EXCEPTIONS AND LIMITATIONS IN THE ITALIAN COPYRIGHT LAW: FROM «HAND-MADE COPY» TO «VIRTUAL» COPY

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Abstract: The article focuses on the implementation of the directive 29/2001 in the Italian copyright system stressing the progressive erosion of user's freedom of private copying of protected works. Reason of this progressive restraint of any user's freedom is ascribed to risk of vanishing author's chance of remuneration, thanks to the digital technologies: solutions drafted to face this risk are (and this is the main question posed by the article) extremely drastic, often forgetting the balance of the ancient copyright systems between exploitation rights and user's freedom.

Keywords: Private copying; free utilizations; exceptions; limitations; compensation.

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I. BACKGROUND

1. Free utilizations in the Italian copyright law

I would like to thank Professor Bercovitz for the chance to take part this important and interesting international conference, on the regime of exceptions and limitations of copyright law. In my paper, I will address the implementation in Italy of Directive 29/2001 on copyright law in the information society; and

given the title of this Conference, I will try to outline a «historical» perspective of the Italian law to highlight the close relationship between copyright law and technological evolution.

I would like to start from the title of chapter V of the old text of the Italian copyright law, which was in force before directive 29/2001 was implemented and even before the first Italian legal innovation of the regime of private copying, law no 93 of 1992.

The old text of the Italian law sounds very interesting nowadays, in the digital era, and I think it can offer a good perspective on the original role of private copying in the economy of copyright law, not only in Italy, of course.

As in other EU countries, the title of this part of the copyright law was «*Utilizzazioni libere*» literally «free utilizations» in English, and under this title different cases were described where copyright law did not apply; cases which were «*free*» from the extension of the exclusivity regime of copyright law.

As in other EU countries, these cases were free from copyright rules for different reasons, which have traditionally been separated into reasons of general interest which are external to the copyright law, and internal reasons which are justified by the scope of the copyright law itself.

In this distinction, private copying for personal use has been ascribed to the internal limitation of the copyright law; a limitation not only granted to improve general interest —such as teaching, research, quoting— but also a limit justifying its purpose in the scope of the law. And I would say, especially in the economic sense of this law.

In the original version of the Italian copyright, private copying for personal use was free if hand-made, for personal use, and realized with equipment unable to market the copy. In other words, private copying was free if it could not represent a direct form of competition with the authors economic rights of exploitation of the work.(the original text of article 68 l.a. literally states: «*E' libera la riproduzione di singole opere o brani di opera per uso personale dei lettori, fatta a mano o con mezzi di riproduzione non idonei allo spaccio o diffusione dell'opera nel pubblico*»).

Other articles of the original text of the Italian copyright law, provided exceptions to the exclusive rights of the author only if the exploitation of the work, or of part of it, didn't pose a direct form of competition to the economic rights (art. 70 l.a literally states: «*il riassunto, la citazione o la riproduzione di brani o parti di opera e la loro comunicazione al pubblico sono liberi se effettuati per uso di critica o di discussione, nei limiti giustificati da tali fini e purché non costituiscano concorrenza all'utilizzazione economica dell'opera*»).

2. The old balance between free utilizations and economic exploitation

In short, the general principle emerging from the old text of the Italian law was that private copying and other forms of exploitation of the work were free if not in direct competition with the author's rights, which in economic terms means if the exploitation had only a marginal impact on the reserved exclusive rights.

Before describing the legal and technological steps carried out on the Italian copyright system, I'd like to highlight, once more, the economic reason at the origin of private copying exceptions: its original marginal impact on the author's possibility to make a profit. In the old text of the law, private copying was free because it was not considered as a form of exploitation in competition with the exploitation reserved to the authors. This original balance began to totter when technical innovation enhanced its ability to compete with reserved exploitation, that is to say when the differences in quality and cost of copying began to vanish.

The original copyright principle and provisions of the Italian copyright law, stating that being free form those uses not constituting a form of competition with the authors rights, made in an industrial context and lost all its purpose in the information society where the «*industry*», the «*factory*» has disappeared and everyone can be at the same time the author, editor and distributor of his/her own works.

II. LEGAL EVOLUTION

1. The analogical copying era

The evolution of the Italian copyright law on private copying can be summarised into three main steps, each corresponding to a different technical innovation:

I will call the first step the analogical copying era, marked by the advent of the first generation of copying devices and, on the judicial front, dominated by the Betamax case in the USA and the decisions of the German Supreme Court in Europe, which introduced an economic compensation for the loss of revenues, first in Germany and then in other EU Countries and in Italy in 1993 (law 92/1993).

Compensation was legally granted by attributing part of the price of copying supports and mechanical devices to the copyright holder, through collecting societies.

The introduction of this change in the regime of private copying raised an inflamed debate on the issue; in my opinion, the most relevant point made in

this early debate was legitimacy of control, even through a form of flat compensation, of the so called «*mero godimento*», the individual, personal and private fruition of a protected work. The influence of the German doctrine on these themes was strong in this early Italian debate on the limits of copyright law.

Nevertheless, the first breach in the original concept of copyright law was made; copyright law began to extend its claims onto non-industrial exploitation of protected works and the search for a new balance between copyright holders and final users started.

2. The mixed regime

The second legal step, I call it the mixed regime. It was settled down in the Italian copyright system with law no. 248 of 2000 on reprography, which modified the original text of article 68 on private copying, as I've just mentioned. In this case, a hybrid solution was adopted: free copy is allowed only within the ceiling limit of 15% of the total volume of the book; every reproduction exceeding such a limit is subject to a compensation regime, establishing the payment of a fee for every copy to be paid by the intermediaries allowing the reproductions; it is a mixed regime which tries to create a balance between limited personal copying activity, which is free (coherently with the economic purpose of copyright law), and a compensation regime, when the copying activity is more intense and no longer marginal, and it is carried out for commercial purposes.

3. The digital step

The third step, I will call it the digital step. It represents the complete, but perhaps not yet completed, evolution of a shift from the industrial to the information world. In this third regime, the problem posed by digital copies is twofold: first of all, as you all very well know, every digital copy is perfect in quality, it's extremely easy to be made and it is very low-cost for every one; second of all, in the information world, especially on the net, every act of circulation or functioning of the web itself translates into a copy.

In the digital era, every copy can virtually represent a threat to right holders' revenues; this is why its impact on the general economic system of copyright law is no longer considered marginal.

In the digital era, the historical origins of the copyright system, -the early industrial background, made of tools, supports, namely material objects, is starting to show its limits.

Directive 29/2001 offers each single Member States the choice to introduce a private copy exception. Italy, like other countries, decided to introduce a private copy exception to the exclusive rights of the authors.

But I will immediately point out that the exercise of such exception is submitted to such a high and complex number of conditions, that I would say it seems to be destined to remain on paper. This provision is disguised as a statement of principles, although the real intention of the legislation was to intensify the protection of the author or rights holders rather, than to allow private copying. And this was already very clear given that Directive 29/2001 did not consider the exception of private copying «mandatory» for member States, but only optional.

III. THE ITALIAN IMPLEMENTATION OF DIRECTIVE 29/2001

1. Article 71 sexies 1.a and its conditions

In the Italian system, the exception for private copying (art. 71 sexies l.a.) applies only if the copy is made from a DVD, or CD or other physical tool; no exceptions of private copying is made for the on line dimension.

Article 71 *sexies* l.a. number 1 describes the regime of private copying of phono or video supports:

This regime of private copying does apply, as I was saying, only in the so called off line dimension (no private reproduction of on line contents ever being allowed for the works available on demand);

Private copying of phono or video records is only allowed if:

a) only one single copy is made;

b) it is made by a person;

c) for private and personal use only and not for any direct or indirect commercial use;

d) the observance of the technological protection measures, provided by article 102-quarter, are followed.

The first three conditions are consistent with the traditional principle of copyright law which tries to avoid direct competition of private copying with the reserved economic rights; the last condition, the one stating the respect of technological protection measures is really new for the copyright system, and it shows how weak the traditional copyright system is in the face of techno-

logical innovations. Respect of technological measures can be interpreted, and in Italy it has been interpreted thus by professor Spada, as a triumph of the influence of technology over the law. In other words, the legislation leaves to technology the role which should pertain to the law: creating a new balance between different interests; between right holders and final users.

This solution goes too far, as it implies abdicating the law in favour of technology and so on comma IV of article 71 *sexies* l.a., the law concedes to the user to have private copies, while stating that right holders are obliged to remove technological measures if the following conditions are fulfilled:

a) just one single copy can be made, even analogical;

b) the copy must comply with the normal exploitation of the work;

c) it must not cause unjustified prejudice to the right holder.

2. The interpretations of the Italian Courts

Given such provisions on private copying, let's briefly go through the interpretation of the Italian Courts.

One of the first decisions on private copying is that of the Court of Milan on July the 1st 2009. The case is not different really from that of 2006 of the French Court of Cassation and it concerns the claim of a private citizen who bought a DVD and asked the DVD producer to remove the copyright technological measures from his copy so he could make a private copy of the content of the disk.

The Court of Milan dismissed the request with the following argumentation:

a) first of all, private copying is not a right but an exception to a right; with this argument all the dogmatic questions about extending copyright also to non-commercial or non-industrial uses —and I will recall that the same issues were raised in the analogical step in the early phase of the debate—, are roughly solved, and copyright expands its claims to every use (private, non private, commercial, non-commercial); this interpretation finds a coherent confirmation on the side of the exclusive right and evidently in the expansion of the reproduction right. I would also like to point out very briefly that Directive 29/2001 gives a very broad definition of reproduction, including every form of exploitation (temporary, permanent, direct, indirect). So if on the one hand reproduction right is reinforced, on the other hand the space of freedom of the end users is eroded. By stating that private copying is just an exception to a right and not a right in itself, the Court of Milan concludes that the right prevails against the exception;

b) second of all, removing technological protection measures exposes the protected work to a significantly high risk of dissemination, and especially to the risk of spreading on the internet;

c) And finally, no technological measures are there yet that allow us to make only one single copy.

Each of these arguments can be hardly criticised; I don't want to abuse of your patient analysing each of them in depth, let me just join in a question with you, a fundamental one, I think, that still remains unanswered after reading such court decision: in which cases can we at least imagine that private copying is allowed or, differently in which cases should technological measures be removed?

If the interpretation of the Courts to deny removal of the technological measures will, in the future, be based on the high risk related to the possibility of wide-spreading on the internet, there is no role left for private copying to be played. The risk is, indeed, in every single copy, and frankly to me it seems quite extreme to prevent all private copying «tout court» to minimise such a virtual risk.

Article 71 sexies, paragraph 3 states that when the work is published on line, the private copy regime, as I pointed out earlier, does not apply. This means that in the digital environment there is no room for the application of any exception whatsoever. The decision adopted by the Court of Milan goes in the same direction of the French Court of Cassation in 2006 the solution is the same even for analogical copies: the risk of spreading through the Internet, even of analogical copies, is considered so high that it led the judges to oppose the removal of technological measures. But again, the same question may be asked: when is private copying allowed?

One could obviously answer that private copying is admitted when no technological measures are set both off and on line. Although formally correct, such an answer opens up to quite a philosophical dilemma: should the decision on the feasibility of private copying be left entirely to technical devices or should it continue, as in the past, as in the origins, to be governed by the law?

In other words, leaving the choice on the feasibility of private copying to technological measures is tatamount to saying that private copying doesn't work like an exception to a right, governed and granted by the law precisely for this reason, but on the contrary, it rather results from the exploitation policy of the right holders.

3. Compensation regime

Like in other EU countries this complex frame of rules and exceptions to private copying is even more difficult to be organized because of the statement of a compensation system for private copying.

Article 71-septies of the Italian copyright law provides a compensation regime for private copying. The «*quantum*» of this compensation is based on the price of the backup devices and on their storage capacity.

Again this is quite a complex matter and I don't want to take up to much of your time but I must point out that the doctrine has already stressed the excess of protection given to right holders, thanks to the overlapping of different kinds of protection, and there already have been interpretations of the law trying to distinguish when the private copying regime, with its rules and exceptions, does apply and when the compensation regime does apply. In other words, if the compensation for private copying is already and forfeit paid on the price of devices and backup devices, than a private copy should be possible and not denied, even if technological measures are posed.

As professor Olivieri recently pointed out, the exclusive rights regime, implemented with technological measures, and the compensation regime should be different and alternative, and they should correspond to a choice of the right holder. I agree with the proposal that this regime should be alternative and not complementary, but I disagree that this can merely be a choice of the right holder.

With regards to the compensation regime, the recent decision Padawan of the European Court of Justice stated, summarizing extremely, that the fair compensation should be applied distinguishing on the basis of the effective use of backups and devices. This decision imposes a rethinking of the implementation of the compensation regime and I think it gives new light, generally speaking, to the private copying matter; affirming the principle of the relevance of each and every different use of backups and devices, this decision paves the way, however practically difficult, for considering, every single case relating to private copying with attention to the function and the role of the copy itself. In other words, interpretations like the one of the Court of Milan, indiscriminately denying the removal of technological measures raising the issue of a general and virtual risk implied in every copy, seems extremely drastic.

IV. FUTURE PERSPECTIVES

1. Extension of rights holders claims

Generally speaking, the solution chosen by the Directive and its implementation in the Italian copyright system is a very defensive one. It tries to prevent the risks involved in copying, even if for personal or private use only, non commercial-purposes, even when far from an immediate and direct competition to the right holder exploitation rights.

As I provocatively stated in the title of this paper, copyright law is shifting from a hand copy exception regime (where private copying is allowed provided that it is hand-made) to a regime where even a virtual copy (a copy which only virtually risks to compete with the authors rights) is unauthorised.

I would like to make a few general and conclusive remarks, starting with the Italian law and its judicial application.

The progressive erosion of the limits of the copyright law and the extension of the claims of the rights holder to cases which in the past were free from every demand, is pervading other areas of the intellectual property law too, the area dedicated to the protection of technical innovation, patent law.

As you all very well know, the latest biotech revolution, which involves the protection of genetic information, asks the patent law to face problems that, in a systematic perspective, are not far from the ones that the digital revolution poses to copyright system. These problems involve in both cases the extension of exclusive rights to private use, to the uses of the final consumers. The point is, that both systems, patent and copyright, were born to protect innovation, be it cultural or technical, and they were tailored in the early period of the industrial era and they cannot be always and easily stretched enough to challenge front the problems of the information age.

The evolution from the industrial to the information age, requires a general rethinking of the innovation's law systems. Both the patent and copyright systems were tailored with attention to mechanical devices, products and manufacturing; in a nutshell, everything that says industry, and adapting these legal provisions to an economic system that's even less tangible, less material and less industrial than before, is now really difficult.

In both systems technological solutions risk to overlap the legal solutions, making a really pervasive and total control of each single utilization possible. This technological supremacy risks to replace the role of the law, introducing a de facto absolute protection.

2. Facing the shift from the industrial to the information era

The traditional innovation law systems have already tried to govern reserved use and free uses, balancing proprietary claims of the right holders with certain freedoms of utilization for final users; doctrine often remarked how in the early period of both the intellectual and industrial systems, the proprietary regime has been the juridical structure which granted freedom to the authors; property rules, as recently professor Lucas affirmed in a conference in Rome, has been considered as a flag to affirm the rights of the authors, to grant them freedom through the exclusive appropriation of the results of their works; now with the definitive shift from the industrial to the information era, this ancient role of the property regime as instrument to grant freedom to the authors is changing: property rules, helped by technology, are becoming so pervasive they're cancelling every freedom for final users, so pervasive that whilst declaring to protect authors and innovators they're cancelling every chance of free utilization for final users; thus forgetting, perhaps, as recently stressed in the green book of copyright in the knowledge economy, that innovation is nourished by use, experimentation, even copy, reverse engineering and access to information and that a balance between this different interests is a value to be preserved, even in the digital era, with all that this entails.