BIC Ministry of Cultural Activities and Culture and Tourism)

Maria Letizia Bixio

(Lawyer and copyright specialist - CREDA)

Initial Greetings

Carlo Fontana

Agis President



Good evening. I would first of all like to thank Vincenzo Spera who, acutely aware of copyright issues, took up my idea of organising events such as these. The size of the audience and the quality of the speakers present today reveal how important the question of copyright is and how it needs to be addressed in a new and open way. Right from the start, I would like to quell any suspicions that this is a meeting organised against the Italian Society of Authors and Publishers (SIAE).

This meeting has no one in its sights. Instead, it is an opportunity to discuss and deepen our knowledge on the complex subject of copyright. It's obvious that firms operating in the entertainment and events industry, in the current critical situation, want a reassessment of the impact that copyright has on their businesses. In our view, it's obvious that tax rates in general and, more specifically, a tax applied also on contributions made by public bodies and sponsors require to be seriously reassessed.

This review is needed because, for instance, in my past profession the search for sponsorship was essential: the concert or event depended on these funds and without the event there would be no fees payable to rightholders. This point deserves careful consideration. Our relationship with SIAE is based on cooperation and dialogue. Having said this, we shall continue to work autonomously to find solutions that take account also of the needs of the entertainment industry. Meetings such as today's are to be applauded as they represent a valuable opportunity to prepare the proposals that we will present to the Government and Parliament.



Vincenzo Spera

Assomusica President

Before handing over to our guest speakers, I would just like to thank those who, together with Assomusica, the organisation that represents the interests of contemporary live music in Italy, support actions that are not only aimed at and interesting for our associates but regard what can only be termed the raw material of our business.

This is made up of two distinct categories of persons: those who work in the world of live events and those who create, and therefore give us a chance to elaborate, produce and achieve the creative moment, a dream, a chance to communicate and share ideas, contents and culture.

When we were planning this conference, I felt immediately that our association and the

Ministry of Cultural Heritage and Activities and Tourism (MIBACT) were on the same page. In particular, I would like to thank Rossana Rummo from the Ministry for having embraced not only our cause, but for her commitment to a European project involving us together with Agiscuola, aimed at spreading in schools and other non conventional settings the principle that any author, any creator of ideas, has the right to a fair fee. I want to thank also Lucia Marchi and Maria Letizia Bixio, whose dedication to this project was matched by a speed in response at the bureaucratic level not typically associated with Government departments. My gratitude also goes to today's speakers who so willingly accepted our invitation.

At this stage I would like to talk to you about some things that may be discussed later on during this afternoon's meeting. The image you see behind me (the cover image) was born when we had a feeling, an idea that found its confirmation in reality. The contrast is between two musicians, one of the past (Mozart) and one of the present or even

the future (David Guetta). This possibly provocative contrast represents the fact that the past lives with the present. In preparation for this meeting, I read documents and examined pictures that in some way made me understand that the image behind me sums up an issue that we have got to address, namely how to reconcile the past and the future in a country – Italy – that has spent too long in the former and struggles to come to terms with the latter.

This situation affects all fields in the country, clearly not only the world of live events or copyright. On this point, I'd like to mention a request made by our colleagues in the United Kingdom to the future government of the country after the upcoming general election. The first demand - there are five in total - is for robust copyright laws. Why? Because copyright represents the foundation of the music industry and possible changes to copyright laws either the EU or UK levels will have an impact on the degree of financial risk faced by the industry and the levels of investment for new contents. This is the position of our colleagues in the United Kingdom. I'd like to quote Plácido Domingo's introduction to the International Federation of the Phonographic Industry's 2014 report. He says: ' Copyright provides the basis of the modern digital music marketplace. While the formats

have changed, the music remains. In a world of constant change, music is something of lasting value. I want to see a digital world that provides young artists with the kind of opportunities I was fortunate enough to have early in my career. Artists still need to be able to benefit from investment by record companies to build a career. That can only happen if governments around the world play their part in making sure the laws that protected creators in the physical delivery age are updated for the digital delivery age.

This is the point and this is why this meeting has been organised, which is a response to a suggestion made by the Italian Culture Minister, Dario Franceschini. I thank him for this, for the statement regarding our contemporaries and his desire to overhaul the system of culture and events in this country. Moreover, he has my gratitude for two important measures that, hopefully, will come into effect soon. The first relates to copyright, whilst the second relates to live events. This implies, however, our ability of looking beyond our own particular interests, and for us to work together and recap to create and promote a piece of legislation that does not look back 20 years, but looks ahead, why not, 30 years, one that observes progress without hindering it. This can be done only con-

sidering two elements: the creators, people who use their creativity, and the financers, people who have the ability to fund this creativity.

Agis Chairman, Carlo Fontana, earlier referred to the Italian Society of Authors and Publishers (SIAE). Clearly, SIAE is not the focus of today's meeting. Nonetheless, it raises some interesting questions particularly in the light of what I'm going to talk about in a minute. SIAE, as a copyright collecting agency, has already been seen as benefiting from excessive privileges in comparison to agencies from other countries in a few judgements coming from the European Court of Justice. The European Union therefore asks Italy to resolve this issue through a process of liberalisation.

If we examine data for the EU: out of 24 countries, the average copyright paid for live music is 6.18%, ranging from the highest levels of Italy and Spain (10%), from 3% to 8% in Belgium down to the UK's 3% and other countries like Austria that decide the range of percentage based on the presence of public and how often live shows are organized. Outside Europe, in Central and South America the average paid is 7.8%, whilst in the United States, incredibly only 0.8% or 0.1% of copyright is paid during live musical events.

As these figures show, Italy is one of the countries that pay the highest le-

vel of copyright and with the current mechanism in place many players face real problems in continuing to do business. The example of David Guetta, who you can see behind me, represents a kind of music that, unless something new happens, we'll no longer be able to hear live. In fact, a certain type of music will no longer be possible to make in Italy, which means no copyright revenues for the creators, no opportunities for socialisation, no chance to obtain revenues that come from this market. David Guetta's shows, and generally speaking electronic music, are considered as requiring a mechanical support, such as discotheques. Shows classified like this are subject to VAT of 22%, an entertainment charge of 16% and copyright of 10%. As you can see, the tax burden makes such events practically impossible, which means no longer being able to put on such events or support those who create them.

It's essential, therefore, that legislators in this field don't disregard the protection of copyright while at the same time considering the main conditions in which this protection should happen. In many other cases, laws in force today – and here we are still on the theme of past and future – were passed in an era when other dynamics and mechanisms were in place, when whoever performed Mozart's music was rightly consi-

dered a third party; in all fairness, Mozart would probably never have been able to perform so often and to so many people as today's artists do during a world tour. The same grounds for copyright then and now simply do not exist. Today's artists often perform their own music and are already paid for this, i.e. for their work as authors/composers. A fair and thorough overhaul of the current regime is needed. It will take courage and the wish to get to something that can reconcile all the components of a difficult task.

I would like to finish summing this topic up quoting a recent editorial by Eugenio Scalfari, founder of one of Italy's major daily newspapers, 'La Repubblica'. After travelling extensively for a long time, in the end he probably arrived to the same conclusion that I share: «The dominant feature of today's world is the global society. This is the topic that all of us have to come to terms with, making an effort. It is already a fact, but it still requires a long time to be built to fit us as men and not beasts, which is where we come from'. I would add that we don't have much time. Thank you.

First Part

Giovanni Figà Talamanca

*Full Professor of Commercial Law
at the University of Rome Tor Vergata*



“Technology & Intermediation: developments and prospects in copyright law”

I would first of all like to thank you for inviting me to this meeting. The invitation gives me in the first place the opportunity to underline the fact that copyright is basically a consequence of technological innovation: copyright would not have existed without technology. In fact, as we know, the first technological revolution that generated the idea of protecting intellectual property rights was the printing press.

Printing for centuries has been the vehicle for dispensing the creative works we are interested in, including obviously music through music sheet. Naturally, the concept of copyright has gone beyond the printed form and in general beyond the production and dissemination of “copies”. Nevertheless, it’s clear to everyone that efforts to bring within the same conceptual framework and to subject to the same rules also the protection of non reproducible works, works of which only one example exists, have been marked

by compromise and adjustments, not always convincing. Musical works, although each performance may be considered unique, are intrinsically replicable and can be listened to again and again. Replication can involve performers and usually involves the industry, i.e. production, the importance of which has grown over time. Not by chance Italian copyright law, extremely modern in it’s time (1941), devised a specific role for the producer, side by side with the author and the performer. In the 20th century, one technological revolution followed another, challenging copyright law and engaging lawyers and lawmakers in a struggle to bring the law into line with

constantly changing methods of reproduction and use.

As I have said, Italian law in the area is relatively modern and already took account in its original draft of mechanical and non-mechanical reproduction and diffusion of musical works. The rules, however, are still closely associated with industrial reproduction and distribution as necessary framework to enjoy music. Indeed, in the early years of the Italian copyright law and also in the decades to follow industrial production was the only way to achieve a widespread diffusion and use of musical works. Today things have changed radically. The possibility of reproducing music on devices at comparatively low cost goes back to the second half of the last century. With tape and cassette recording first, and later with CD burning, high fidelity copies could be made at home with no industrial intermediary. This transformation determined a system-wide crisis. Not surprisingly, the development of these forms of reproduction came up against considerable opposition from the industry, which saw them as a threat to its dominance in the reproduction and diffusion of music. But technological revolution had by no means yet ended.

The next stage offered the possibility of reproducing music without any visible or tangible support. In the face of these developments, once more compromise was sought, involving a revision of the main concepts of intellectual property, i.e. exclusive rights of copy. Copyright holders obtained remuneration through taxation of reproduction devices rather than through direct control of reproduction. Few have wanted to admit openly that we have gone from exclusive rights to a “paying” public domain. But we must admit that reproduction without consent has widely become legal, even where presented as an ‘exception’. Although these forms of remuneration are circumscribed, a systematic challenge to the concept of exclusive rights is implied.

Traditional copyright was strongly related with property: with the ownership of copies (the sale of which represents the exploitation of the work) as well as the “ownership” of the work, which consists traditionally in the exclusive right to produce copies for sale. When the work “dematerialises” completely, and no physical support or industrial machinery is needed to listen, share or transfer it, the whole system needs to be reviewed. Today, permanent connection and access to an enormous mass of data or “contents” allows us to abandon all need of ownership of any corpus mechanicum on which the work was recorded, moving instead to on-demand use: rights of access rather than property rights. The digital music market has already overtaken the tra-

ditional physical music market, and we can imagine before long the disappearance of the physical market to the dominance of digital market. Recently, this digital market has moved on from a “download and own” structure towards a new “listen on demand” model. Instead of buying copies to be listened time and again, we buy library-scale access to works made available for multiple access.

However, this latest phase of technological innovation arrived before all the previous changes could be assimilated and before an adequate update of the terminology, concepts and rules could be made to the recent last but one and last but two phases of the technological revolution. We are facing a new challenge, as works become merely “information” to be consulted on demand, and ownership becomes irrelevant. This brings us to one of the key issues: what is and what will be the role of the industry in the face of these new challenges? Undoubtedly a rearguard action can still be fought in defence of a property rights concepts, seeking to exploit works through limitation of access.

We cannot ignore nonetheless the disappearance of the role of intermediation in the reproduction of works. Today the reproduction of “copies” of works is been totally industry-free,

whilst instead their use is increasingly tied to Internet access. Consequently, the industry intermediation that maintains a key role is no longer in production but in diffusion, with the internet industry as major player. Unlike the channels of diffusion of ‘old’ radio and television technology, the new channels are not dedicated to specific contents with centralised programming, but are indiscriminate, allowing users to access copyrighted works but also as well as other contents.

However, the online industry has nothing else to offer but contents. Therefore, we need to find a point of balance between industry providing content and industry providing access. This balance may depend on the players and their strategies, but it also requires, I believe, a broader political and legislative strategy. More precisely, what is the ideal equilibrium that allows for the optimal allocation of resources deriving from the use of copyrighted works between the contents industry and the transmission industry? How can we achieve this equilibrium? Through an ownership-based system? Through the negotiation of licences on a case-by-case basis? Or through a (technologically feasible) system of (paying) public domain use? It’s no longer impossible and will become even easier when users, as they

are now starting to do, stream rather than download media.

It becomes extremely simple to quantify exactly when and where each single piece of work is streamed. In this context, the new frontier is a legislation that seeks to maximise the opportunities of access to works, rather than restricting it. This would fulfil both the general interest, allowing widest enjoyment of art in its broadest sense, and the interests of authors and production industry. Ownership-based regimes of exclusive rights should therefore be abandoned, opting instead for the distribution of revenues generated by subscription fees (as they are already now) or online access charges. Nowadays, even if we don't subscribe to a music provider or stream music, the Internet gives millions of opportunities for both access and use.

It is interesting to point out that the music industry has adopted a varied and pro-active policy with regards to the various forms of free use of works. Significant also is how for instance the approach changes on the basis of the quality of use, i.e. low or high definition audio-visuals. I've also asked myself and I ask you too why all the lyrics of songs are freely available on the Internet and why the rightholders do not want to promote an ownership-inspired policy for

these lyrics that are, undoubtedly, protected by copyright. It's probably a commercial choice: free access to this part of the work acts as a promotional tool for the song, which is after all what the public wants and not the lyrics alone. If my hypothesis is correct, we can empirically confirm that we are ready to face the challenge. As I said, we must however doubt that the process can be left solely to market forces.

I believe that institutions at national and EU levels should play their part in drawing up a new system of rules. These rules should be shaped to govern this delicate phase of transition and avoid patchwork regulation which penalises above all authors. I now turn to another delicate question that concerns the roles of authors and producers. Today not only have reproduction and diffusion been disintermediated (or perhaps more correctly re-intermediated), but we have rapidly reached the point where production itself can be disintermediated. Certainly, also in the past, music was produced without the support of an intermediary simply because it appeared in sheet music form. Nevertheless, it still required intermediation for it to be performed and broadcast. Today all of us can record a piece of music. So, we should ask what role remains for intermediation in the field of record production. The

culture industry appears to be moving from intermediation in production to a new role focused on promotion and marketing.

This role is increasingly turning towards agency rather than industrial support. Faced also with this new challenge, we have to make sure we do not arrive unprepared. Today's contributions will certainly help us make sure we don't.

Alberto Maria Gambino

Full Professor of Private Law at the European University of Rome; President of the Italian Academy of the Internet Code (IAIC)

“Copyright and Innovation: incompatibility or synergy?”



Giovanni Figà Talamanca’s effective introduction certainly makes considerably easier my contribution to today’s meeting on the future scenarios for copyright and innovation. Giovanni Figà’s words contain the hope that sooner or later things will sort themselves out.

This positive outlook may be considered visionary or more simply optimistic; nonetheless a healthy dose of optimism can only be beneficial in a meeting such as this.

Moreover, the law involves blood and tears, namely its statutes, its regulations and the ability of the courts to interpret both in the face of the challenge posed by new technologies. Consequently, we have to highlight above all a method that we can use to address this challenge. There is little or no choice: the method can only be the law in its existing form - *de iure condito* - which reveals applications of the hendiadys “copyright vs new technologies”. Moving from those

premises, as the title of my talk is ‘Copyright and Innovation: incompatibility or synergy?’, I would like to start off by giving you my conclusions and then, working backwards, outline the reasons for this position.

I believe that synergy has been developed in the private sector of self-regulation, whilst incompatibility has become ingrained in the public sector of some legislative subject areas that has produced a series of laws that are complex and difficult to apply.

Giovanni Figà’s optimism is justified by the private sector. The music industry, only a few years after a climate of profound crisis, has today

with a system of minimum but global payment found a state of equilibrium. There is a systematic weakness however in current copyright law that has a glaring defect often pointed in many conferences: it does not take account of the diversity of the product markets in question. We have one copyright law when what we need is several, each tailored to content types covered by industrial property rights. An immediate example of the variety of copyright can be seen in publishing. Those from the world of research know well how much they would like to see their work distributed in millions of copies throughout the world. The prestige, also economic, is built up by the increase in the numbers of those who read and study these texts. On the other hand, the novelist, the writer of a best seller, is concerned primarily with sales and each pirate copy represents economic harm. Consequently, although behind there is the same law and the same publishing contract and theoretically the same remuneration, researchers usually have to pay for their works to be published, whilst writers of best sellers receive rightly substantial royalties.

A second example you may recall where new technologies have not actually shone concerns the law on decaying or degraded books. This is a classic example of where the initial fear of technological innovation determined a bad law, fortunately never adopted by the Italian Ministry of Cultural Heritage and Activities and Tourism. The Ministry's failure to apply the norm, which from an institutional point of view can hardly be seen positively, nevertheless is in terms of common sense a useful act of, let's call it, forgetfulness.

This case reveals a concern for a vast heritage of reproducible works, which the legislator attempted to protect, with regards to a system of 'copyright exceptions' or 'free utilisations'. The intention was to identify a technological mechanism that prevented reproduction. However in drafting the law, the legislator made the mistake of approaching technical issues of which he had insufficient knowledge. As known, the rule provides: 'The image may be reproduced but in only degraded form'. The problems is that online everything is technically 'degraded', but with differing degrees of intensity. Here lies the paradox: if a work has to be so poor in quality that no one will want to download it, the work will obviously lose its commercial attractiveness; however, in sites dedicated to science and learning, the moment a researcher sees a work in its worst possible form, he'll lose any interest in wanting to know more about it! A third point: private copy. Regarding this issue, it's important to underline that there is no need criticizing every time someone comes up with ways of remunerating authors (it will be the market or the author

to say whether this remuneration is adequate or not). SIAE comes in for considerable flak...but SIAE is simply an institution; and then there are the authors, the publishers and those who have the legitimate right to be paid for their labours. The solution of a direct charge on physical media objects has existed for a long time and pre-dates new technologies.

We should start from our legal system, follow its framework and then apply it to new technologies and their overall impact. The memory card, on which the charge is applied, is essentially a physical object just like a photocopier; nevertheless it's important to understand that we are no longer solely in an individual context. When we enter into the world of technology, we have to realize that everyone has to pay, not just users. If we understand this, we can reach an equilibrium.

Giovanni Figà made the useful distinction between the work as a physical artefact and, as Ferdinando Tozzi would say, the work in digital form. Twenty years ago, to organize a cinema event you had to physically get hold of the roll of film. The film was seen by everyone together. SIAE intervened if the aim of the event was commercial, but was more tolerant if the screening was in a no-profit setting. Today there is no longer

a physical artefact. Is this fact individual or collective? It's collective; a revolution that concerns everyone.

All of us can copy a film and reproduce it in DVD or file format to watch with friends and family. Technology has increased the opportunities to reproduce a work. This is of public significance and influences our collective habits and interests.

The question of intermediation, in the past physical and today technological, consequently has to be reassessed in terms of its final effect, which is the wider exploitation of the economic rights that lie at the heart of copyright. This reassessment should not focus only on recovering lost profits, but also on the new opportunities and the creativity of the culture industry needed to exploit them.

Another aspect that should not be forgotten concerns moral rights. We should be wary of the excessive commercialization of creative works above all when we move from the protection of intellectual property to a service and all that goes with it. We have avoided that the private sphere prevails over the public one.

What does all this entail? It may mean that a work is not used or enjoyed in the way its author envisaged: advertising breaks, the possibility to access the work through technologies that can in part deform

the performance of the work, etc.. I'm not an expert but many say that music in vinyl sounds much better than in digital form and the analysts of the sector have in the last five years reassessed the value of vinyl records.

Some may argue that new technologies have led to the impairment of a right. A moral right, remember, is not only the right of attribution but also the right of integrity whereby the work is not subjected to distortion or modification, i.e. it remains faithful to how the author intended it.

A study of case law reveals that the protection of the right of integrity actually prevails over the protection of an owner's right to income. This latter right is a cornerstone of all Western democracies and yet it is inferior to the right of integrity. Recognition of the fact that a work should remain integral, not distorted or modified.

A fifth question concerns also the relationship between copyright and institutions. In fact, for some time now the question of copyright has been handled by the Ministry of Heritage and Cultural Activities and Tourism (MIBACT) and other government bodies such as the Ministry for Economic Development, the Department for Publishing. Radicalizing the arguments used by the speaker before me, we run the risk of prioritizing the service rather than the content. Therefore, within the rather antiquated architecture of our *état de droit*, the representative institution is fast becoming the market, economic growth and the industry as a whole. Culture, which lies at the heart of copyright law, appears in the background somewhat jaded. A word of warning is needed at this stage. This is a battle that has to be fought together. We cannot risk losing the fulcrum of the value of authorship in the race towards the framework of service and industry. If we do, there is little doubt that creative quality will suffer and if there is no longer an incentive to create, content will suffer too. There will always be some poet who will continue to be a poet, but if poetry does not provide him with sources of sustain, he will be forced to turn to something else. Above all there is the negative effect on cultural content; the content that I have perhaps slightly emphatically defined moral right. In this situation the Ministry of Heritage and Culture has a key role to play.

A clear example are exhibitions. Are they public? Are they private? Do they have an institutional purpose or a commercial one? In substance, exhibitions give the public the possibility to enjoy works that otherwise they would have little chance of seeing. The organization of such exhibitions requires orga-

nizational efforts that use above all public resources. *Mutatis mutandis*, it is extremely similar to the situation of those, like Assomusica that work in the field of live music; like an exhibition, it's a way of creating a social event, a moment when people of all ages meet and socialize. Can we recognize copyright protection also to those who organize these creative events whether they be exhibitions or concerts? I'm particularly attracted to this idea because here we are talking about recovering authorial content obviously where such content makes a cultural contribution. We are not talking about merely a service as there has to be something more than that.

Turning to the question of format, how many times have heard the sentence 'the law of copyright excludes format'. Nonetheless, in a context of reform, 'format' has been the object of considerable discussion being a typical example of a technological change that raises questions. These questions require answers and a law is needed to provide incentive for intellectual work that deserves protection.

Another example of an apparent clash between innovation and copyright concerns software, which protected as we know by copyright. This choice illustrates another legislator's mistake, since software cannot pro-

vide the creative contribution which manifests itself in a work that can be experienced and enjoyed by the senses. It is this sensorial experience that generates the premises of copyright and the protection it offers.

Copyright originated with the development of printing, which enabled the immediate transposition of a word into a creative work; with this transposition comes the reproducibility of the work itself. The general framework isn't quite the same with software.

One could even say that software is a lesser invention. The doctrine holds today that patent law rather than copyright law might be the more appropriate route to follow. When purely technological elements come under the protection of copyright, the risk is that all and nothing can be the object of copyright law.

The model we should follow instead is to search out in intellectual works creative innovation and guarantee its protection.

The question becomes even more sensitive in the area of biotechnologies and the healthcare industry as a whole.

As I near the end of my contribution, I would like to say something concerning the most delicate part of the legislative system, one that revolves

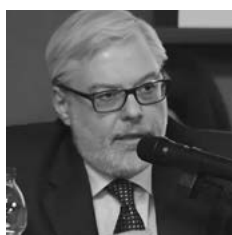
around the subjective nature of copyright. Indeed, the so-called European Constitutional Charter states that copyright ‘is a property right’, which means that only the courts can resolve claims because only there can subjective rights be protected. However, we know only too well of the problems determined by technology, problems that the courts cannot resolve promptly. Judgements often arrive after the damage has been done. Here is where the system of the Authorities AgCom amongst others albeit not representing a system expressly disciplined by the Italian Constitution, may offer a solution. A case in point is the excellent work done by AgCom in preparing its Regulation, whose constitutionality is currently being discussed by the Italian Constitutional Court. The reasons for this challenge to the Regulation include the fact that it contains some enforcement measures which, it is claimed, are the responsibility of the courts and not authorities. Prior to the transfer of the case to the Constitutional Court, the Regional Administrative Court (TAR) had judged the structure of the Regulation to be without flaws though at the same time pointing out the existence of a possible imbalance between freedom of expression on one hand and the protection offered by copyright on the other within the overarching legislative framework that assigns AgCom as competent authority.

The choice of the Constitutional Court is anything but unimportant with regards to what has been said so far; this is because the issue before being legal is above all cultural. If new technologies provide operators working in the culture industry with a culture of legality and so they understand what is right and what is wrong in a transnational market we will be able to create a cultural environment and a model for integrated development with all the systems’ players, authors and publishers included.

I end with a topic raised by Giovanni Figà Talamanca, one that is as important as it is insidious: access to the internet and to technologies. According to the United States’ Federal Communication Commission, ‘net neutrality’ implies that there cannot be a first-class and second-class internet accessible only to those with high-speed connection.

It’s important when talking of net and infrastructure access that we don’t prioritize exclusively the economic aspect of the service at the expense of content. If we do, the risk is dividing the population into those who can afford new technologies and those who can’t, so forced to stay with obsolete technologies and missing out on life-enriching access to cultural content.

Panel Discussion



Alessandra De Marco

*Coordinator Office for the Protection
of Copyright and Intellectual Property
and Supervision of SIAE, Department
for Information and Publishing, Office
of the President of the Council of
Ministers*



Good evening everyone. I would like to thank Assomusica for having organised this event that gives us a valuable opportunity to exchange views on a question that interests all of us. First of all, I would like to introduce myself. I am Coordinator of the Office for the Protection of Copyright of the Department for Information and Publishing of the Office of the President of the Council of Ministers, which together with the Library Directorate of the Ministry of Cultural Heritage and Activities and Tourism, is responsible for copyright and related rights.

Briefly, I want to provide details of two activities the Department is currently focusing on: first, the transposition of Directive 2014/26/EU on the collective management of copyright and related rights and multi-territorial licensing of rights and, second, the initial Italian response to the European Commission's project of copyright reform that is strategically part of the Digital Single Market (DSM). Member States have to bring into force the laws, regulations and

administrative provisions necessary to comply with Directive 2014/26/EU ('the Collective Rights Management Directive') by 10 April 2016. It is for this reason that within the confines of the Permanent Consultative Committee on matters of Copyright, an ad hoc commission has been set up to study harmonisation issues.

The Directive will have an impact on the intermediation of related rights, which as you will know, was liberalised at the beginning of 2012 by article 39 of Law Decree 1/2012. This Decree also established the minimum requirements for operators in the sector. These requirements were subsequently fixed by the Decree of the President of the Council of Ministers dated 19 De-

cember 2012, which includes primarily the legal requirements that operators have to fulfill regardless of the company form. Such requirements include for instance accounting obligations and a non-monocratic board of statutory auditors (i.e. non sole auditor) whether the legal structure chosen be limited liability or business partnership.

Other requirements relate to the organisation and management of the entity and refer to data banks, ITC and human resources. There are also further requirements aimed directly at protecting rightholders, above all by security furnished by a guarantor. The current system is therefore based on the provision of individual guarantees for the financial solidity of the entity. The Collective Rights Management Directive overturns this logic, requiring all operators to respect standards of transparency, governance and non-discrimination and assigning rightholders the responsibility to choose in an informed way the collective management organisation operating in the market. In a nutshell, the Directive is based on the principle that authors and artists shall have the freedom to choose their collective management organisation. Operators are required: to manage the proceeds of rights diligently and distribute them in a timely manner; to adopt pre-determined standards of transparency; to provide in detail all necessary information and disclose it in the organisations' statements as well as in their transparency reports.

The work carried out as part of the harmonisation process of the Directive will represent an opportunity to evaluate critically the system of minimum requirements and offer proposals for modifications. Staying on the subject of related rights, the efficient working of the sector is hampered by a series of problems that are well-known to operators. In response to these problems, Under Secretary Lotti has initiated a process of reform that aims to produce a bill (*disegno di legge*) overhauling the area of related rights. This process includes the participation of collective management organisations, which have been invited to put forward proposals. After an analysis of these proposals, a first draft of the bill was made, which is currently under examination.

Lastly, I would like to draw your attention to the checks carried out on minimum requirements by Government departments since last October. All collective management organisations that communicated start of business have been required to provide information proving conformity with the minimum requirements. The documentation received from these entities has been exa-

mined and where necessary further details requested. On the basis of this information processing, the Government will be in a position to identify those collective management organisations that comply with the minimum requirements established and those that that will be struck off the Department's list.

So, both the Department and the Ministry of Cultural Heritage and Activities and Tourism are committed to making sure that the present system is adhered to by all competing organisations. The checking process ends in May. Nevertheless, we are aware that the direction taken in Europe, driven also by the development of new technologies, is moving towards a different model based on the responsabilisation of operators, which has less importance in the minimum requirements system. This is because when a government department carries out compliance checks, despite some form of screening, implicitly all operators are considered the same.

However, with the system foreseen by Directive 2014/16, which establishes transparency and mandatory disclosure of a series of information via the internet, rightholders have access to a greater amount of instruments to enable them to understand how different organisations operate and so make an informed choice.

These considerations could be taken into account during the preparatory process for the transposition of the Directive along with the possibility of reviewing some of the more unpopular minimum requirements. One notable example here is the problem firms with limited liquidity have in providing guarantees owing to the fact that they are committed to distributing proceeds by a certain date. In this particular case, alternative forms of guarantees could be imagined.

As time is short, I would like to move on to another question, namely European copyright reform. As I pointed out at the beginning, the European Commission has identified, also through a consultation process carried out in 2014, certain problems facing the realisation of the digital single market, which are territoriality, exceptions and limitations, and copyright enforcement.

The process is ongoing and the European Commission has issued various statements, generating differing responses from Member States. The competent bodies – the Office of the President of the Council of Ministers and the Ministry of Cultural Heritage and Activities and Tourism – have considered at length the technical position to adopt with regard to the problem areas identified by the Commission and on which the Com-

mission itself would like to intervene; the Italian response will be to adopt a shared and organic approach. The basic idea underpinning this approach is that copyright is vital in defending the industry of creativity not only because the industry promotes cultural diversity and cultural development in general, but also because of its economic potential within the broader knowledge economy.

Consequently, accepting that every effort has to be made to make the digital single market a reality and that such a reality cannot be at the expense of copyright, Italy has clarified its position as regards the Commission's proposals. So, on the principle of territoriality, both the Department and Culture Ministry believe that sufficient harmonisation already exists and that instead of introducing a single European Copyright title, focus should be rather on licences.

Thanks also to Directive 2014/26, multi-territorial licences are forecast to grow further in the musical sector, which can act as a pilot sector and a driver for licence use in other settings. As regards exceptions and limitations, Italy believes the only exceptions that can be introduced are those that are strictly essential for the working of the digital single market and only those that comply with the three-step test currently in force.

The economic impact of exceptions on the various categories that make up the supply chain of the culture industry must also be carefully assessed as we all know of the problems of distribution of added value along this chain.

In fact, this redistribution is all the more necessary in a digital economy where added value too often appears concentrated in those steps of the supply chain more distant from the culture industry, with the damaging effects this phenomenon has on smaller operators. Turning finally to enforcement, our position is that a review of the Information Society Directive (Directive 2001/29/EC) cannot be made without reviewing at the same time the Electronic Commerce Directive (Directive 2000/31/EC) and the Enforcement Directive (Directive 2004/48/EC).

This is because the deresponsibilisation, a strong word but appropriate in this context, of all service providers represents a significant weakening of capabilities in the fight against piracy. Ideally, we need solutions arising from collaboration with industrial sectors involved in the provision of services or at least some form of differentiation amongst providers based on their real capacity to recognise and thereby remove pirated content.

Thank you for your attention.

Leonardo Lascialfari

*Lawyer,
Assomusica Consultant*



“Copyright in live events: Current problem areas”

I would like to focus today on live events and innovation, and particularly on the question of copyright. My approach will therefore differ considerably from that of previous speakers in that the relationship between live music and innovation, the latter most evident in the transmission and reproduction of copyright material, makes the live event a distinct perhaps even separate entity. In fact, in a live event, communication continues to be direct without the support of innovative technological support.

Innovation has little relevance for a work performed during a live event, apart from some aspects that are not connected to the transmission and diffusion of the work itself. The protection of the work against arbitrary use and the management of copyright applied to the performance of the work in front of an audience have remained substantially unchanged.

And here lies the essential vitality of the live event despite the technological changes that have radically affected the broadcasting and reproduction of music works. In the face of new ways of accessing music, people are increasingly attracted to the direct contact with an artist that the live event offers.

The increased opportunities of accessing music has actually made us appreciate more the nature of a live performance, which becomes an event experienced in a place and time shared with other people; all this makes the event an experience that we will remember. Our perceptions of the music in that performance contribu-

te to our overall cultural development. In a certain way, these reflections tie in with what Professor Gambino said about the protection of the integrity of a work of music: the direct enjoyment of a piece of music performed live highlights the intrinsic changeability of the work compared to its immutability when experienced via mechanical reproduction. Every member of the audience has his/her own very personal perception of the event that, in a way, makes the experience unique.

Going back to innovation and its relation to live music, we surely need a revision of our legal framework is required in order to assign value to the event. If we look at the current law regulating the sector (Law 633 of 22nd April 1941), we find a late 19th century vision of copyright, one linked to the theatre impresario, the musician's agent and the sheet music publisher. Such a vision is clearly anachronistic; the entertainment business has undergone significant changes and one only has to think of different ways in which the consolidated law on public security is interpreted. Here, we can see how the Constitutional Court has contributed to the dismantling of the original system of controls targeted mainly at the contents of a performance, modifying the objective of public intervention, in compliance with constitutional principles, towards the promotion of an event as a cultural asset that is worthy of protection, regardless of its content and maintaining authorisations and controls only for questions of public safety at the venue where the events are held.

The logo of today's meeting brings emblematically together Mozart and David Guetta. At the moment we have to come to terms with a restrictive notion of live music, contained in the Italian Tax and Revenue Agency's circular 165/E of 7th September 2000. This circular defines live music as only that which is performed through the use of musical instruments (a list of instruments is provided) and excludes from the category of live music the playing of pre-recorded music before an audience; this type of performance is categorised as 'entertainment', which has a different and higher tax rate. Just out of curiosity, I wanted to find out how some celebrated artists and composers in the field of contemporary music described their work. For instance, Luciano Berio referred to his 1958 work "*Thema*" (*Omaggio a Joyce*) as 'an electroacoustic elaboration of the voice of Cathy Berberian on a magnetic tape'.

Using Wikipedia, so not having any pretence of having carried out an exhaustive research, I also found another work by Berio, '*Questo vuol dire che*' for three female voices, choir and magnetic tape (1958), along with Luigi Nono, who in 1964 performed for the first time '*la Fabbrica illuminata per soprano e nastro*', Bruno Maderna, who as far back as 1952 published his '*Musica su due dimensioni*' for flute, percussion and magnetic tape, followed by later works, such as "*Le rire*" for magnetic tape (1962), '*Ausstrahlung*' for female voice, flute, oboe obbligato, large orchestra and magnetic tape (1971) and 'Venetian Journal', for tenor, orchestra and magnetic tape of a libretto by James Boswell (1972). The list doesn't end here: Karlheinz Stockhausen, who in 1960 published 'Kontakte', a work for piano, percussion and magnetic tape; Pierre Boulez, with "*Répons*", for two pianos, harp, vibraphone, glockenspiel, cimbalom, orchestra and magnetic tape (1980-84) and '...explosant-fixe' for chamber ensemble and magnetic tape, which saw its first version in 1972-74, followed by a second version in 1992-93.

So here we have music composed by some of the most celebrated and important Italian and European composers, cultural symbols of the last century, which if performed in public

today, would be classified as mere entertainment and musical reproduction by third parties according to a ministerial circular on VAT. Such an approach is not only seriously outdated, but also reveals a profound ignorance of the subject.

The features that help us to distinguish between live music and entertainment surely cannot be laid down by a ministerial circular. I agree once more with Professor Gambino, when he referred to the incompatibility between existing rules and the reality of our sector. When this country's tax agency prefers to categorise a work of music on the basis of ticking one box rather than another, this absence of intellectual depth translates into the law itself and here we have failed to provide useful indications for research and overall better understanding.

Although necessary, it's difficult to talk of innovation in music when the works for magnetic tape were published and performed for the first time in the 1950s. Today we have to exclude such a work from the category of live music solely for tax reasons.

As we are talking about which areas of the live music business need an innovation overhaul, we can start with the tax treatment of sponsorship

money and public contributions and its effect on the payment of royalties. On this issue, SIAE clearly has to look after the interests of its institutional members and is fully aware of the fact that when it signs agreements with music sector associations the overall tax framework handles the question heterogeneously. SIAE realises that some leeway is preferable in the approach to judgements made by the Italian Court of Cassation: three relating to sponsorship (Civil Court of Cassation, section I, 13th December 1999 no. 13931; 15th June 1999 no. 5932; 19th January 1996 n. 428) and one relating to public contributions (Court of Cassation, section I, 13th January 2004, no. 267). To add to these are decisions of lower courts conforming to the Cassation's position (e.g. the Court of Rome, Industrial and Intellectual Property Division, 14th February 2011 no. 3016 and no. 3023 and the Court of Milan, 26th August 2008) i.e. , that all forms of contributions that help to keep ticket prices for live events low and which consequently indirectly affect the price of tickets are subject to the full rate.

These are extensive interpretations which, taking advantage of an excessively vague law, have undoubtedly worked in SIAE's favour. However, at the same time, these interpretations reveal their weaknesses if taken

to an extreme. Following this rationale, even the financial contributions made by a partner of a firm organising an event will be subject to the payment of copyright fees given that such contributions ultimately help to keep ticket prices low and have an impact on the cost of the event.

These aspects, I believe, should be addressed and revised by taking the whole copyright system into account rather than on a piecemeal basis. In fact, one can no longer accept that the concept of copyright as a property right, which developed in a late 19th century liberal climate, is to remain untouched by the mitigation of private law aspects relating to the social function of private property enshrined in article 42 of the Italian Constitution. Clearly, if a public contribution is made to support live events, it should be treated in a way that recognises the need to quantify the value, not only economic, of copyright royalties.

What is needed is that also private copyright law, as long as it benefits of public contribution targeted at promoting culture, should respect this form of contribution and should realise its importance as a driver for the promotion of cultural issues and of the protected work itself, rather than considering public funds just as an additional source of income.

There are many other similar aspects requiring an innovative assessment of this subject that takes into account the need to compare the sector's various legal systems, such as copyright, Constitutional law and more recently Community legislation. The aspects I have discussed here relating to live events are only a few of those that are part of a broader context where the monolithic conception of copyright, already unable to prevent certain forms of public performance of copyrighted works, has to come to terms with principles emerging from public law rules.

Ferdinando Tozzi

Lawyer and Member of the Copyright Consultative Committee and holds a PhD from the University of Naples 'Federico II'



“Towards a new conception of copyright? Principles and methods of use”

The so-called new technologies, which frankly are no longer particularly new, have posed a significant challenge to the system of copyright.

This challenge arises from the convergence between informatics and telecommunications. Informatics allows for the digital reproduction of works, whilst telecommunications have enabled the widespread distribution and transfer of data at ever lower costs.

Innovative online technologies have generated new vehicles for the distribution and reproduction of traditional creative works. This has determined also in Italy the problem of applying copyright law.

The criticalities this area of law faces are not the result of the challenges of new technology; in fact, copyright, as the law establishes, applies to creative works ‘regardless of their way or form of expression.’

Consequently, we have to categorically reject the view that new technologies make it impossible to apply copyright law in defence of intellectual property. In no way do new technologies signify the death of copyright.

In particular, what needs to be changed is not the principles but the actual laws, which risk becoming obsolete and so require a radical overhaul. A case in point is Law 633/1941, which needs review in the light of the changes brought about by the digital age and online distribution. Such a review should not be simply an anachronistic defence but an acknowledgement and as-

assessment of the opportunities new technologies represent in the diffusion of culture and information in general and the development of national and trans-national markets.

In recent months, in fact, at the EU level an update of Directive 2001/29/EU is currently being prepared that focuses on three important areas:

- a) territoriality for what concerns the management, collective or individual, of copyright;
- b) the definition and adjustment of exceptions and limitations;
- c) copyright enforcement with restrictions on access to non-authorised content (with the hope that Internet Service Providers assume a role of 'responsible collaboration'.

Music, content par excellence (and so the lifeblood of the market) is the best indicator of copyright's current state of health.

The new technologies, at least in the music sector, after an initial period of uncertainty and suspicion, are bringing about a positive realignment of the market (or if anything else reduced asymmetries).

This extraordinary development accompanied by a move towards greater equilibrium is not, however, matched by a similar trend in the area of law.

If anything, in this area the intrinsic characteristics of new technologies have created considerable confusion built around the fact that material available on line is not a physical artefact (*corpus mechanicum*) and so judged to be freely usable.

On the contrary, the Internet represents an evolution in the ways creative works are used and created; new technologies raise a series of criticalities that stem precisely from the move to digital/online environments and the enormous disparities this has created.

Crucially, it is important to understand what is lawful in this new digital world and it is the law that must provide us with certainty. Otherwise, the risk is that if all is forbidden, in practice all will be allowed. Precisely from this situation of prohibition comes the phenomenon of what is known as altruistic piracy, a form of piracy that allows for the diffusion and exchange of online material

for non-profit motives such as research and study.

Such use should be part of a range of necessary freedoms and not absolute prohibitions. Music does not escape such problems. In fact, a file containing a creative work, though ‘logically’ legitimate, may be in fact an act of altruistic piracy.

We face a law with two heads: offline, the tangible creative artefact will be freely transferable, whilst online the digital support because it is digital will not.

Copyright law, as we know, protects the intangible work of creativity (*corpus mysticum*) as distinct from the physical possession or ownership of the medium (i.e., paper, physical, mechanical, magnetic, digital) through which the work is accessed or used.

This vehicle or medium belongs to who buys it, but and here is the problem where the medium used to access or use the creative work is via a tangible digital support (e.g. downloading of files, streaming), the purchase can be considered as a rental/account for life.

I believe, therefore, that alongside *corpus mysticum* and *corpus mechanicum* we need a third *corpus* that I will dub *corpus digitale*; through this channel no copyright shall be transferred but only a form of

leasehold or, to put in another way, a personal right of use tied to the account, which by now represents for many of us a second digital identity. So, whilst property of a book as a tangible artefact can be transferred, property of downloaded files cannot or at least not always. As things currently stand, the only viable solution is *corpus mechanicum*, with due regard being had for MTP and DRM protection systems.

Clearly, digital technology is an extraordinary opportunity for the culture industry and its related parts. In my view, this opportunity can only be exploited by adopting a new approach to copyright and a proper equilibrium between the interests of artists with control over their works on one hand and consumers on the other.

In this way, will we see a reduction in the monopolistic power of providers within the context of a copyright law tailored to meet the differing needs present in every use of protected works and compatible with legislation in the area of service providers and enforcement.

The spirit underpinning this approach should be to ensure that consumers and operators have the adequate information and awareness of their rights and duties, of what they

are buying, of the channel or medium through which the purchase is made and the rights that such a medium can realistically guarantee the buyer. The ultimate objective must be therefore to balance on one side the need for information, cultural promotion, research, teaching and learning, the protection of cultural memory and support for creativity with, on the other, the indisputable right of remuneration in its various ways of artists and rightholders.

Guido Scorza

Lawyer and university lecturer. He teaches New Media and Technology Law



“Intermediation, copyright and related rights”

First, I would like to thank the organisers of this conference, which I believe to be extremely useful for all of us working in this field. If I may, I will focus on the current state of the intermediation of related rights in Italy. Copyright law itself is perhaps one of the finest works of art ever written.

A work of art that over the centuries has achieved a compromise between the conflicting interests of rightholders on one hand and users on the other. One principle enshrined in this law I judge to be particularly important, i.e. the intellectual property rights recognised in copyright law do not represent the final objective, but the means.

The real objective of copyright law is to promote creativity and to maximise the circulation of cultural works thereby spreading and sharing knowledge. The best way to achieve this objective is the author's right to remuneration. Recognising this right is as

important now as ever. Proof of this comes from recent cases of enforcement and in reality also the identification of private copy compensation. In my view, we have lost sight of this position, preferring the idea that ultimately copyright law recognises holders' rights. I believe that when drafting copyright law the correct position is to identify an equal distance between the two main parties, namely rightholders and users.

Having made this point, I will now move on to make some suggestions relating to the current situation and the market of intermediation. To start, we have to recognise that we are talking about a market that

is global in a natural way, a market that is European in a natural way. Today, using an app we can book a car in Rome, Paris or New York (Uber) or book a house in Cape Town as easily as in Paris (Airbnb). It would be unacceptable if a market that by definition is intangible ended up tied to national regulations even more stringent than those applied to tangibles such as cars or buildings. Either Italy takes an active part in this revolution or instead we try to hold back the advancing single market; either we become protagonists in that market or mere bit part players.

Now I'd like to turn to the topical question of SIAE, the Italian Society of Authors and Publishers because when we talk about the intermediation of rights in this country we inevitably talk about the monopolist SIAE. Let me read to you the following: 'Italian music writers and publishers would have excellent prospects for growth if only they could count on a SIAE that is efficient and in line with the times rather than a bureaucratic crony-based monolith that weighs down on our competitiveness'. Now before Paolo Agoglia threatens to sue me, I would just like to point out that these words were spoken by Filippo Sugar, the recently appointed President of SIAE, in an interview published by the Italian daily 'La Repubblica' in 2010. If we are going to discuss the intermediation of rights in Italy, we have to address the Society's chronic inefficiency. Perhaps it's nobody's fault or maybe many are to blame and I'm not here to point the finger at who is responsible. The fact is that the SIAE described by Sugar in 2010 and SIAE today are essentially the same: gleaned from SIAE's accounts for 2009-2013, gross operating margin (the difference between what it costs to produce and what it collects from producing) ranges from -20 to -27 million euros. You don't have to be a financial analyst to understand that SIAE is structurally inefficient. We could say that these figures paint only part of the picture. Nonetheless, this is the copyright collecting agency that operates for the Italian state. We'd be hypocrites if we denied the reality of an inefficient monopolist upstream and an inefficient market of rights intermediation downstream. Faced with such a situation, those with supervisory responsibilities must intervene.

Two more suggestions: a short circuit exists in the Italian rights intermediation market that has to be eliminated as soon as possible. SIAE is a monopolist; this is a political choice that I'm not here to discuss today. Needless to say, I have clear ideas on the matter. SIAE is a monopolist whose by-laws establish that during the Annual General Meeting each vote counts as one vote plus

one euro for every euro members take home as copyright revenues. In the Italian rights intermediation market, this is an intolerable distortion. A rule that the right to vote is wealth-based may be reasonable in a free market where author or small-sized publisher are free not to join a collection society, knowing only too well that they will be able to exert little influence on it. Here, and I quote ‘music accounts for 80% of SIAE revenues and the vast majority of music revenues comes from 700-800 writers and full-time professional publishers that however can’t decide changes to the by-laws owing to the fact they are in a minority’.

Here we are faced with a paradoxical situation: if who has a legitimate interest in an entity cannot influence its strategy, a potential conflict arises between the interests of its members and the agenda of who controls it. SIAE was not born to guarantee the rights of all. This point was another one made by SIAE’s new President. If this observation was worthy of support in 2010, when the richest publishers and authors had little influence in the governance of the Society, it’s even more so today when one looks at the situation of the weakest publishers and authors. I’m not saying the rule contained in the by-laws is wrong; what I am saying is that either the rule is incompatible

with the regime of monopoly or the regime of monopoly is incompatible with the rule. Somehow authors and publishers must be allowed the choice whether to become members of the Society and have a voice in how it is run.

A final word on another issue that I believe is the most important for Assomusica: the relation between a monopolist rights intermediary and users. I cite the following: ‘article 171 of Law 633/41 establishes a criminal complaint to the judicial police (*polizia giudiziaria*) in the event no request for authorisation is made to SIAE and the resulting failure to make payments for the diffusion or performance of music in any form. Those in such a situation shall regularise their position within the time indicated or incur criminal liability’. This is just one of the many communications users receive. The message is clear: either you comply with SIAE’s rules, whatever music you play, or you risk criminal sanctions. This behaviour clearly differs, from a legal point of view, from what is actually written in copyright law. This law in fact states that having a licence or using a work of public domain is very different from having signed up with SIAE. I believe that either we manage to get acceptance for the principle that a user pays when he uses the rightholder’s work

or we go on following practices that can be termed at best anachronistic, but which are in actual fact against the law. These practices go something like this: I (SIAE!) turn up at an event, I listen to the music and I tell you that I represent the rightholders of this music; even if I've heard music played for only a minute, you're going to have to pay an annual licence fee, a quarterly licence fee and perhaps even a fine for not having previously subscribed. Intermediation is a vital conduit in translating the principles of copyright law into practice, but a market like this cannot work.

Who knows me knows that I normally speak my mind. I apologise if this afternoon I have taken SIAE to task. However, if I speak about the history of copyright law in Italy, I think of SIAE; if I speak of intermediation, I think of SIAE; and if SIAE doesn't work, the intermediation of rights doesn't work. Thank you.

Alessandro La Rosa

*Mediaset consultant,
Studio Previti*



“The responsibility of intermediaries”

My role during this conference on the subject of ‘Innovation and Copyright’ in representing Mediaset is to describe the Group’s activity in contrasting the abuse of intellectual property rights in a digital setting.

Mediaset can be considered a major player in the defence of these rights in the light of the complex action it has brought against those entities that continue to regard themselves as ‘mere intermediaries’. I would like in particular to clarify the reason why we hold that such intermediaries are anything but ‘mere’.

As the President of Assomusica, Vincenzo Spera, correctly pointed out in citing Domingo, there is an urgent need to protect the investments made in the audio-visual sector. This principle is clearly established in the Enforcement Directive (2004/08/EC), whose first ten recitals aim at raising awareness of this need.

On this point, it should be stressed that without the suppliers of audio-visual content, the so-called ‘internet industry’ would be an empty container with nothing to host or transmit.

In numbers, Mediaset has over the last ten years invested more than 20 billion euros and pays more than 60 million euros into SIAE’s coffers every year.

In the light of what I have said and the figures I have provided, a question inevitably comes to mind: why is that an operator like Mediaset but in general all television companies - has to respect, rightly I must add, a series of stringent laws both at Community and national levels whilst other operators in the sector, those

who as we have seen like to call themselves ‘mere intermediaries’, can distribute freely and without hindrance content authored by third parties, without having to make any investment, without having to pay one cent for the acquisition of licences and related rights even though these intermediaries use these contents for advertising purposes, so generating a business similar to that of traditional television companies?

The upshot of the situation described is simply the need for adequate regulation that offers all operators a domestic and European level playing field.

Ms De Marco introduced the topic of harmonisation at European level of copyright and related rights. At the moment, France’s Superior Council of Literary and Artistic Property has asked Professor Pierre Sirinell to assist in a thorough and systematic review of the three key directives in this area, i.e. the E-commerce Directive (2000/31/EC), the InfoSoc Directive (2001/29/EC) and the Enforcement Directive (2004/48/CE).

In our view, the appropriate legal principles for regulating the sector are clear and are already in place. What is missing however is a system capable of ensuring compliance on the part of all operators in order to guarantee a high level of protection of authors’ rights and related rights in a digital context.

This is confirmed in the 9th Recital of the InfoSoc Directive, as well as the Enforcement Directive, that establishes amongst its principal objectives the need to protect investments, without which there would be neither culture nor employment.

For these reasons, the key issue to address concerns the effective role of intermediaries.

It is traditionally held that the E-Commerce Directive foresees and regulates three types of intermediary, one of which is hosting.

This is incorrect: the E-Commerce Directive foresees in fact a sole genus made up by three species types hosting is one but, more precisely aims at distinguishing between providers of information society services on one hand and the traditional figure of hosting provider on the other.

The exceptions and limitations clearly established by article 5 of the InfoSoc Directive refers to intermediaries that technically transmit content and therefore can use it solely within these limits.

On this point, what the German MEP Julia Reda proposes in her Report on Copyright reform is totally unacceptable, namely to make it compulsory for all Member States to adopt the regime of exceptions that is currently optio-

nal and to introduce an ‘open norm’ regarding exemptions from reproduction under copyright law.

Community law provides for the defence through court action of one’s rights against those who violate them using intermediary services. This judicial option, some claim, is fundamentally a rearguard action. I do not agree.

The European Court of Justice in a recent judgement - ‘TeleKabel ‘ case c-314/12) upheld, consistent with the Enforcement Directive, that the concept of intermediary must be understood in its broad sense, i.e. that any provider through its own instruments permits the violation of authors’ and related rights.

As regards the responsibility of intermediaries, it is clear that this regime must be reviewed in such a way that all those contributing to a violation of third-party rights be subject to general civil liability only where the conditions and requirements established by the E-Commerce apply. In particular, intermediaries can benefit from a series of limitations pursuant to article 16 of Legislative Decree 70/2003 enacting the E-Commerce Directive only where the intermediaries have no effective knowledge of the existence of illegal content and when becoming aware of its existence take immediate steps to remove it.

The same E-Commerce provides instruments for establishing the conditions these limitations may apply to. Crucially, intermediaries must perform a merely technical, automatic and passive role as the Directive states and in no way must they have any control over the data and information transmitted.

Further clarification in this area comes from the European Court of Justice which, in *L’Oréal vs. e-Bay* (case c-324/09) establishes that operators which optimise and/or promote data and information consequently assume an active role in the handling of the content they receive and are therefore subject to the general principle of responsibility.

In *Mediaset’s* action against YouTube, the Court of Rome in an interim measure accepted our argument, i.e. that a provider cannot benefit from the exemptions just mentioned if instead of limiting its activity to the offer of memory space, it actually interacts with the content, by organising it and cataloguing it; such activity cannot be defined as ‘merely technical’.

Some commentators claim that the Court of Milan (in actions started by RTI against ‘Libero’ and ‘Yahoo’) has created a new form of intermediary in terms of ‘active’ hosting.

In reality, nothing new has been created given that in the L'Oréal vs e-Bay decision, the ECJ contrasted the activity of mere passive hosting with active hosting so as to distinguish between those providers who do limit their activities to the merely technical handling of data and information and those who do not.

Currently around 15 cases are pending before the Courts of Rome and Milan involving claims against principal market operators such as, in addition to 'YouTube', 'Dailymotion', 'Vimeo', 'Megavideo' and (previously) 'Rojadirecta'.

This last web portal was recently re-opened and allows access, unauthorised, to sporting content, mostly football matches.

Importantly, on 26th March 2015, the Court of Paris decided that operators offering hosting services are in effect publishers of audio-visual content so making redundant the active/passive distinction - and therefore should be subject to the provisions of the Audio-Visual Media Services Directive (13/2010/EC).

It has been said that the the judicial option is a rearguard action that is an inappropriate means of resolving the issues we've seen so far.

Undoubtedly, court action is not the only solution, but it is undeniably the

one that has allowed us to achieve important results, such as the cessation of infringements, the prevention of future infringements and obviously compensation.

Frequently, these claims are settled. Certainly, the first step is a formal letter of notice demanding the removal of the illicit material. In our experience, this measure leads to the removal of harmful content in 60% of cases. If this doesn't work, precautionary injunctions are justified given that the internet allows for the maximum diffusion of illicit material and the continuation of the damage caused by its diffusion. The aim here is to obtain a court order against intermediaries, whether they be website managers, hosting providers or intermediaries offering mere conduit services, not only to remove harmful material but to desist from such activities in the future (*inibitoria pro futuro*).

The question at this stage concerns the chances of getting these types of injunctions. The E-Commerce Directive and the the Italian Legislative Decree enacting it exclude the possibility of obtaining measures that oblige operators to perform generalised surveillance.

What we are asking for is not this, but an obligation of the part of intermediaries to remove pre-determined content after an infringement has come to light and after formal notification of the infringement has been made.

The ultimate objective is to obtain a prohibitory injunction and compensation for the negative effects caused by the infringements; these results can only be achieved by starting justified grounds for action

Andrea Micciché

Nuovo Imaie President



“What are the prospects for the intermediation of copyright and related rights”

‘Whatever works’ is the title of a marvellous film by Woody Allen. It’s also my personal motto, because whatever system works is fine by me. As far as we are concerned, we are not against liberalisation provided it works! This leads me to a situation in which to a certain extent I’m the person most involved. ‘Nuovo Imaie’ is the Mutual Institute for Artists and Performers, which replaced the previous institute with effect 14th July 2009.

I’d like to talk to you today about the experience of an entity that enjoyed a supposed monopoly until one evening in early January 2012, the Council of Ministers of the Italian Government, in adopting a law decree on the subject of liberalisation, decided to liberalise the intermediation of related rights. In a rule written probably just before midnight and to article 39, which covered the topic of newspapers and their distribution, i.e. newsagents and newsstands, the Monti

government added provisions liberalising the intermediation of related rights. What happened should be borne in mind when considering any similar action involving SIAE: will it be necessary to subject it to the same late night treatment? Or will it be more appropriate to adopt a more methodical approach to an analysis of past mistakes in order to understand where and how to intervene, inspired by the motto ‘whatever works’? So, what exactly happened to ‘Nuovo Imaie’? The Institute which I’ve been the Chairman of from its outset had the opportunity to understand what worked and what didn’t in the previous Imaie, how to fix what went wrong and how to

improve and consequently monitor the results obtained. I believe that the new Institute has achieved in the area of the related rights of artists and performers significant results. In terms of transparency, turnover and the identification of rightholders, 'Nuovo Imaie' has obtained unprecedented results in the history of related rights in Italy. Some figures will give you an idea. We have almost doubled the Institute's turnover; we've solved the complex problem of identifying artists and published all the data online. In this way, we've been able to give access to all Internet users and thanks to a constant work of data collection and investments in research and development, we've been able to identify the number of supporting artists – leading artists were already easily identifiable – bringing the level up from 1% to the present 50%.

A figure which, though apparently not so important, meant identifying supporting artists in millions of pieces of music. A complex activity, just like that of identifying actors involved in dubbing in the audio-visual sector. Prior to our initiative, these artists were simply invisible, now the level of identification has reached 75%. These numbers show how the Institute was able to increase significantly both member numbers and the level of satisfaction with their Institute's work. Then came liberalisation. Obviously, the events concerning 'Nuovo Imaie' and other intermediation societies produce effects that cannot be easily seen in the short term.

What is true is that who plans today, will benefit tomorrow. 'Nuovo Imaie' went through a period of intensive planning and restructuring and thanks to the work and investments carried out in the supposedly bleak period of monopoly the Institute in 2014 achieved results that I can only call extraordinary: in comparison with the previous institute's turnover of almost 20 million euros, we reached almost 40 million. The phase of liberalisation for the audio-visual sector began on 1st November 2013, i.e. the date when the first recognised intermediary could operate in the market along with 'Nuovo Imaie'. The Decree issued by the President of the Council of Ministers on 17th January 2014 establishes in fact that new intermediaries can operate from the first day of the month when they were recognised by the Department of Publishing of the President of the Council of Ministers (Dipartimento Editoria della Presidenza del Consiglio). The intermediary in question was recognised on 13th November 2013. Competition began therefore on 1st November 2013, the date from which it became responsible for the rights acquired by those artists it represents.

Well, today in April 2015, do you know how much we have billed so far for rights acquired from November 2013 onwards? Nothing, not one euro. We haven't signed even one contract with users for the period from 1st November 2013. The operators present here today know this just as, unfortunately, our artists do, too. What hasn't worked and why not? Some might say that the possible cause lies in the post-liberalisation confusion and this had inevitably an impact on relations with users.

I think that there are probably a series of factors that have played a part in preventing the market from working, even though in the music sector things have gone slightly differently. So my motto 'whatever works' needs to be looked at again because things are not working and we have to ask why.

Things aren't working for a series of reasons that we announced already on that night back in January 2012. Things aren't working because a liberalised market, which gives competitors the job of fixing with a sole entity the remuneration to be paid to artists for the use of their work on television or in the cinema, weakens the competitors' position vis-à-vis the sole entity. Inevitably, the user does two things.

First, obviously, he looks after his own interests and delays payment; second, he wants to pay as little as possible. If the field is occupied by two, three, four, five, six or more intermediaries, agreement on the amount of fees to pay be paid to each competitor in relation to their respective principals/artists becomes almost impossible.

This situation arises simply because each collecting society will have established different criteria for fixing a fair compensation and each collecting society will have differing criteria for establishing which artists are rightholders.

As we know, the law does not provide clear and certain guidelines to identify rightholders. So, it has become impossible to establish how much to pay and to whom, with the worrying result that the collection of royalties has ground to a halt. My friend Guido Scorza may jokingly call me 'an incurable monopolist', but as he knows I'm not; my position is 'yes' to liberalisation if it works. How can we reconcile, on one hand, healthy liberalisation and therefore the right of artists to choose which collecting society they want with, on the other, an efficient market that guarantees artist compensation? Personally, the only instrument that can get us out of the present stalemate is

coalition. We need to create a central consortium, made up by all intermediaries, which is a one-stop-shop for all users, which centralises all negotiations, which unifies the criteria for the distribution of royalties, and which acts as a single data bank. In our view, this is the only way of making sure users pay compensation owed to artists.

Despite being more than prepared to face a liberalised market, it's essential that this competition is regulated by measures that guarantee primarily respect of artists' rights and the proper working of the market.

Naturally, I'm pleased to hear that these problems are being addressed by the Government, also as part of the adoption of Directive 2014/26/EU on the collective management of copyright and related rights. Nevertheless, even though collecting societies will have to comply with a series of transparency requirements, the problem of a blocked market will not be solved. Mandatory transparency, in relation to the liberalisation that concerns us here, is quite simply the least of our problems because the artist will never choose a collecting society with transparency problems; the market itself will impose transparency. The problem that has to be solved is to create a legislative framework that guarantees the payment of compensation without favouring anyone and without unjustifiable entitlements.

Speaking on behalf of 'Nuovo Imago', we are ready to face competition provided there are clear rules designed to protect artists and that these rules are respected by everyone.

Rossana Rummo

*Director General of Italian
Ministry of Cultural Heritage
and Activities and Tourism
(MiBACT) Libraries and
Cultural Institutes*



It's a great pleasure to be here today and to have taken part in organising this seminar together with Assomusica, Creda (the Centre of Copyright Research Excellence) and our hosts Agis.

Meetings such as these dedicated to the subject of copyright offer a valuable opportunity to present a framework of the problems we face every day.

The specific competence of the Department I'm in charge of, is, as many of you will know, copyright. Issues relating to intellectual property have probably never been so topical as we try to find a balance between the challenges presented by innovation and technology on one hand and the protection of creative work on the other.

Technological development and scientific progress are drivers of growth for our country. However, to support the work of artists, foster creativity and protect cultural diversity, we have to find instruments equipped to address the challenges posed by new technologies.

There is where institutions have difficulty in working together to find the right balance between at times contrasting interests: the need to protect existing cultural heritage, the importance of guaranteeing right of access to knowledge, the commitment to providing incentives for new creative processes.

Italy faces a tight schedule of measures to be implemented as part of the European Commission's Digital Single Market (DSM), where copyright issues will play a crucial part.

The strategy underpinning the DSM (adopted on 6 May 2015) is principally in response to the belief in some EU Member States, particularly in northern Europe, that

copyright is a hurdle to the access and use of digital cultural content. This potentially dangerous viewpoint should in my opinion act as a warning call for us to defend the centrality of authors and their right to appropriate remuneration for the intellectual work they produce. On this point, we should not forget that the so-called contents industry in Italy accounts for a sizeable part of the market; reason enough for defending it. Soon all institutions will be required to propose solutions that will put Italy on a level digital playing field with other states as part of an overarching European strategy.

The Digital Single Market is already a reality in our country. However, any measures that institutions seek to take as part of harmonising the Italian situation with that of its fellow EU partners must take into account three crucial issues, namely the current state of the Italian industry, new technologies and broadband diffusion in the country as a whole. The objective must be to avoid our country becoming a second division player in comparison to technologically more organised countries. To achieve this, we have accepted from the start that Italy will certainly need more time than other EU Member States to meet the requirements of the DSM.

As I've said, to bring Italy up to DSM standards, a crucial area of work will inevitably be regulating not only the right of access to information, but also harmonising this with the authors' right to remuneration and the incentives to creativity this generates.

We are not faced today solely with managing the present, but also the challenge to find solutions that will allow us to release and incentivise new creative possibilities.

Any strategy proposed must address the current state of our industry, our technologies and even the extent of broadband diffusion, which in Italy lags behind other countries. The risk is ending up subject to decisions made by and in the interests of countries better equipped than us. Three issues demand attention: firstly, the need to foster the right of access to knowledge and information; secondly, the authors' right to remuneration and, thirdly, perhaps also the most important, the right of opportunity to create new conditions for creativity. We cannot only manage the existing situation, but we must also create an environment for future artistic innovation.

At this stage, I would like to say a few words about the adoption in the near

future into Italian law of Directive 2014/26/EU on the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. I would also like to focus on the topic of liberalisation in the intermediation sector of copyright as regulated by article 39 of Law decree 1/2012, subsequently converted by Law no. 27/2012. Liberalisation, which has already been addressed today by previous speakers, highlights the problems, so thoroughly examined by Alessandra De Marco, that competent authorities have in managing copyright issues.

One can only agree with the view that the Italian legislator's approach to the process of liberalisation has been somewhat hurried. Undoubtedly, the role assigned to authorities was certainly not helped by an excessively rigid and narrow interpretation. Nevertheless, I have to say that also in these circumstances the person most in need of protection within the system of the intermediation of related rights is still the artist and his right of access to the funds he is entitled to. To make the position of artists and performers even weaker is the role of new technologies that have revolutionised the way creative works are used, leading to a situation where the user can actually change the con-

tent of an artist's work. Providers, which host an enormous quantity of works and by so doing earn enormous profits, today play a key role in copyright issues. Despite the role of ISPs, whether it be active or passive, Italy is still without a uniform and well-defined regulation.

On the question of the digital use of works, more positively I have to point out that some sectors have responded successfully to the challenge posed by new technologies. The major player here is the music industry, where recently we have seen the use of digital works on a par with physical works (eg CDs). This result is proof of the excellent quality of the work of music publishers and producers, which can act as a driver for all the other sectors including the film industry, which still has much ground to make up.

In this complex and multi-faceted scenario, the role of the competent Government departments will be to balance the two main interests involved, guaranteeing freedom of access to cultural content within a framework of rules that protect the creators of such content.

Taking these questions into account, I believe that those responsible for the transposition process of Directive 2014/36/EU will have to bear se-

riously in mind what happened following liberalisation of the sector of the intermediation of related rights. This past experience should act as a guide to making the best possible harmonisation choices that prioritise the optimal working of the intermediation system.

In conclusion, I want to stress that the beneficiaries of rights are those who have less protection and fewer guarantees. The commitment of the Government Department I represent is that these individuals should be firmly at the centre of all proposals coming forward.

Federico Bagnoli Rossi

*Secretary General of FAPAV
(Federation for the Protection
of Audio-visual and
Multimedia Contents)*



“Protection of audio-visual content and the right balance between education and enforcement: prospects and new developments“

Hello everyone and thank you for having invited me here this evening.

My name is Federico Bagnoli Rossi, Secretary General of FAPAV, which represents the major players in the Italian audio-visual industry, from those working in production through to those in distribution. Our Federation’s mission is to protect creative work in its various forms.

The speakers we have heard so far have provided us with a thorough analysis of the legal issues affecting our industry. Here I would briefly like to focus on the current situation of copyright and the opportunities we have today which we didn’t have in the past.

Today, we are equipped with new instruments, above all the AgCom Regulation on Copyright and the Internet issued by the

Communications Authority (Autorità per le Garanzie nelle Comunicazioni) in December 2013. In its first year in force more than 200 complaints were made to the Authority, 20 of which coming from our Federation. The result was the blocking of those platforms dedicated entirely to the unauthorised distribution of copyrighted material.

This is an important result considering that in the past the time needed to block a site was at least six months and sometimes up to a year.

Obviously, although more than satisfied with the results

so far achieved, our hope is that the AgCom Regulation can extend its range of actions.

We must not forget the contribution of the law enforcement agencies. For instance, last July, the Tax Police of the Guardia di Finanza in Cagliari, Sardinia, in collaboration with the Anti-Tecnological Fraud Squad of Rome, took down the main Italian cyberlocker “DDLstorage”. This complex operation led to the dismantling of an organisation that generated revenues in one year of more 1.3 million euros and involved 25 individuals.

Another key aspect is self regulation, which from an operational point of view is crucial. Together with FPM we have signed a memorandum of understanding with IAB Italia and in the following days we’ll be starting a trial period during which we aim to cut off the revenues generated by advertising on pirate portals.

Today, Italy is in the forefront of the defence of intellectual property rights and we have a range of strategies that allow us to protect copyrighted material.

Another important aspect for our Federation is communication and education.

During the last Rome Cinema Festival we premiered the MPAA campaign in support of the ‘Where to Watch’

portal, which supplies information to US users about how to legally access audio-visual material. The message transmitted by this campaign is consistent with the aims and actions of our Federation and the audio-visual sector as a whole. We need to talk to consumers, the general public and users about what really happens behind the cinema camera and what goes into making the creation of ‘an amazing story’; we have to show them the passion of those working in the industry, their skill and creativity. FAPAV is working on projects that go exactly in this direction. Last year, together with our founding members ANICA, MPA and UNIVIDEO, we created a communication project called ‘The Protagonist’, in collaboration with YouTube. The objective was to address the topics of creativity and the protection of ideas, where users become the main actors thanks to a series of initiatives such as competitions and masterclasses. In this way, we hope to create a stimulating exchange between the traditional world of cinema and new technologies and innovations in content creation.

On the ‘Where to Watch’ portal in Italy, Confindustria Cultura Italia, the branch of employers within the culture sector belonging to the Confederation of Italian Businesses, created a website (mappadeicontenuti.it)

that offers consumers and users up-to-date information about Italian digital culture.

Staying on this theme, we have just announced in fact the participation of ANICA, FAPAV, MPA and UNIVIDEO in EMCA (European Multimedia Copyright Alliance), which is responsible for the design of an extremely interesting educational project 'Respecting Creativity'; the project was presented also within the confines of the AgCom committees and is targeted at students. I hope I've been able to provide an overview of the current situation regarding the protection of audio-visual contents and the prospect for the future both from an enforcement and communication perspective. Many thanks for your attention.

Paolo Agoglia

Director of the Office of Legal Affairs and Institutional Relations, SIAE (Italian Society of Publishers and Authors)



Copyright as a driver for the Cultural and Creative Industry in a Digital Europe

My contribution comes towards the end of this meeting and I'm now able to understand Carlo Fontana's opening address when he declared that this event was "not against SIAE". A surprising comment in its assertiveness and one that would be difficult to understand had we not followed today's work.

I have no intention of replying to Guido Scorza's acrimonious speech, containing an angry and specious attack on SIAE, that only thanks to flights of fancy could be considered as linked to the theme of this conference. I'm not here to answer to it, all today's assertions were already used in previous attacks from the same person on other occasions and they have been adequately dealt with in the right contexts, both in the past and more recently. Satisfaction for me comes from the evident embarrassment and astonishment that the members of the audience showed during the performance we have seen, that is very

much in keeping with the person himself. I am here today to present my report, entitled "Copyright as a driver for the Cultural and Creative Industry in a Digital Europe" and this is what I am going to do. The topic is extremely important now that Europe is addressing the supposed need for a modernisation of copyright law. Such an expression seems difficult to understand mainly because European copyright law and national legislations derive directly from international Treaties (Berne, Geneva and more recently Marrakech). The issue came to the forefront on the occasion of the Italian Government's definition of its position vis-a-vis

the announced European Commission's initiatives, a subject on which the representative of the Department for Information and Publishing of the Presidency of the Council of Ministers has spoken earlier today. During the course of said national debate, the importance emerged of a study promoted by SIAE and other European Societies belonging to GESAC (the European Group of Societies of Authors and Composers), aimed at assessing the economic value of Cultural and Creative Industries (CCI) within the single market.

The first complete study on the economic weight of CCIs in Europe was made by Ernst & Young in December 2014. The report, "Creating Growth: measuring cultural and creative markets in the EU", available at the SIAE website, identified the following:

a) cultural and creative industries represent a strategic lever for the economic development of the single market, currently generating 4.2% of EU GDP and a turnover of 535.9 billion euros;

b) the number of CCIs-related jobs rose in spite of the economic crisis. Between 2008 and 2012, whilst Europe recorded a 0.7% annual loss in jobs, the number of jobs in CCIs annually rose by the same 0.7%. CCIs employ directly more than 7 million people and represent the third largest employer in the EU (3.3.% of the EU's active population) after the building and construction industry and the restaurant and catering sector, providing far more jobs than, in a degressive scale, the iron and steel, food and drink, automotive, chemical, and telecommunications industries. Most jobs in cultural and creative industries are made up by workers and creators working within the European Union and closely tied to the local economy. In fact, people working in this area are expressions of specific European realities and therefore cannot be easily transferred outside the EU. Of these jobs, 19.1% is represented by people under the age of 30;

c) Europe's international strength in content production comes precisely from the role of CCIs, which represent a specific social and economic feature of Europe, in a way that firms in the high-tech sector do for the US and technological manufacturing businesses characterise Asia.

Creators and cultural and creative industries, by supplying the content for new technologies and services, are therefore the forerunners and promoters of the success of digital market. The economic importance of CCIs within the sin-

gle market is great and cannot be underestimated in the design of future European policies for the digital single market (DSM). Copyright is the “engine” of this market and it is the “factor of production”, the source of the “raison d’être” and the strength of the cultural industry; therefore, any legislative change at the European level has to be “handled with care” as any change that weakens the level of protection will inevitably harm the economic growth in the EU.

It is not my intention to examine the juridical aspects of each point the EU Commission intends to focus on in view of the announced revision. What I would like to stress is that copyright has no need of a uniform regulation of the criteria used to identify the acquisition of rights, i.e. a single copyright title; such regulation already exists in the Berne Convention and is founded on the original acquisition of the right for the “mere creation of the work”. It is the patent law, necessitating the establishment of its formal criteria so that the right is recognized, which requires a uniform, pan-European regulation. Similarly, the heated debate on exceptions and amendments within the JURI Committee, whose rapporteur is significantly - Julia Reda of the German Pirate Party, has at least revealed a substantial, let’s say, lack of awareness on the subject. It has

been affirmed that all 21 exceptions contained in Directive 2001/29/EC (Directive Copyright in the information society) should be binding in all EU Member States, ignoring the fact that during the drafting stage of the Directive all Member States had presented and obtained exceptions justified by the cultural specifics of individual countries (cultural diversity recognised and protected by the UNESCO Convention of 2005). On this point, the Italian Government’s position has been clear and worthy of support: to make an exception compulsory, a prior careful analysis of its impact is needed. Only in this way will it be possible to adopt a related decision and then probably only for some exceptions, such as, as someone says, the private copying exception.

As regards the suggested usefulness of a private copying tariff scheme common to EU countries, we have to bear in mind that within each EU Member State audio and video products are taxed differently (as an example: IVA/VAT) and that commercial distribution circuits differ according to specific national characteristics. If any changes are to be made to Directive 2001/29/EC as to the single digital market, I have to say as the Italian government’s stated in the documents sent to Brussels that the most pressing issue relating to the DSM is to re-balance the

so-called “transfer of value”, which currently represents a distortion of the CCI’s digital ecosystem. Many intermediaries (internet providers, search engines, content aggregators, social networks along with financial and advertising intermediaries including internet domain registrars) are making bigger and bigger profits without paying or paying only symbolically the rightholders on content.

This is the outcome of a legislative system created by Directive 2000/31/EC on e-commerce, which was passed in an era (now 15 years ago) that can be considered in information technology terms as antediluvian. The E-commerce Directive foresaw a series of significant liability limitations for internet intermediaries (the so-called “safe harbor”) that in fact determine a “transfer of value” towards internet intermediaries. This value has to be redistributed by remunerating the copyright holders, and this to avoid a widespread loss of creativity, legal jobs and legal companies. Therefore, it is important that Internet Service Providers and the other intermediaries “collaborate responsibly”. Once having obtained economically adequate licences from rightholders, they have to manage them responsibly and collaborate in order to avoid any illegal use.

The issue consequently opens a different scenario relating to the need to review Directive 2001/29/EC in unison with the e-commerce Directive (2000/31/EC) and the Enforcement Directive (2004/48/EC) on intellectual property rights protection. In this area, every enforcement action has to be targeted against digital piracy. This action should prioritise the fight against illegal sites and not against individual users, and this also by actions aiming at preventing advertising on illegal sites (“follow the money”).

As regards laws that may or may not be considered in tune with their times, during this meeting also someone said that Law 633/1941 on copyright is “old” and should therefore be revised. This is the old refrain on the law regulating the subject, an assertion that, even though untrue, is used to trivialise the communication. The Italian Civil Code dates back to 1942, but no one says that it is old. Why? Perhaps because our Civil Code has been changed and updated over the years, just as our Copyright Law has. In fact, Law 633/1941 incorporating the principles of international Treaties - has been modified by as many as 19 European directives and a number of domestic legislation through legislative revision respectful of the original system and framework similar to that experien-

ced by the Civil Code itself. In this way, the rational legislative system is maintained and therefore legal professionals have the possibility to use its general principles as support during the process of interpreting and applying the law. I think you will agree with me when I say that this particular subject would need a meeting focused on it only.

To conclude, I'd like to illustrate in short how five synthetic points of a “creative agenda” could imagine the strengthening of the digital market in Europe through culture and creativity:

1) CULTURAL DEVELOPMENT:

To breath new life to the “Europeana” project by adding to the literary sector the audiovisual/cinematographic and musical ones.

2) INNOVATION:

To act aiming at allocating resources within Europa 2020 (the Juncker plan) to innovation projects for the CCIs, as they represent 4.2% of GDP in the European Union.

3) EDUCATION:

An Erasmus Programme dedicated to cultural education (projects involving the participation of European artists and authors in schools and universities).

Establishing a European Day of Copyright, which is the “engine” of CCIs.

4) CREATIVE INDUSTRIES' ECOSYSTEM:

The ecosystem of CCIs is determined and fostered by the protection of copyright which, as I said, is a driver for creativity. To contribute to the equilibrium of this ecosystem, European measures are needed for:

- fairness and equality in the area of taxation,
- creation and support of European platforms and start ups of distribution of creative content,
- “transfer of value” from internet intermediaries to CCIs, thereby changing direction in relation to the current responsibility regime of “safe harbor”,
- a consistent and informed action of enforcement targeted against digital piracy and illegal sites (also by actions that prevent advertising: “follow the money”),

- support for the role and activities of collective management organizations, whose solidarity role is of fundamental historic, social and economic importance in all EU countries.

5) CULTURAL DIVERSITY:

The promotion of an ecosystem for CCIs in Europe should embrace cultural diversity (UNESCO 2005). This diversity is to be incentivised and supported via:

- access to European content on legal digital platforms,
- support and development of dedicated national policies for the creativity sector (tax credits, quotas for national products, reduction of VAT for on line cultural products),
- recognition of the central role of culture in the drafting of European legislative projects, particularly in European competition policies,
- preservation and protection of European culture and CCIs in negotiations and agreements with non-EU countries.

Thank you for your attention.

Giordano Sangiorgi

AudioCoop President



“Copyright 2.0 for the new generation”

Firstly, I'd like to thank Vincenzo Spera, the President of Assomusica, for having invited me to today's meeting.

I represent the world of artists and small independent record companies; a world that finds itself in difficulty both in the face of a strong monopoly and in the context of liberalisation described here today.

I have appreciated two things in today's proceedings. The first was the appeal made by Rossana Rummo in favour of new creativity. She was the first so far to make this point, whilst others have preferred instead to view cultural content as a 'product', just like anything else.

I believe it's crucial to remember that we are talking about something that is fundamental to our cultural heritage, our identity and our economy, which cannot be delocalised. The work of these artists and record companies must be protected and developed with care and not simply be dumped on the free

market as if it had to compete like FIAT or other types of activities. We are dealing with another type of activity. Who plays music does so as a cultural activity, one that is part of the cultural renewal of this country. Many thanks then to Rossana Rummo for having reminded us of this and the fact that the Ministry of Heritage and Culture is working in this direction.

A second aspect is precisely the protection of new creativity and the development of a virtuous cycle of support that creates the environment for new artists. What is missing today are the incentives for future development. I'm pleased for instance that Guido

Scorza reminded us of what the current President of SIAE said. We believe in the importance of dialogue and generational renewal and in the President's commitment to a reformed, transparent and digital SIAE. Our belief is that in this moment these declarations deserve our support even though we cannot be sure of the results. This is the start of real change, a project in which we will play our part. We will provide our support to those who within a global market want an Italian champion of rights. In fact, if in a global market we arrive split as we are today, what realistically will become of Italian rights and rightholders? What do you think Europe or the major trusts that govern Assomusica's digital content will do for these rights and the needs of live music in general? Today, eight brands govern the distribution of culture and music in the world along with hundreds and hundreds of millions of computers.

We are faced by a frightening monopolistic concentration that harms cultural diversity. Four of these majors can decide to press a button and write off the independent musical culture of a country. If you're no longer on YouTube, where are you going to go? Fifteen years ago, with 100,000 personal computers linked there were 100,000 choices of watching a video or listening to music. Today, with 100,000 pc's linked, there's only one choice: YouTube. Or, they take you of Facebook and you no longer exist. I read today, and this is also part of the declarations made by the SIAE's new President, of a new European search engine as an alternative to Google. An indispensable European as well as national identity.

I say that we have to fight these battles because if we go to Europe so divided, so quarrelsome, so let me say Italian, we'll lose in all areas. Those states that present themselves united will certainly win; countries which, like France, have imposed radio and TV limits that guarantee 40% airtime for French music and 20% for new talents, which have forced digital providers to pay a fair compensation to incentivise those who produce new cultural content. Countries like Germany, which have stood up to YouTube. I've mentioned countries that are strong in other sectors. It's essential that we too show the same strength, leaving aside the problems that exist and which we are well aware of. To achieve this we need a reformed SIAE which, if it is along the lines indicated by its new president, will clear away the dust of the past because digital technology will force us to be transparent, to adopt an analytical approach to accounting, to use electronic takings registers. Digital technology will inevitably lead to a situation where every performer will receive the money

he is entitled to. So, I believe from this point of view the creation of a strong European player should be supported, despite all the problems and differences.

The other major player concerns instead related rights. I fully agree with Micciché. Related rights, as they are envisaged today, represent a liberalisation on the basis of which tomorrow even a building firm could become a collecting society. No offence intended to building firms of course! I make this point simply to underline that there is not enough attention to the cultural heritage aspect of an artist's work.

Two more points regarding the changes. We are heading towards an increasingly fragmented market where it will be increasingly difficult to represent all the interest groups involved. If one day the music majors decided to pull out of Italy, in the same way they've done in other sectors, this would have an impact on turnover. The signals coming from the 'new' SIAE are I believe in the right direction: strengthen Italian music and support the indie and emerging artist scene. In other words, it is essential to protect all that can't be delocalised. It's also essential to work on a new vision of copyright, one that new generations can identify with.

Today the difference between primary rights and related rights is one that is not really understood. Today we believe that those who should legitimately benefit from these rights are not just the performers of a single event, but also those involved in the creation of a videoclip, those who design the logo, and all those who are part of the creative value chain linked to a piece of music.

Today, without this creative support, a piece of music goes nowhere. Therefore Copyright 2.0 must address these points and demand from the monopolistic distributors let's hope less monopolistic in the future fair compensation and the resources currently invested to distribute content that in turn generates business for the major multinationals.

A policy of incentives and tax breaks for young artists is important. I believe that a bit of good news can't do any harm, especially in the current climate where many young independent artists find it hard to survive through music. I'd like to remind you of Record Store Day on 18th April. The boom in vinyl records is not just a success for a particular niche market, but it's above all a success for independent producers. Digital, however, is unfortunately in the hands of a small number of multinational brands that pay artists a

pittance. These are the ones to start with who have to pay. A word to Vincenzo Spera: in return for what you do for Spotify, they should finance a year of concerts!

To end, there'll be tax breaks and incentives on Saturday 18th April on Record Store Day. This is a celebration of independent record stores that continue the fight, but also of the many independent producers of vinyl records who, in a niche market, continue to grow. This is an important sign of craftsmanship. These independent Italian firms should be protected and supported and not abandoned to certain death on the global market.

Luca Vespignani

*Secretary General FPM,
(Federation for the Fight
against Musical Piracy)*



“The Challenge facing Music: new business models and an integrated approach to enforcement”

I have to say right from the start that I feel a bit confused: I'm here today as a representative of the music world, now cited as a model to be followed when only a short time ago we were regarded as the bad boys. I'm also slightly envious of SIAE as it has managed to monopolise the attention of the lawyer Mr Guido Scorza; a fact that I see nevertheless as positive. Briefly, I would like to give you two figures regarding market trends: firstly, today at the global level, 39% is generated by digital sales. In Italy the figure is 38%; a result that should not be underestimated given that we have always tended to lag behind other countries in terms of our ability to exploit digital assets. This inability stems from the obvious disadvantages represented by the low penetration of broad band and a reluctance to use credit cards for online purchases.

These factors have certainly held us back in comparison to other countries. Secondly,

an increase of 4% in sales, a result that might be looked down on by many firms, is, I can assure you, an excellent result for the record industry if you consider that the trend for the last 11 years was negative and that we lost 50% of the market. Achieving a 4% rise, above all thanks to digital sales, which obviously generate a much lower return on volume in comparison to physical products, is we believe an excellent result. How have we managed it? By doing what many today recommend, namely embracing innovation and opening ourselves up to third parties capable of being valuable partners in the rebirth of this particular music market.

The record industry has penetrated markets that once didn't belong to it: primarily digital management, but also live events, merchandising, as well as many partnership and co-branding agreements.

Professor Figà Talamanca was right when he said a transformation was underway. Today the record industry is no longer what can be termed as a heavy industry producing pieces of round-shaped vinyl; today it is a provider of services for artists in all aspects of their profession, taking advantage obviously of what the current Italian context can offer. In Italy there are currently 45 million SIM cards, 54% of handsets are smartphones, with the possibility of listening to music on the move thanks to 4G technologies. Inevitably, we have experienced a sea change in the move from possession to access. Just to give you an idea: in terms of social engagement, five major artists generate 110 million YouTube views, 2 million contacts on Wikipedia, 1.5 million likes on Facebook and almost 1 million followers on Twitter. It's no coincidence that 9 out of the 10 most followed personalities on Facebook and seven out of the 10 most followed on Twitter are artists from the world of music.

This is a potentially enormous market not necessarily in terms of revenues or direct sales, but in terms of work in contact with what is an essential element for survival. This business segment has in fact been successfully the focus of attention for several years. What has the digital revolution brought with it? Certainly a total review of existing distribution models. Today there are 40 million tracks available anytime and anywhere; there are countless ways of accessing music, from downloads, streaming both free and paid, music videos, and other innovations continue to be developed. How can we respond to piracy? I believe with an approach founded on enforcement, but above all a response based on the law. I have always believed that we can demand robust protection only when the legal framework allows us to do so.

A quick word on the Agcom regulation. Apocalyptic scenarios were imagined such as the closing down of the Internet, Google and Facebook, thousands of sites on the list of the Majors ready to be reported to Agcom. The reality is that we have so far this year reported 15 platforms. By reporting only those platforms that are illegal, we have blocked millions of files and links to illegal files. I'd like to point out here our success rate is 100%, no dismissals, no claims rejected. I certainly don't wish to take credit where it's not justified, but I do wish to underline that the Agcom regulation has always been interpreted incorrectly. The Agcom regulation is the final solution. Before using it, a completely different approach should be tried, namely the search for a voluntary agree-

ment. Personally, as part of the music industry I prefer to seek an agreement with a platform, indicating the presence of an illegal file and hoping that the platform in question cooperates. This is better than going straight to Agcom, which I consider to be the final option. The success of the strategy I support the cautious use of the Agcom regulation - is proved by the figures.

Two topics have been discussed here today: firstly, the role of private and not public intermediaries, namely all those who place themselves between producers and final consumers and, secondly, the desire for copyright reform, the Reda Commission and many initiatives at the local level.

A thought: if it has been possible to launch new innovative models, continue to project new ones, have hundreds of platforms authorised to distribute content legally, have 40 million online traces and even arrive at a situation where the consumer doesn't pay, perhaps the current protection regime actually works or at least doesn't prevent these systems from breaking up.

A strongly invasive revision in my opinion is frankly useless. If we've been able to do it, many other industries can do it too and many are already doing so; there is, I believe, considerable room for manoeuvre. On the question of intermediation,

when one thinks about a review of copyright, one always thinks in terms of limiting the rights of producers and increasing those of big-name intermediaries.

However, I believe that this situation should be inverted because the safe harbour concept is an anachronism for those platforms that cannot be considered anything but safe harbours because they are certainly not passive actors, organisationally or financially. It's the safe harbour concept that needs to be rethought and not the regime of protection and rights. Picking up on what Giordano was saying, he was possibly right in complaining about Spotify and the amount Spotify pays artists.

A couple of days ago I was talking to a graphic designer who was comparing the amount Spotify pays to that paid by YouTube: Spotify pays almost twenty times more than YouTube. And it's here that the role of intermediaries needs to be reviewed. As the real investments are made by those behind YouTube, perhaps a fairer distribution of these revenues should be made.

I close with the hope that partnerships may flourish, because the record industry can't go it alone, and that new and even better systems can be developed for final consumers, because without them the market would not exist.

Acknowledgments

This volume presents the Proceedings of conference “Innovation & Copyright: What lies ahead?” that was held in Rome on April 16th, 2015, and it was realized thanks to a synergistic sharing of intent.

Therefore, I would like to express my gratitude:

To Dr. Rossana Rummo with whom I had, since our very first meeting, an agreement which is not easy to find throughout our institutions. Our harmony was immediate.

To Dr. Lucia Marchi and attorney Maria Letizia Bixio, for their immediate acceptance of this project and the passion and determination with which they dedicated themselves to it, bringing it to fruition so quickly.

To all the keynote speakers, who have accepted the challenge and brought their significant contribution to the debate.

To Agis President Carlo Fontana, for sharing this experience and inviting us to a prestigious setting.

To the whole Assomusica staff: Dr. Paolo Varriale (scientific office), Serena Ferrari (organizing office) and Caterina Surace (graphic realization and coordination).

And a final thank you to all those who participated and gave, in any form, their support to the initiative.

Vincenzo Spera
Assomusica President



Roma – Registered office and operational headquarters Via di Villa Patrizi, 10 - 00161 Roma

Tel. +39 0688473.374 - .287 - Fax +39 0688473228

Genova - Operational headquarters Via Archimede, 28/14 - 16129 Genova Tel. + 39 0105221441

Bruxelles – Rappresentative office c/o Smart Be, Rue Emile Féron 70 - 1060 Bruxelles

www.assomusica.org