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COPYRIGHT ISSUES IN THE ELECTRONIC COMMUNICATIONS SECTOR

Sector Inquiry – 12 February 2010

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INTRODUCTION

Nowadays the ability to easily distribute and exchange content through new digital channels enables the circulation of such content, in any available format, without proper control by legitimate right holders. The juncture of conflicting interests frequently leads to a clash between copyright and other basic institutions (fundamental user rights) in our society, particularly the freedom of speech, privacy and Internet access.

The current technology evolution and the new forms of digital content fruition requires Italy to analyse and rebuild its copyright framework. The main aim is to ensure, on the one hand, its effective application (right to free speech and to a fair author compensation) and, on the other hand, the appropriate protection of citizen rights (access to the culture and to Internet, privacy, freedom of expression). This step is even more necessary due to the recent adoption of the revised EU Framework on Electronic Communications, where open access to the Internet is recognized as a basic principle of the European Law and, therefore, to be implemented by national authorities. The obvious implication is to redesign administrative functions in order to meet the new regulatory framework objectives, with specific regard to control procedures. This statement follows the lines of a lively international debate on copyright issues, which requires re-consideration of the Italian regulatory system as well (see Chapter 4).

The starting point of this research was the role of the Italian Regulatory Agency, namely the Communications Authority (AGCOM). In this regard, the legal analysis carried out in Chapter 1 revealed that AGCOM is entitled to full regulatory, control and enforcement powers in the area of copyright protection as it pertains to the web and to electronic communications networks in general. Accountable to the Parliament, AGCOM is the National Regulatory Authority for electronic communications in Italy. It operates as an independent administrative body and has the general authority under the law to safeguard electronic communications and consumer rights as well as to fight against online copyright infringements, by means of investigation, enquiries, inspections and sanctions. Considering its general powers, AGCOM is therefore the first and foremost public “guarantor” to ensure equitable conditions for fair market competition and the protection of citizens fundamental rights, particularly with regard to constitutionally protected fields such as the freedoms of information and speech, private entrepreneurship and fair competition.

By contrast, the Italian collective society - SIAE (Società Italiana Autori ed Editori - Italian Society of Authors and Publishers) is a public entity protecting specific private goals (that is, its associates’ interests) particularly related to intellectual property rights and – more generally – to copyrighted works.

In reference to the Italian Law no. 248/00, which separates AGCOM’s powers from those of SIAE in the area of copyright protection, it is worth noting that the Law makes a clear statement on the criteria to be applied in the definition of each agency’s role and responsibilities (“*within their own scope of competence*”). To the extent that electronic communications networks are involved, AGCOM is therefore responsible for carrying out monitoring activities and for applying any possible preventive and/or enforcement actions to online copyright infringements. It is worth noting that such activity takes place in a sector often packed with simultaneous and sensitive needs of

very diverging interests and with quite peculiar safeguard issues. SIAE competence includes operative activities and collaborative initiatives based on a preliminary outline eventually established by AGCOM.

In order to define possible measures which AGCOM may adopt in line with the proportionality principle, the study presents a technical and financial analysis of the “online piracy” phenomenon. The aim is to obtain a preliminary study on the most suitable measures to fight against piracy. But what is the best definition for “online piracy”? Such term refers to unlawful downloading, peer-to-peer and streaming of audio and video files on the web. In its attempt to somehow quantify such activities, AGCOM realized that today it is unable to gather precise data about such different traffic options (downloading, peer-to-peer and streaming), which are instead generally available to Internet service providers (ISP). The online piracy activity also seems related to a larger broadband access: while for downloading music files, legally or unlawfully, even a common dial-up connection could be enough, online video content requires a much faster connection to the Internet. This condition seems to imply that such an increase of broadband availability brings along a corresponding raise in piracy. However, according to a global traffic research, the unlawful *peer-to-peer* (P2P) activity appears to be decreasing (from 40% in 2007 to 19% to 2009), while broadband subscribers are increasing (see Chapter 3). Therefore, the expansion of broadband access in Italy could actually lead to the development of a legal market of audio-visual digital content, thus becoming a deterrent for unlawful P2P downloading.

Our study also addressed the technical issues related to various “piracy” practices within electronic communications networks and limited access services, in order to consider possible technical solutions to stop such unlawful practices. According to our research outcome, the technical options enabling copyright infringements in the electronic communications networks are constantly growing and evolving. Therefore, even those counter-measures currently applied by private or public organizations with a certain degree of success (by limiting Internet access to their own employees) cannot be implemented in the larger broadband residential user market, due to privacy protection regulations, Internet access rights and the Network Neutrality principle (along with technical circumvention options easily available to users, see Chapter 2).

Consequently, our study presents a complex technical and legal framework within which it aims at clearly identifying the possible actions to be taken by AGCOM for a better control over online piracy. Indeed, AGCOM has discretion in the exercise of such functions as oversight, prevention and balancing of rights on matters of online copyright infringements. By contrast, the imposition of monitoring obligations on ISPs must be limited in accordance with the EU directives and the conditions set out by the EU Court of Justice. Therefore, an initial possible framework should avoid general obligations to monitor and start by imposing cooperation on ISPs in order to prevent and reduce online copyright infringements through a notification process. According to this proposal, ISPs may be obliged to regularly provide AGCOM with (aggregated and anonymous) data about Internet traffic, so that privacy requirements can be met and the system may result in line with Network Neutrality. Such implementation is based on several converging issues: ISPs already retain those data, which can easily be forwarded to AGCOM, thus enabling the same Authority to perform an accurate analysis of the overall user traffic aimed at defining more specific and focused measures to prevent piracy activities.

Finally, adequate and transparent information to users may help to establish an educational campaign about the general risks associated with any piracy activity – however such a campaign seems necessary and should use targeted advertising, information on AGCOM website and broad communications to Internet users (i.e., when signing contracts for / or subscribing to Internet access services).

In order to effectively implement our proposals, AGCOM must first assert its primary competence on the broader issue and require an active collaboration from the other actors involved (SIAE, copyright holders, Internet Service Providers, consumer rights organizations, etc.), thus harmonizing the various interests at play and promoting preventive actions in the best possible way before resorting to regulatory interventions. In this framework, the study also sets out proposals for a work programme, such as fostering a procedure under which illegal contents may be challenged and removed.

This study also aims at promoting a broad public debate to fully review the current copyright law (beyond the review of the existing agreement with SIAE, which was due at the time of its publication in Italian). With regard to this purpose, this report presents an international benchmark for the main reforms carried out in recent years and identifies the main issues raised by the international debate. International discussion and recent studies seem to show that an effective strategy about copyright protection should be based on the necessary forms of collaboration between all interested parties, and particularly with the ISPs, whose market position is critical for effective copyright protection initiatives. In fact, differently from infringements committed by common users, the ISPs are easy to identify and become an economic target for copyright holders claiming damage compensation for their copyright infringement.

1. COPYRIGHT ISSUES IN THE ELECTRONIC COMMUNICATIONS SECTOR

1.1 Copyright and digital technologies

1.1.1 Technological evolution, interests at play and the constitutional framework

Nowadays the ability to easily distribute and exchange content through new digital channels enables a broad circulation of digital copyrighted works, in any available format, in a variety of venues and situations. However, such technological advancements involve the risk – on a larger scale than in the analogical world – of content circulation lacking the proper control by legitimate right owners.

From the perspective of the relationship between content providers and users, the former's need to freely carry their economic activity on the Net and to gain a fair income for the content they own is conflicting with the latter's interests to freely participate in social and commercial activities online – today even extending such activities with the so-called “*user generated content*”. The crossing of these diverging interests often fosters a conflict between copyright holders and other basic institutions in our society, such as the freedom of speech, privacy, and Internet access rights.

The Italian judicial system sanctions the rights of authors, as well as those of publishers and/or distributors, put in charge of managing their work financial revenues by the same authors, to receive compensation for their own work – along with the power to oppose any unlawful circulation of such work for profit. The economic interests deriving related to copyright works must be harmonized with other benefits, particularly with the public interest to culture circulation and research freedom: the United States Supreme Court has repeatedly confirmed that copyright is both “a means and an end” to affirm such interests. The current copyright regulations pursue such goal in different ways: they provide an economic incentive to create and distribute a wide array of intellectual works, support authors and publishers in bypassing government funding, foster the merit of original expression and individual contribution to public culture and discourse. However, copyright could also restrict freedom of expression. For example, a copyright holder denying permission or asking a hefty fee to license his work will prevent others to copy or create something new based on his words, images or music. Such exclusive right is not limited to copy but could also prevent such activity as parody, critical analysis, etc. Considering the copyright function as an engine for freedom of expression, traditionally the holder's exclusive rights were limited in scope and length, and have often been associated to significant exceptions to support the public domain for culture and information. Therefore, Italian Courts have usually considered copyright in line with the freedom of expression value due to its relative “security valves”, mostly its *fair use* privilege, limited length, and the rule that it only applies to an author expression not to the inspiring idea or fact.

In recent decades, however, the extension of copyright has grown exponentially. Nowadays, it covers a much larger spectrum of rights, thus granting holders with a wider control than they ever had in the past.

Today's conflict between copyright and free speech is being increased by the new opportunities provided by technology advancement, thus giving way to an ongoing debate about the copyright role in the current environment based on digital technologies. The intensity of such debate has been further increased by the many and frequent lawsuits

brought by producers or distributors of cultural or entertaining products against users involved in “pirating” their protected works. Along with the need to take full advantage of such technological evolution, *the right of access* to culture and information – which deserves an even broader satisfaction – is being strongly promoted by the research and science community, in regard to not-for-profit distribution and fruition of intellectual works for study, research, and teaching purposes. Therefore, the central issue is to find possible ways in which these different interests can be integrated within the current positive law system. To that end, we envisage the need to develop copyright laws based on an appropriate balance between the relevant interests and fundamental values at stake and, therefore, addressing copyright protection issues consistently with emerging social, economic and technological trends .

Under this perspective, the reasons giving shape to copyright regulations seem to point, not so specifically but nevertheless in a clear way, to articles no. 2, 3, 9, 21, 33, 35, 41 and 42 of the Italian Constitution. Particularly regarding those rights more directly linked to the personal and expressive sphere, it is imperative to sustain the authorship right as an individual and inviolable right according to article 2 of the Italian Constitution. Publishing or communicating a public work is a common expression of freedom of creative thinking as laid down in article 21 of the Constitution, pairing with the principles of culture development and artistic creativity freedom outlined in articles 9 and 33. But this action is also characterized as an economic activity when exerted in a professional form by the same author, or (as it is often the case) by entrepreneurial middlemen, with protection and limitations penned in article 41, in the framework of inviolable rights, binding obligations, and the equality principle outlined in articles 2 and 3 of Italian Constitution.

The financial rights following the first publication of an intellectual work belong to the property rights framework as drafted by article 42, including related limitations and possible protections granted by article 35 and following, when such creative activity is carried on as an employee. Finally, articles 41 and 42 are even more relevant in a (quite frequent, as noted above) situation of intellectual work managed by professional middlemen.

1.1.2 Constitutional limitations of copyright: the central role of the freedom of expression

On the other hand, those same provisions spell out the constitutional limits of copyright, regarding both the necessary balance with the protected right to cultural access or to expressive and artistic freedom for authors and consumers, and the social compatibility imposed by constitutional laws within the property rights framework. This step is also in accordance with article 151 of the EU Treaty, which states the protection of “artistic and literary works” while underlining the “improvement of knowledge and circulation of culture”, thus promoting, even within the EU constitutional context, a positive effect for the development and dissemination of intellectual works.

In this regard, freedom of expression becomes particularly relevant within the copyright constitutional limitations. In fact, several legislative acts at the EU level, particularly those of a conventional nature, affirm the central and fundamental role of freedom of expression. Based on similar predictions affirmed by the European Convention on the Protection of Human Rights and Fundamental Freedoms (art. 10), by the International Covenant on Civil and Political Rights (art. 19) and the EU Charter of

Fundamental Rights (art. 11), everyone has the right to freedom of expression and this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

As a consequence, the Italian legislative system lists freedom of expression as a final target, thus fostering the dissemination of culture and freedom to express one's opinions, as stated by articles 9, 21 and 23 of the Constitution. Therefore, any copyright limitation makes sense when such restriction could aid in its function of promoting freedom of expression.

On the other hand, strictly addressing the economic aspect of copyright laws, which are essentially equivalent to property rights, the principle of freedom of expression walks side by side with another fundamental right, the freedom of financial entrepreneurship (and therefore, of market competition), protected by art. 41 of the Italian Constitution. Since authors can receive compensation only after creating a certain work, before accomplishing such goal the author will need some external funding, provided either by the government or by private investors or producers interested in gaining a profit from their investment. Therefore it is almost unavoidable that, along with the increasing economic relevance of the cultural industry, both national and international legislations have shifted somewhat from the protection of authors to the protection of investors, thus transforming copyright law into a tool for safeguarding investments.

From this perspective, it is interesting to note the growing trend toward services related to the search, aggregation and indexing of online news and content, provided by portals and websites at no charge for users and supported by advertising revenues.

Such services employ content produced by the publisher's investment and entrepreneurship, thus affecting the profitability of their use and to support the publisher's choice in displaying that news published by the same portal. In particular, for the publisher, those portals became the very tools that allowed online users easy access to their content while at the same time affirming themselves as a major hub for news access on the user side. Therefore, the widespread usage of online information impacts on the typical revenue model of printed newspapers and is causing a heated discussion about tomorrow's business model for newspapers and for the traditional publishing industry in general.

1.1.3 Copyright and electronic communications networks in the EU: the right to Internet access

Creative content can be accessed and disseminated via the Web with no limitations about quality and reproduction. Innovative tools to distribute and exchange digital material have broadly increased consumer access to knowledge and consequently loosened control over the circulation of intellectual works. In this framework, the integration of diverging interests of authors and users constitutes the inspiring principle for a new copyright legislation. This principle has also been affirmed by the Universal Declaration of Human Rights which recognizes that everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits (art. 27, paragraph 1) and also that everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (art. 27, paragraph 2). The European Parliament and Council have confirmed and sanctioned the same principle regarding electronic communications networks when they approved the Directive on privacy and

electronic communications. This Directive includes the citizen's right to free Internet access as one of the fundamental freedoms, in line with the European Convention on the Protection of Human Rights and Fundamental Freedoms. Previously that principle, already included in the legislative body of some EU Member States (Spain, Finland, Greece, Estonia), was only mentioned in some non-binding EC documents, such as the European Parliament recommendation of 26 March 2009 to the Council on strengthening security and fundamental freedoms on the Internet, or was otherwise indirectly inferred in National regulations such as the digital administration Code (Decree no. 82/2005).

The final text approved by the European Parliament clearly states that any measure intended to restrict Internet access must be proportionate, justified and necessary within a democratic society, while the decision to block a user from connecting to the Internet may only be taken with a fair and impartial procedure that includes the right to be heard of the person concerned.¹ Therefore, should a State resort to restricting Internet access to prevent piracy, the administrative or judicial officials should apply a specific procedure that recognizes the defendant's right to a fair defence.

The new regulatory framework, published on the 18th of December 2009, must be implemented by the EU Member States legislations within 18 months. As stated in the above provision, access to the Internet becomes a fundamental principle of the EU law and, therefore, also of the Italian legal system. Accordingly, any surveillance activity must conform to this principle by properly respecting limitations and criteria stated in the same Directive.

With specific regard to copyright laws, an important premise is that, as a direct consequence of the digital revolution, both the United States and the European Union completely revised their copyright law systems and, starting in the 1980's, they designed a regulatory strategy addressing the new technologies enabling editing, reproduction and distribution of intellectual works.

Such a regulatory strategy includes new International treaties and, within the EU framework, a harmonization procedure. The evolving trend is characterized by recognizing new creations as fully protected works (like *computer software*), strengthening the exclusive rights, creating new safeguarding tools and, in some instances, as well as by restricting certain user rights.

¹ The final version passed by the Conciliatory Committee (later introduced in art.1, paragraph 3 of the Directive) specifically states: "*Measures taken by Member States regarding end-users' access to or use of service and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law.*

Any of these measures regarding end-users' access to or use of services and applications through electronic communications networks liable for restricting those fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law, including effective judicial protection and due process. Accordingly, these measures may only be taken with due respect for the principle of presumption of innocence and the right to privacy. A prior fair and impartial procedure shall be guaranteed, including the right of the person or persons concerned to be heard, subject to the need for appropriate conditions and procedural arrangements in duly substantiated cases of urgency in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to an effective and timely judicial review shall be guaranteed."

In detail, the most recent regulatory measures for copyright protection attempt to fit in the peculiar frame of the so-called Information Society and the new technological landscape.

The Directive 2001/21/CE of 22 May 2001, about the harmonization of certain aspects of copyright and other rights related to the Information Society, is finalized to encourage the Information Technology development and to help regulate the overall Internet activity, thus pushing Member States toward a regulatory framework shared by all.

The following Directive 2004/48/CE defined the sanctions and judicial remedies related to the protection of intellectual property rights.

In July 2008 the European Commission drafted a Green Paper on Copyright in the Knowledge Economy which provided an analysis of exceptions and limitations to copyright, relevant to the dissemination of knowledge in the digital age. The document is particularly focused on: a) exceptions for libraries and archives; b) exceptions allowing dissemination of work for educational and research purposes; c) exceptions aimed at people with a disability; d) a possible exception for user-generated content. The Green Paper and the following public consultation led to the Communication of 19 October 2009, where the European Commission detailed the operational guidelines that will apply in the near future, including, also, the outcome of a constant dialogue with most relevant stakeholders.

On 22nd October 2009, the European Commission published reflections on the challenges related to the creation of a digital single market for creative content online, such as books, music, film and videogames at the European level.

Such document focuses on implementing a regulatory framework adequate to the needs of consumers for the availability of digital content within the EU and, at the same time, providing strong protection of intellectual property rights and fair compensation for content creators. From that perspective, the document covers the challenges related to three specific categories, that is, copyright holders, consumers and commercial users.

1.2 The relationship between AGCOM and SIAE

1.2.1 SIAE competence area

The Italian Society of Authors and Publishers (*Società Italiana Autori ed Editori* – hereinafter SIAE)² was founded in 1882 and became a public agency in 1930. Based on network activities (which is regulated in details by the Law establishing its mission), SIAE mostly manages collective rights and specific private interests related to the protection of copyright and intellectual property. According to the current Copyright Law, in Italy SIAE is in charge of the economic intermediation rights³ for holders of intellectual works in all artistic fields (music, film, theatre, literature, visual arts, etc.). Based on its own definition, it is a nation-wide collecting organization of general scope, somewhat different from the vast majority of those entities that in other countries provide copyright protection only to specific sectors. SIAE is a National Association⁴ whose members pay an annual subscription fee (art. 2 of its Statute) and include natural and legal persons holding a copyright on any intellectual work – authors, publishers, film producers, etc. – that decide to apply for a membership. Therefore, these copyright holders delegate to this organization the economic intermediation and protection of their own works, in accordance with the Italian Civil Code and sectoral legislation. SIAE charges its members for the provision of rights management services and retains a percentage of the compensation for the use of their copyrighted works.

The Law Decree 491/99 (*Act for the reorganization of National public agencies*) based on Act no. 59 of 15 March 1997 (Bassanini) includes several provisions that define SIAE legal status. Art. 7 (paragraph 1 and 2) specifically defines SIAE as “a membership-based public agency” and states that, with the exception of its functions pursued according to the Law (in observance of the legality principle), SIAE activity is governed by Private Law regulations⁵. SIAE has then modified its Statute and organizational rules according to such provisions.

In particular, as stated in article 1 of its Statute, SIAE pursues the following functions: a) *Acts as an intermediary in any manner, whether by direct or indirect intervention, mediation and mandate assigned by authors or their heirs, related to the management of works under their copyright (...); b) Maintains the registries provided for according to art. 103 of Law no. 633 of 22 April 1941⁶; c) Grants the best protection of*

² For more information about the nature and purpose of SIAE, see (in Italian): Ubertazzi, *Commentario breve al diritto di concorrenza*; Santoro, *Società Italiana degli Autori e degli Editori*, Enc. Giur.; Schiavano M.L., *Pubblico e privato negli enti pubblici associativi. Il caso SIAE*.

³ Italian Law no. 633, 22 April 1941, paragraph 5, art.180 and following.

⁴ The organizational structure of SIAE includes its headquarters in Rome, 13 regional offices, 34 branches, 600 local agencies managed by independent contractors. Today it consists of over 80,000 members, including both natural and legal right-holders, who are unwilling or unable to manage their own economic rights and therefore delegate such operations to SIAE. Every four year all members are called to elect, also via proxy, the Executive Bodies: assembly, five section committees, board of directors, president, auditors.

⁵ “*The general criteria giving shape to the administration of the overall activity of SIAE relies on the difference between the management aimed at the protection of copyright on one hand, and related rights, on the other. (...) In both activities the agency activity must be focused, given the nature of its interests, on private measures and objectives*”, according to a ruling by Puglia’s Administrative Court, Sec. Lecce, 24.5.2001.

⁶ Art 103 states: “The Italian Presidency of the Council of Ministers establishes a general public registry of intellectual works protected according to this law. SIAE maintains a special public registry for cinematographic works. These registries include all intellectual works subject to a registration with the name of its author and producer, publication

those rights under a), within the Information Society and also regarding the protection and development of intellectual works; d) Administers the ascertaining and collection of taxes, contributions and royalties (...); e) Performs all other tasks it is empowered with by the law; f) Executes other accessory and subsidiary activities; g) Carries out distribution of royalties among right-holders. According to art. 181, paragraph 1, of the Law no. 633 of 22 April 1941, SIAE also performs all other functions enforced by “*this law or other provisions*”, including “*other tasks related to the protection of intellectual works*”. This regulatory proxy has been included in art. 1, paragraph 1, letter c) of the agency Statute, which states that SIAE “*grants the best protection of those rights under a), within the Information Society and also regarding the protection and development of intellectual works*”.

According to the regulatory acts mentioned above, the judiciary body⁷ has also recognized SIAE as a public economic agency equipped with a voluntary membership structure. Particularly, the Italian Supreme Court defined SIAE as a membership-based body that mostly exerts an economic activity, since it produces revenues, by administering specific private interests and gaining its own income. Indeed, according to the Supreme Court, along with license releasing for users of each work, SIAE primary activity is an economic intermediation based on art. 180, paragraph 1, of Law no. 633/1941 (...*the mediation task is exclusively assigned to SIAE...*). Such activity has a major economic nature and therefore is substituting/representing the author’s private financial goal. For this reason, the copyright protection and promotion tasks carried out by SIAE can objectively be included in those economic activities exercised to gain a profit (that is, making a profit favouring a single person through the tasks carried by the agency).

Given the above considerations, we can reasonably say that Italian lawmakers assigned to SIAE several private and financial tasks, something that is also in accordance with the EU legal principles, where the definition of “body governed by public law” covers also those private companies pursuing a mission of general interest. In other words, SIAE is a body exerting a full economic activity.

Indeed, the EU regulations list the *collecting agencies* as a business, according to art. 81 of its Treaty, since they assign and/or administer copyright licenses for a profit and therefore they manage an entrepreneurial activity mostly based on service providing.

In order to qualify SIAE activity as a business, its intermediation tasks carried out as a monopoly are subject to a ban of arbitrary discrimination and to the obligation to operate, as imposed by art. 2597 of the Italian Civil Law.

This short outline about SIAE nature and powers clearly shows that its core activities, recognized as such from the national institutions, concern mostly a private intermediation for the commercial use of intellectual works protected by copyright. Within this framework, the “*other tasks related to the protection of intellectual works*” as described in art. 181, paragraph 1, of the Law no. 633 of 22 April 1941, appear to play a

date and other data according to specific regulations. SIAE also manages a special public registry for computer software programs. This registry includes the name of the exclusive economic right holder and publication date (that is, the first time those rights are put in place) of each software program. Such registration affirms the existence and publication of that work. Authors and producers indicated in the registry are considered legitimate authors and producers of that specific work. For cinematographic works the authorship applies to registry annotations according to paragraph 2. The registry’s management is regulated by specific provisions”.

⁷ Particularly the Supreme Court (unified sections), with its rulings no. 8880/98 and no. 2431/97.

very marginal role. Such conclusion still stands true even when considering art. 182 bis of the same Law, which assigns to SIAE the task of monitoring copyright infringements, but in coordination with AGCOM and only “*within the field of their respective competencies*”.

1.2.2 AGCOM’s competence in copyright matters

The Italian Communications Authority (AGCOM), established in the sign of technology convergence by Law no. 249 of 31 July 1997, operates in the audiovisuals, telecommunications and publishing sectors. The courageous choice made by the Parliament, anticipating similar decisions in other EU countries, aimed at assigning a wide range of functions - extending from regulation to monitoring within the electronic communications field - to a single entity. This choice took into account the deep changes caused by the “digital revolution” which has blurred the boundaries between the different media, whose contents – images, data, voice – are becoming more and more interactive.

AGCOM is first and foremost a “guarantor” which ensures equitable conditions for fair market competition in the electronic communications field. As a general task detailed in the institutive Law no. 249 of 31 July 1997, AGCOM protects and safeguards the fundamental rights of all citizens, according to the judicial framework supported by the principles drafted in the Italian Constitution. AGCOM functions include: implementing the liberalization in the telecommunication market through regulation and supervision activities⁸, rationalizing audio-visual resources availability, applying antitrust rules and verifying possible dominant positions, promoting universal service and social pluralism, and, in particular, protecting copyright for audiovisual and software products. While the internal tasks are determined by a set of rules, with the adoption of a Regulation concerning organization and functioning (art. 14, par. i) the specific competence for copyright issues has been assigned to the Commission on audio-visual and multimedia content. The following Law no. 248 of 18 August 2000 introduced a change in art. 182 bis of Copyright Law no. 633/1941, thus appointing AGCOM with the general task of monitoring copyright issues.

1.2.3 The coordination between AGCOM and SIAE after the introduction of Law no. 248/2000

After the introduction of the Law no. 248 of 18 August 2000, the best doctrine read this legislative step as a confirmation of the tendency to extend powers and competencies of specific Authorities. However, in this case that decision can hardly be considered an extension. In fact, since its inception, the Italian Communications Regulatory Authority has been a “convergent” agency with functions extending from telecommunications to audiovisuals and publishing. Therefore, it is already responsible for copyright protection issues. More precisely, this new law pushed forward a “collaborative evolution” for the public aspect of the previous SIAE competency area. Actually, Law no. 248/2000 can be considered the expression of a political-legislative willingness to stimulate and promote institutional collaboration between those administrative structures in charge of right-holders protection, even if still differing regarding specific interests and scopes.

⁸ Article 1, paragraph d), of Decree Law no. 259 of 1 August 2003, “Electronic Communications Code”.

The nature of the interests pursued by each of these two public institutions is indeed different. As an independent administrative authority, AGCOM operates as a monitoring and a safeguarding actor (through investigation, verification and sanction powers) in order to ensure equitable conditions for fair market competition and to protect the fundamental rights of all citizens. Its targets are of public interest and are protected by the Constitution. AGCOM carries on its duties in pursue of as the freedoms of information and expression, private entrepreneurship, market competition (art. 2, 3, 21, 41, 43, Italian Constitution).

On the other hand, the Italian Society of Authors and Publishers (SIAE) is a public membership-based organization pursuing private aims (that is, those pertaining to its members) concerning the economic protection of intellectual works and, more in general, of any copyrighted work. After the Copyright Law no. 248/2000, particularly with its art. 182 bis, paragraph 1, as a direct integration of previous Law no. 633/1941, AGCOM is responsible for implementing monitoring functions in collaboration with SIAE, which operates “*within the field of their respective competencies*” with the objective to “*prevent and ascertain violations to the current copyright law*”.

Paragraph 1 of article 182 bis defines the monitoring activity as a shared competence of SIAE and AGCOM. As indicated by subsequent article 182 ter, such activity is carried out by exerting their respective powers. The article 182 bis, paragraph 1, specifies also that each organization must operate such monitoring activity “*within the field of their respective competencies*”. In order to facilitate the general interpretation of this expression, probably a specific bullet list detailing those competencies regarding monitoring (and inspection) action for copyright infringements would have been useful. In any case, the legislative wording has not been updated nor integrated since 2000, and therefore, art. 182 bis continues to be referred to in paragraph 4 of Law no. 249/2000 and SIAE regulations still do not specify its monitoring and inspection activities.

As a consequence of the legislative landscape and analysis presented so far, according to the legality principle governing the overall administrative activity, and in the absence of any specific provisions, it is impossible to charge SIAE with tasks that go beyond the mere coordination of the activity institutionally assigned to AGCOM concerning copyright monitoring and protection.

Considering the above and the assignment of competence to AGCOM on copyright protection, a clear definition of the coordinating role of SIAE becomes important in order to reassert the actual meaning of article 182 bis when stating “*within the field of their respective competencies*”. In accordance with the legislative norm and the changing needs of copyright protection to keep pace with the ongoing technological advancement, it appears reasonable to assign those powers of copyright monitoring and protection within electronic communications networks mostly to AGCOM, with SIAE acting as a collaborative and supporting party.

The willingness to assign a primary role to AGCOM in the copyright protection structure already became evident during the Parliamentary Commission activity concerning the Law 248/2000. In a first draft, article 182 bis went even further, stating the exclusive role of AGCOM in monitoring, preventing and ascertaining copyright infringements within the electronic communications networks. Only at a later time, lawmakers introduced the support and coordination activity of SIAE. The reason for providing AGCOM with this primary role about copyright protection was actually based

on the growing spreading of the Internet as a tool to access content and works under copyright. Therefore lawmakers intended to strengthen AGCOM competencies in light of the ongoing technological development and the increasing risk of computer piracy activities.

In 2000 Italian lawmakers were already eager to prevent piracy and counterfeiting productions particularly on the Internet, and AGCOM seemed the natural body able to provide copyright protection in the best possible way, due especially to its long achieved technical expertise in the sector of electronic communications and the Internet.

Indeed, this approach is confirmed by a close analysis of the wording in art.182 bis: paragraph a) refers specifically to those fields covered by AGCOM expertise and action since its inception. The paragraph makes a clear reference to the “*reproduction and duplication activity through various means, on audio-visual, phonographic or any other media, and also through public infrastructure, via copper cable, optical fiber or radio-frequencies, and radio-television broadcasting of any kind*”. Despite the lack of a formal integration in such legislation, AGCOM drew an agreement with SIAE (in 2000, then renewed in 2007) to plan and coordinate the general control and monitoring activities. However, based on the above analysis, a full revision of such agreement seems now necessary. Indeed, the coordination between AGCOM and SIAE mentioned by Law no. 248/2000 (“*within the field of their respective competencies*”) must be clarified as referring only to the operational action pursued by SIAE based on a preliminary and inspective activity already performed by AGCOM.

Thanks to SIAE collaborative and operational interventions, AGCOM can then shield and protect copyright from those risks hidden in the technological advancement, while still promoting an open and necessary use of the Internet as a new and modern tool for freedom of expression and access to information and culture.

1.2.4 Restrain copyright infringements: does AGCOM have sanction powers?

a) The impossible configuration of a sanction power

After clarifying the full competence of AGCOM concerning copyright infringements committed within the electronic communications networks, The possibility of assigning AGCOM with a related sanction power should be addressed. Once again, the starting point can only be the Copyright Law no. 633 of 22 April 1941, namely its article 182 bis. As a matter of fact, while underlying the monitoring activity against right-holders, that norm assigns to AGCOM only the power to “*prevent*” and “*ascertain*” such infringements.

In other words, a literal reading of the actual text seems to indicate that, despite conferring such a broad monitoring power to AGCOM, lawmakers intended to limit this power to the prevention, or at most to the ascertainment, of copyright infringements — without extending it to the next repressive step.

In order to introduce more effective protection for intellectual works under copyright, while at the same time addressing any potential future risk due to technological development and innovation, lawmakers considered AGCOM as a sort of “*investigative police*”. It was thus enabled to implement all of its *intelligence* capacities to prevent and investigate possible infringements and then report its findings to the judiciary officials, responsible for applying the law.

Following article 182 ter, which requires all inspectors (not only those deployed by AGCOM) to fill out a written report about each confirmed infringement and forward it to the investigative police for further actions, this analysis seems to gain even more strength.

The combination of the last two provisions suggests a lack of restraining power on the part of AGCOM concerning ascertained infringements. Therefore, according to a literal interpretation of such regulations, AGCOM is surely entitled, on one hand, to implement any action aimed at preventing any copyright infringement attempts, and, on the other hand, to carry out inspection activities targeting confirmed infringements that possibly eluded the preventive actions. However, AGCOM is not empowered to actually enforce any punitive sanction against the infringer.

Obviously AGCOM's role would strongly be downsized by an analysis that focused only on a reading of the literal provisions, similarly, it does not seem plausible to envision a monitoring power so lacking in any subsequent enforcing action. Such a gap can only widen if we consider that, in regards to the restraining power, the Italian legislation system does not provide a stretching or on-field interpretation in a *vacatio legis* instance. Indeed, in the case of criminal or simply administrative sanctions, one must assume first the legality principle stating that a punishment or sanction can be applied "only by enforcing a Law that came into force before the committed crime". This principle has been explicitly affirmed by article 1 of the Law passed on 24 November 1981, which establishes a legislative limitation for administrative sanctions similar (even if not perfectly identical) to the margin detailed in art. 25 of the Italian Constitution covering crime penalties. As a consequence, even after determining a certain infringement in this competency area, AGCOM cannot appropriately apply any administrative sanction against the infringer, lacking any explicit law provision. Even article 98 of the Electronic Communications Code, that also assigns to AGCOM the sanction power for violations to the same Code, does not affirm a similar behaviour in the case of copyright infringements. Indeed, AGCOM competencies detailed in the 2000 regulations, and included in the Law no. 633/1941, were not incorporated in the Electronic Communications Code.

Equally unsuccessful is the attempt to locate a regulatory anchor for such sanction power in the Law no. 249 of 31 July 1997 establishing AGCOM itself, and its subsequent modifications – where the only reference to the copyright protection, in art. 4) bis, singles out AGCOM's Commission for services and products as the competent body. This regulatory void cannot even be filled by a secondary rule, that is, by re-routing only a detailed part of AGCOM competence to also cover its sanction power. Indeed, a series of Court rulings denies the application of administrative sanctions based on provisions included in subordinate clauses.⁹ Therefore, this analysis of the provisions rules out, *de iure conditio*, any chance of assigning AGCOM with a copyright monitoring power and, at the same time, enabling it to enforce an administrative sanction against a confirmed infringer.

⁹ Actually, the Supreme Court decisions also stated that the observance of the legality principle does not impede that "...such law provisions could be integrated by new clauses targeting the specific area where the secondary sources are going to operate." However, in this particular framework, we cannot sustain that art. 182 bis provides "specific terms for expected rules and sanctions", as asserted by some lower Courts. As said above, such article assigns a monitoring activity, described only in general terms, to AGCOM (see *Supreme Court rulings no. 9584, 26/4/2006, and other similar rulings, no.13649, 22/7/2004; no. 17602, 20/11/2003*).

b) The possible identification of an enforcing power for preventive measures

Art. 182 bis specifically charges AGCOM with the preventive action for possible copyright infringements – thus leading to the possibility of imposing preventive measures, that is, something different from economic sanctions. In this respect, the regulatory norm is clear and solid: AGCOM is in charge of monitoring copyright infringements in order to prevent their actual fulfilment. Such position seems to leave room for applying the restrictive measures necessary to prevent those infringements from happening on the media, even if this step has not been specifically laid out by lawmakers. Within this context, the legality principle characterizing an administrative action could be sustained, since the preventive measures adopted by AGCOM will have their legal basis in the same law provisions. As a consequence, AGCOM will have the legitimacy to step in with a detailed plan outlining the necessary measures to prevent certain infringements. This is also in accordance with Lazio's Administrative Court ruling – that sustained the legitimacy of a measure plan outlined by AGCOM with its deliberation no. 22/06/CSP, eventually included in art. 3 and 7 of Decree Law no. 177/05 – stating that “*unlike criminal violations, where the legality principle has a very strict validity (ex art. 25, paragraph II, of the Constitution) article 1 of Law no. 689/81 does not contain an exception preventing an integration clause, whose basis can nevertheless be found in the same law, through a series of delegated provisions (see, among others, Supreme Court rulings no. 5743, Sec. I, 23/3/2004; no.17602, Sec. I, 20/11/2003; Sec. 1242, Sec. I, 15/2/1999)*”.

It is true that in this case such delegated provisions are not directly laid out by the lawmakers, while in other instances the clauses introducing new monitoring functions for AGCOM also included specific sanction powers.¹⁰ However, it is also true that a possible preventive measure established by AGCOM, far from being an “outlaw” provision, will be firmly anchored at least to the final goal of the law. We can properly say that the lawmakers decided to only outline the end objective to pursue, that is, preventing copyright infringements, then assigned to AGCOM in charge of the monitoring power (being a technical body with highly specialized skills) some kind of “blank proxy” for adopting the most appropriate measures to achieve this objective. This position is supported by the so-called “implicit powers” theory, where the secondary provisions acquire full legitimacy every time the lawmakers establish only the laws general goals, therefore delegating to the proper Authority the implicit power to outline the actual action. As explained by authoritative sources, resorting to such implicit powers is quite a common procedure for independent Authorities, since “*often the law provision details only the Authority's general competencies and expected achievements*”.¹¹

Therefore, it is reasonable to assume that AGCOM responsible for preventing copyright infringements should also retain the possibility of adopting those measures necessary to achieve the goals established by the appropriate law. In other words,

¹⁰ For example, art. 1, paragraph 4, of Law no. 40 of 2 April 2007 (also known as Law Bersani-bis) while detailing the monitoring power assigned to AGCOM concerning users' protection, explicitly states: “*...violations to those provisions laid out in paragraphs 1, 2, 3 are sanctioned by the Communications Regulatory Authority based on article 98 of the electronic communication Code included in the Decree Law no. 259 of 1/8/2003, modified by article 2, paragraph 136, of Decree Law no. 262 of 3/10/2006, then approved by Law no. 286 of 24/11/2006*”.

¹¹ G. Morbidelli, *Il principio di legalità e i cosiddetti poteri impliciti*, in Dir. Amm. 2007, page 703 and following.

AGCOM has full legitimacy to introduce the measures considered instrumental in achieving the preventive goals explicitly articulated by the lawmakers.¹²

c) Limitations to the power to enforce preventive measures

Given the possibility to adopt preventive measures, our analysis will now focus on the overall scope of such implicit power, addressing the extension and limitations facing AGCOM in imposing such preventive measures to avert copyright infringements. For example, one provision could force electronic communications providers to disclose their traffic data to locate owners of those Internet sites unlawfully hosting copyright-protected content. Other measures could restrict access to or block out such websites, or even remove their unlawful content. Current technologies provide several solutions for deploying preventive measures, such as preventing user access to websites included in an appropriate *black list* (i.e., by implementing the so-called *filtering systems*). However, the Italian judicial system has explicitly assigned such powers to a Court action. Indeed, Law no. 128 of 22 May 2004, article 1, states: “*Network operators part of the Information Society infrastructure, according to Law Decree no. 70 of 9 April 2003, should forward to police officials information to locate owners of Internet sites and users suspected of unlawful behaviour*” only “*based on a specific Court order (see paragraph 5)*”. A specific Court authorization is also needed for “*infringements committed through online computer networks, to force network operators part of the Information Society infrastructure, except for Internet service providers as specified in articles 14, 15, 16 and 17 of Law Decree no. 70 of 9 April 2003, to deploy all necessary measures to prevent access to certain website content or to remove such content altogether (see paragraph 6)*”. It is also worth noting that both these latter provisions have been confirmed in the subsequent Law no. 43 of 31 March 2005, which introduced only a slight modification to paragraph 1.

Therefore, it seems that AGCOM has little room left to enforce restraining measures, at least with regard to network operators and content providers. The only exception to such Court orders seems to apply to *Internet service providers (ISPs)*, thus giving room to AGCOM measures that are consistent with its final objective of preventing infringements and that apply only to those ISPs.

¹² On this issue, it is important to note an opposing ruling by the Administrative Court of Lombardia related to some provisions issued by the Italian Authority for Electricity and Gas (AEEG). The Court denied AEEG an implicit power similar to the one outlined above for AGCOM, even when such provisions are intended to meet the final aim of a specific law. In its ruling no. 1331 of 4 April 2022, the Administrative Court stated that “*the legality principle of the administrative action, according to art. 97 of the Constitution, prevents the acceptance of the presence, within national administrations, of implicit powers, that is, powers not explicitly expressed in any regulation but deriving directly from the need to meet the objectives established by the same administrations in their legislative mode. This conclusion does not change even if such objectives have been defined by a EU legislation, since the duty of any national institution is to contribute to the enactment of principles and norms established by the EU cannot prevail on the primary need of a different legality principle when related to administrative provisions, which cannot be intended in a restrictive fashion when the public administration tends to shrink the rights also assigned to private citizens by art. 41 of the Constitution*”. Later the Administrative Court of Lombardia confirmed its position opposing the AEEG provisions with subsequent rulings no. 246 of 6 February 2006 and no. 39 of 16 January 2007. On the other hand, it is also significant to note that ruling no. 6392 of 14 December 2004 (where the same Administrative Court established the illegitimacy of another AEEG provision due to its lack of covering funding as stated by Law no. 481 of 14 November 1995) has been overruled by the State Council in second grade. In this case, the Appeal Court stated that the covering funding for the Authority derived directly from Law 481/95 which, “*as many other laws establishing independent administrative Authorities, is a law relying on uncertain outcomes, future power wielding, general clauses, or indefinite concepts that the Authority must then implement in practice*”.

This clause related only to ISPs deserves some further analysis. Indeed, their business is regulated by the Law Decree no. 70 of 9 April 2003 (implementing the EU Directive 2000/31/CE about electronic commerce) whose articles 14, 15, 16 and 17 essentially relieve the ISP of any responsibility for content transmitted by the so-called intermediaries for Information Society services (that is, those entities providing only access to electronic communications networks or the mere conduit) regarding information produced by third parties (the so-called “service recipients”) or also the caching or hosting services for information and files provided by the content provider – given that they remain totally alien to that transmitted content.

In particular, art. 17, paragraph 1, clearly states that “*the ISP is not subject to a general monitoring activity regarding transmitted or cached information, not it is generally subject to search for facts or situations that could indicate the presence of unlawful activities*”. Therefore, as also outlined in the same regulations, possible provider responsibility could “*exclusively emerge in the case of unlawful content and could be assigned to the same intermediary, which has also authored or ‘appropriated’ that content, by being involved in production, selection or communication of those messages, or by exerting a direct control on the available content and becoming responsible for its distribution on the Internet*”¹³. Facing such relief of responsibility for ISPs, we should consider whether AGCOM has any regulatory power to push toward their active involvement in the monitoring activity aimed at preventing copyright infringements. Actually, a closer look at the same rule excluding any responsibility for the ISPs seems to provide some different signals.

Firstly, such exemption does not appear to have an absoluteness characteristic. Even if art. 17, paragraph 1, of Law Decree 70/03 excludes the imposition of a general monitoring action about information transmitted or cached on the Internet, it is also true that “such provision does not cover monitoring obligations in specific cases and, in particular, leaves open the ordinances issued by national officials according to their respective legislations (in accordance with art. 47 of CE Directive 200/21). This seems to indicate that both the Court and administrative officials with “monitoring powers” — that is, AGCOM — could force the ISP to monitor actions regarding suspicious traffic activity related to a specific site. This stance is also reinforced by the fact that art. 14 (mere conduit), 15 (caching) and 16 (hosting), paragraph 2, all assign both to the Court and the monitoring body the option to “*force, even with an urgent motion, the provider to prevent or block the infringement*”. Also, the same provision stating the responsibility exemption in paragraph 3, then makes the IPS liable of civil charges if it does not promptly remove the “suspicious” content. In any case, as pointed out by many legal experts, the limited liability assigned to the ISP seems mostly intended to avoid criminal charges: indeed, such step would otherwise introduce in the current legislative body a new and unacceptable provision stating the ISP’s liability, or at least its co-participation in a criminal activity for content distributed by a third party using access services provided by the same ISP, according to article no. 110 of the Criminal Code.

Secondly, even when accepting the minimal role played by such exceptions, the ISP’s limited liability could not prevent them from becoming the recipients of regulatory

¹³ For an in-depth analysis of the possible liabilities related to each actor within the Internet structure please refer to the special section further down in this Chapter.

provisions issued by AGCOM as preventive measures. This is true not just because the interventions by the Courts and the administrative Authority operate on very different levels; the first action attempts to ascertain crimes and related charges with regard to punitive/restraining objectives, while the second action purely follows regulatory logic in order to prevent specific infringements. Indeed, we should not forget that, besides being in charge of monitoring copyright infringements according to art. 182 bis of Law 633/41, AGCOM is first and foremost the Authority responsible for regulating the electronic communications sector (ex Law 249/97 and ex Law Decree 259/2003, also known as Electronic Communications Code). AGCOM is a body appointed by the Italian institutions to guarantee the fair functioning and use of electronic communications networks (including the Internet, as specified by article 1, paragraph 1, letter dd) by all actors involved, from access providers to final users, through the implementation of the appropriate regulations to achieve such objectives. This institutional role provides AGCOM with the necessary legitimacy to set up rules of conduct for network operators aimed at achieving those goals outlined in the originating laws, including *preventive measures* about copyright infringements.

In any case, these possible measures will not undermine the ISP's relief from civil and criminal responsibility for (unlawful) content transmitted by third parties through their networks. Actually, both situations can live together: any non-compliance with the conduct rules will only bring administrative sanctions against network operators, which will translate in monetary fines, according to art. 1, paragraph 31, of the Law 249/1997, which establishes only monetary penalties for those "*bodies that do comply with orders and injunctions issued by the Authority*". Therefore, while the Law Decree 70/2003 seems to outline a "competitive", and not exclusive, jurisdiction between the Courts and the administrative Authority in addressing ISP's responsibilities, it appears reasonable for the same Authority (to which the lawmakers specifically refer as an "administrative Authority with monitoring powers") to introduce specific measures aimed at preventing copyright infringements, given its full respect for user privacy, Internet access and the Net Neutrality principle.

But there is something more. After confirming the ISPs relief of responsibility, articles 14, 15, 16 and 17 of Law Decree no. 70/03 leaves open the possibility, in paragraph 3, for both judiciary and administrative authorities with monitoring power to "*force, even with an urgent motion, the provider to prevent or stop the infringement*". Such provision gives legitimacy to a measure aimed at compelling the operators to remove the "unlawful" content available to the users of a specific Internet site, in order to prevent their subsequent copyright infringement.

Finally, according to article 1, paragraph 6 letter b), clause 4 bis of the Law no. 249/97, the collegial body enabled to issue measures aimed at providing copyright protection is the Services and Products Committee ("*carries out the tasks outlined by art. 182 bis of Copyright Law no. 633/1941, and subsequent modifications*"). Therefore, in accordance with the lawmakers' position, AGCOM's competency and intervention power is focused on its prevention tasks.

In-depth analysis: liability levels within the Internet structure

Ensuring copyright protection against “anomalous and unlawful” behaviour on the Net is a difficult challenge, particularly due to the lack of a positive law concerning the Internet within the Italian legislative body. Among the different kinds of unlawful behaviour carried out online¹⁴ our analysis is focused on copyright infringements – which include the online posting and publishing of documents, images and other intellectual works without explicit permission from their author or copyright holder. The easy propagation of such infringements on the Internet makes it difficult to assess individual liabilities. Along with restraining measures at the legislative and criminal level against piracy activities¹⁵, as specified below, a helpful aid to single out unlawful behaviour and individual liabilities can be found in the Electronic Commerce Directive no. 2000/31/CE.

1) Liability for the Internet Service Provider

This Directive, adopted in Italy with Law Decree no. 70 of 9 April 2003¹⁶, identifies the various actors participating in the “*Internet value structure*”¹⁷. The document defines the user as “*any physical person whose actions are not linked to business, entrepreneur, professional activities*”. It also describes the “*recipient of a service*” as any “*subject who uses a service of the Information Society for professional or personal purposes*”, and finally defines the role of the “*Service Provider*”¹⁸. The Directive clearly states the lack of liability¹⁹ for the *Internet Service Provider* (ISP) that distributes content over the Internet²⁰: although required to cooperate with Court officials if needs arise, the ISP does not carry actual liability.

The definition *Internet Service Provider* refers to a subject providing a variety of services for Internet final users. The first and foremost service is providing direct access to the Internet (as a server/access provider) in order to enable citizens to use all other services available online. Therefore, the ISP acts as an interface between users and the *Network Service Provider* (NSP), which in turn relies on larger telecommunication

¹⁴ Indeed such instances range from libel to privacy violations, from unfair competition to patent infringements. Given the difficulty of applying to the Internet the same rules used in traditional mass-media, online it is hard to locate online subjects and establish their geographical jurisdiction, to deal with the broad anonymous options, to verify each content publication, and so on.

¹⁵ With specific reference to Law no. 248 of 18 August 2000 (New regulations about copyright protection) and Law no. 128 of 21 May 2004 (Initiatives aimed at opposing illegal distribution of audiovisual material on the Internet, and at supporting cinematographic and artistic activities).

¹⁶ Law Decree about the “implementation of Directive no. 2000/31/CE regarding some judicial aspects of the Information Society services, particularly about electronic commerce.”

¹⁷ A formal expression used in jurisprudence to define all stakeholders that are part of the Internet. See *Ubertazzi*, “Commentario al diritto di concorrenza”.

¹⁸ According to Law Decree no. 70/03, article 2, paragraph 1, letter b), a service provider is a “physical or legal person providing any service within the Information Society and exerting a business activity through an established organization for an undetermined period of time”.

¹⁹ See articles 14 through 17 of Law Decree no. 70.03.

²⁰ Directive no. 2000/31/CE carefully the issue of ISP liability, reaching a compromise among diverging interests and taking into account the different positions of EU countries. Article 40, in particular, explicitly details such judicial differences. The issue at stake was to find a balance between diverging interests, equally important for the development of this sector, including user rights protection and reduced liability for online intermediaries. After two years of intense discussion and different viewpoints among the same stakeholders, the EU Commission did not accept the Parliament proposals aimed at establishing more stringent regulations for the ISPs. In its first part, the Electronic Commerce Directive outlined a large series of liabilities regarding all Network operators, even if most of them were already included in Directive no. 97/7/CE detailing user rights protection in long-distance contracts. In the part focused on intermediaries liabilities, they were excluded from carrying a general monitoring activity.

operators. ISP activity is defined as an actual business entrepreneurship, with revenue streams coming from services to actually connect to the Internet, the offering for hardware and software needed to operate such connection, and also additional services (like a possible server or hosting space and the “machine time” needed to manage the operations of the hosted party). Initially, ISP activity has been characterized by a general freedom, as confirmed by the clear distinction between its services: providing access to a computer network and transmitting third parties’ information or searching information already available on the Internet. The Directive no. 2000/31/CE detailed three different activities for the ISP, as mere conduit, caching and hosting party, while Article 15 established the principle of “no general obligation to monitor” for service providers.

While the electronic commerce document does not introduce any specific form of liability, it does include a sort of “conditional immunity” for intermediaries. In other words, the final text says that the service provider is not liable for the information transmitted, on condition that the provider does not modify in any way that information, a principle already affirmed by the legislative body in Italy (and in any other democratic country). Therefore, the intermediary liability is defined in its negative terms: based on the conditions of Law Decree no. 70/2003, the provider cannot be liable for unlawful behaviour carried out by online users. On the other hand, if the provider does not comply with such regulations, then he will be forced to compensate the damage done. According to the 2003 Law, there are three different kinds of situations:

- a) *Mere conduit services*: regarding the transmission in a communication network of information provided by a recipient of the service, Article 14 of Law Decree no. 70/2003 establishes the service provider is not liable for the information transmitted, on condition that the provider a) does not initiate the transmission; b) does not select the receiver of the transmission; c) does not select or modify the information contained in the transmission.
- b) *Caching services*: Article 15 of Law Decree no. 70/2003 establishes that the service provider is not liable the automatic, intermediate and temporary storage of user information, on condition that the provider: a) does not modify the information; b) complies with conditions on access to the information; c) complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry; d) does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; e) acts promptly to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement (paragraph 1, letter A-E). These caching activities are important to meet specific needs, such as greater speed for searching and downloading information, and ensuring stricter system security. To avoid the liability stated in letter E, the provider must remove information stored in all cached copies, when they have already been removed from the original website, either by the website owner or by a court or an administrative authority. This clause stated in letter E is similar to the other provision regarding the hosting services.

- c) *Hosting services*: following the same pattern of the two previous articles, Article 16 of Law Decree no. 70/2003 establishes that a service provider is not liable for the information stored at the request of a recipient of the service, on condition that the provider: a) does not have actual knowledge of unlawful activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the unlawful activity or information is apparent; b) upon obtaining such knowledge or awareness, acts promptly to remove or to disable access to the information.

This is the framework established by Italian lawmakers concerning the liabilities and obligations of the Internet Service Provider, an issue where some subsequent Court decisions were able to clarify a regulatory provision often too vague.²¹

2) *Liability for the Content and Host Providers*

The Directive 2000/31/CE ensures that Internet Service Providers will not be liable in the circumstances described earlier, but does not address the specific issues of the Host Provider and the Content Provider²², that should equally be considered in this in-depth analysis about the different liability levels regarding copyright infringements on the Internet. Given this lack of a supporting regulatory provision, the Court decisions²³ showed a certain approval of that liability, particularly regarding the Content Provider tasks, thus considering it a case of common liability related to a specific instance. In such a context, the Content Provider could be directly liable for an illicit behaviour committed by distributing that unlawful content. Indeed, the issue at stake here concerns the provider liability about an unlawful behaviour committed by a third party. In such instances, while the provider activity is completely independent from the user's unlawful behaviour, it is still a first cause (*condicio sine qua non*) for such behaviour.

The jurisprudence identifies the provider as a content publisher even if it merely provides access to (autonomously) managed websites by other parties. Also, the definition covers the case that a provider does not supply options aimed at determining such party nor furnish evidence of the agreement signed by the user about the website usage. Given such premises, the provider services equate to a publishing activity and are therefore subject (only under the Civil Code) to the Law no. 47/48, Article 11, which states that “for crimes committed by a printed publication the civil liability falls on the article authors, and also the publisher and owner of the same publication”. According to

²¹ The issue of ISP liability has been resolved in different ways by different Italian Courts. For example, the ordinance issued by the Cuneo Court on 23 June 1997 (Milano Finanza Editori Spa v. STB Stock Exchange computer services, in *Giur. Piemontese*, 1997) and the decision of 19 October 1999 (in *AIDA*, 2000) about a copyright infringement ruled out ISP liability, since it only provided access to the Internet and server space for publishing some information. The ordinance issued on 4 July 1998 by the Rome Court affirmed the difference between an Internet site and a news outlet, thus rejecting the request for an urgent order to remove a supposedly defamatory message posted on a newsgroup, which was un-moderated and therefore lacking any monitoring power from its provider. Instead a provider in L'Aquila has been found liable for “having allowed, or somewhat supported, the illegal user behaviour in distributing over the Internet advertising messages including names and brands registered by competing companies”, thus equating the provider to a newspaper publisher. In regards to the online defamation, the Court also imposed the seizing of all provider equipment used to disseminate the defamatory message on the Internet.

²² A Content Provider can also be defined as someone who, in his own interest or on behalf of a third party, uploads different kinds of information and works on an online server (see also ruling no. 3331 issued by the Bologna Court on 14 June 2004).

²³ But also the jurisprudence itself, see *Ubertazzi* among others.

this jurisprudential position, the provider liability is mostly related to the (objective) protection of the anonymity of the website manager, rather than to the hosting activity in itself.

This issue may trigger both civil and criminal lawsuits. In the former instance, there is a concurrence or an unintentional cooperation in a criminal liability case against a content provider, while in the latter instance, there is a damage compensation liability inferred by the unlawful behaviour committed by others (regardless of the actual crime prosecution). It is worth noting that the Italian legislation does not include the figure of the Host Provider — that is, a provider that is just hosting an Internet site, independently managed by others. On the other hand, the EU Directive no. 2000/31/CE introduces the Host Provider as someone who supplies hosting services for information furnished by others, and therefore he is not liable for such services, on condition that he does not have actual knowledge of unlawful activity or information or, upon obtaining such knowledge, acts promptly to remove or to disable access to that information.

Court decisions tried to differentiate the Content Provider and the Host Provider positions, making the former liable and latter not liable for distribution of unlawful content over the Internet²⁴. Some Courts²⁵ ruled that the Host Provider is not liable for unlawful content produced and distributed by others but hosted on his own server, thus furnishing access or other services for such content, unless his direct involvement in that content production could be proven. Indeed, this subject has no legal obligation to monitor content hosted on other websites, a monitoring activity that in any case would be very difficult if not impossible to carry out (due to the sheer volume of data) and would be of little or no value (since such data can easily be modified at any given time). The Host Provider has been considered liable when a third party features websites with domain names similar to a well-know brand, if the same provider took charge of registering that domain name — thus being a typical case of common and personal liability.

3) A possible framework for “typical” liability situations

The Law Decree no. 70/2003 was limited to transposing the Directive 2000/31/CE within the Italian legislative body, thus introducing some generic regulations that fuelled the jurisprudential debate. In particular, the new law did not clarify the issues concerning the provider liability about its *mere conduit*, *caching* or *hosting* services (see articles 14, 15 and 16). These provisions simply state that a service provider is not liable for the transmission in a communication network of information provided by a recipient of the service on the condition that they do not modify such information whatsoever — just

²⁴ The jurisprudence actually raised an interesting problem regarding Host Provider liability regarding an advertising banner posted on the site he created but managed by others. Such a banner can lead to a liability issue if it is directly illegal, while it is irrelevant if the illegal behaviour concerns the site hosting that banner (regardless the fact that the banner is owned by the hosting service company that also hosts that website). This issue is similar to the so-called linking liability, that is to whether someone who merely posts a web hyperlink to an illegal content can be liable for such infringement. The jurisprudence did not go further to note that the presence of a relevant banner could reinforce users reliability toward that website and its published content (even if defamatory), thus helping to cause or strengthen a possible damage; and also that the overall relevance of that banner could create confusion about the website ownership, suggesting that the subject featured in the banner could be the producer of the website information. Other unspoken elements (domain name registration owner, business activity in direct competition with the damaged company, other entrepreneurial connections, etc.) could also imply that the website information producer coincides with the subject advertised in the banner, even if formally published by a third party.

²⁵ See Milan Court ruling no. 1993 of 25 February 2004.

confirming a position (*ratio iuris*) already established within the Italian legislative body. This appears to be the substance of article 17, which denies the requirement of a general monitoring activity, while imposing several demands to the same provider. While, on one hand, the law does not compel the provider to implement a monitoring activity about information transmitted or cached over its server, on the other hand the same law subordinates the provider non-liability position to a series of conditions, such as the provider lack of actual knowledge of unlawful caching, thus making him somehow liable even without imposing a strict monitoring activity. This setting seems to favour the transmission or caching of data coming from trusted users, probably even financially prominent, thus undermining the freedom of information experienced so far by all users of our virtual universe.

Given this general framework, we should ask ourselves whether it is feasible to bring such liability issues for the ISP within the boundaries of common criminal and civil regulations. Indeed, some Court rulings acknowledged the provider extra-contractual liability according to ex article 2043 Civil Code, while other decisions affirmed the hosting liability for unlawful activities committed by third parties²⁶. Also under discussion is the option to consider an ISP not liable only for distributing messages over the Internet. According to one judicial opinion, an ISP is liable even if an unlawful activity has been committed by someone else using its service, thus equating the provider with a newspaper publisher, or underlining the instrumental stance of the provider who is trying to cover-up that unlawful activity with the excuse of protecting user anonymity. An opposing position denies altogether that an ISP could be liable for merely providing access to the Internet or some space on his server, doubting the assertion that an Internet site could be considered equal to a media outlet.²⁷ Therefore we witness a quite contradictory situation, probably fuelled by a difficulty in applying concepts and tools belonging to a traditional legal perspective to extremely specific but still little-known matters. However, the major issue at stake is essentially to understand the extent to which monitoring obligations may be imposed upon providers, having considered that under the Italian Law this is a personal liability issue.²⁸

²⁶ The former liability issue, based on article 2043 of the Civil Code, covers an illegal activity resulting in unfair damage to others. Instead the criminal liability relates only whether a certain behaviour could be considered a crime for the society at large, eventually issuing a penalty to protect its citizens. But if a certain behaviour is not explicitly defined as a crime, then it is simply not a crime. And no penalty for similar crimes can be applied here.

²⁷ Cuneo Court, Civil section I, rulings of 23 June 1997; Rome Court, Civil section I, ordinance of 4 July 1998.

²⁸ A ruling by the Naples Court (Section II, ordinance of 14 June 2002) is particularly clear in this context. Given the several subjects operating on the web, the ordinance highlights the need to differentiate the web content producer from the host provider, whose activity is limited to enabling the web content producer to use his server space. As a consequence, only the content producer is accountable for the distribution of illegal material on that web space (Lecce Court, Section I, 24 February 2001, in *Foro.it*, 2001, I, 2032; Florence Court, ruling no. 3155, 21 May 2001). The host provider is also excluded from any legal obligation to ascertain and eventually prevent such illegal content distribution by the website manager (Bologna Court, Civil Section I, ruling no. 3331, 27 July 2004). Regarding the provider's legal liability for its advertising banner on a website managed by others, the ruling simply states that the provider can be liable only if such banner message has illegal content, notwithstanding the possible illegality of the website itself (Catania Court, Civil Section II, ruling no. 2286, 29 June 2004). Also the Law Decree no. 70/2003 detailed the nature and limitations of the provider by outlining his three different roles with the related activities and liabilities (Milan Court, Civil Section II, 9 March 2006). A similar distinction had already been established in a well-known ruling by the US District Court for the Eastern District of Pennsylvania (ruling of 11 June 1998). Another provision about the provider civil liability was also included in Law no. 62/2001, covering publishing products issues, suggesting a possible illicit behaviour according to article 633 of Italian Criminal Code.

Based on such position, the perpetrator of an unlawful behaviour can only be prosecuted according to article II of the Italian Constitution, given the impossibility to identify specific liabilities for crimes committed by others. This traditional setting has unclear applications for the Internet and consequently for the ISP liability framework²⁹, when considering them as accountable subjects for distributing and circulating potentially unlawful content over the Internet. However, there are three accountability provisions that could be applied to the ISP situation. Article 2043 of the Civil Code can be applied when considering the Internet Service Provider as the perpetrator of the unlawful activity, while article 2055 of the Civil Code details a possible complicity liability, and in the case of the ISP negligent behaviour — by omitting to perform those necessary actions that could have prevented the unlawful activity from taking place — Courts could resort to article 2049 of the Civil Code.

At this point part of the jurisprudence³⁰ introduces a distinction among “Internet unlawful behaviour”, referring to infringements committed directly by online access managers, “unlawful behaviour against the Internet”, referring to activities carried out by users to damage the Internet structure and operators, and “unlawful behaviour carried out through the Internet”, referring to any infringements committed by taking advantage of Internet tools. The first instance is the less problematic to define, since the unlawful content has been directly published by the Content Provider, who is then personally liable according to common law procedures. The same self-regulatory code of conduct drafted by the AIIP (Associazione Italiana Internet Provider) states that “*the Content Provider is liable for any information made available to the public*” and also that “*no other Internet subject can be held accountable, except by proving his active participation*”, meaning “*any direct involvement in content production.*” The second situation, regarding an “unlawful behaviour against the Internet”, is more complex to define, since it implies that the ISP should be aware that someone is carrying out an unlawful activity through his technical infrastructure and the same ISP has willingly provided access to unlawful content distributed by others (article 2055 of the Civil Code regarding contributory negligence). The major concern here is the technical possibility for the ISP to have actual knowledge of all content and services hosted or managed on his servers and the way they are produced.

Part of this theory³¹ explains that upon obtaining such knowledge or awareness about some unlawful content or services, the ISP must act promptly to remove and disable access to the unlawful information. Such instance, however, cannot be sustained in accordance with the property rights regulations, since the ISP is not entitled to remove something that does not belong to him, given that the hosting (or any other service) contract protects the intellectual property of the final user. Based on article 2049 of the Civil Code, the incurring liability provision is negligence for omitted monitoring, which could be referenced every time the ISP does not prevent an unlawful behaviour, by

²⁹ Indeed, is it possible to identify the perpetrator of an illicit behaviour (if other than the actual provider), considering that one of the main characteristics of the Internet is to enable users to perform most activities from distance without the need to be physically present in a certain place, and that a user should willingly implement specific actions to actually to get identified online? And exactly what role does the ISP play in this situation? More in general, can he be considered directly accountable for such illicit behaviour, either at a civil or criminal level? Is he acting as an accomplice or in any negligent way? Finally, is the provider subject to any specific liability provision?

³⁰ On this specific issue, see *Marchetti-Ubertazzi*.

³¹ “The liability of Internet operators: national and International profiles”, in *Diritto dell’informazione*, 2000.

omitting to verify the legality of content uploaded on his server. The AIIP self-regulatory code of conduct is very clear on this issue. If a provider of technical services has no direct knowledge of content transmitted through those services, he cannot be held accountable for such content. Indeed, it is very difficult to prove that the ISP has knowledge of a certain page content when such content can be quickly modified at any given time and without leaving any track behind. Also, the requirement to have an editor-in-chief similarly to an official media outlet, according to article 3 of Law no. 62/2001, can be extended to Internet sites only when these sites publish news and information on a regular basis.

4) Copyright infringements carried out by the ISP

Court decisions also addressed provider liability regarding copyright infringements on the web (“unlawful behaviour carried out through the Internet”)³². As a necessary premise, all works protected by the copyright law “available on the Internet as text files in electronic format, deserve the same protection assigned to traditional literary works, since they can always be converted to the original printed format and are nevertheless creative works, regardless of the media and value of that artistic expression”. Regarding the extension of the copyright law no. 633/1941 to those works distributed through electronic communications networks, the jurisprudence tried to follow the major orientation pattern applied so far to the provider liability. The prevailing model denies not just any objective liability or business risk, but also an aggravated subjective liability. Indeed, the theoretical approach seems oriented to subordinate the provider liability to whether he is aware of the unlawful information or activity carried out, or at least about the existence of such information or activity. The common jurisprudential rule is that the ISP is liable for an unlawful activity carried out by a user only if he has “full knowledge of the unlawful behaviour executed by the latter”. Therefore we have a subjective liability, characterized by the subjective element of the crime, when the ISP, aware of the presence of suspicious content on his servers, fails to ascertain its unlawful nature and eventually to remove it. Such liability, however, could also become fraudulent when the ISP has full knowledge of the unlawful activity carried out by a user and, once again, fails to intervene. Given the above framework, a provider faces three liability levels related to copyright infringements on the web, as detailed here below:

a) Basically ISPs are not liable when they just provide access to the Internet. In other words, an ISP is the equivalent of a telephone network operator who undoubtedly cannot be considered liable for an unlawful activity carried out by a network user;

b) ISPs could be liable when he provides, beside basic Internet access, additional services, such as caching and hosting space (becoming a Content Provider), and his liability depends on whether he has full knowledge of the unlawful information or activity carried out through his infrastructure; however, the Content Provider has no general obligation to monitor the information transmitted or cached, nor is he required to actively search for events or circumstances that could suggest the presence of unlawful activities;

³² For a specific overview about this issue see the Catania Court ruling no 2286/2004.

c) The ISP liability is different from the liability assigned to a publisher or a managing editor, and therefore he is not governed by the strict liability rules applicable in the latter cases³³.

5) *User liability in copyright infringements*

In the last few years, Copyright Law has been updated several times to strengthen its sanctioning power at both criminal and administrative levels³⁴. By leaning on EU and International orientation ordinances, recent regulatory adjustments addressed mostly Section II (Copyright protection and criminal penalties) of Law no. 633/1941, articles 171 and following. Particularly article 171 and 171 bis detail those unlawful activities that lead to criminal and administrative liabilities. However, it is important to note that the same frequency of regulatory upgrades gave way to a certain lack of consistence and uniformity. This situation suggests the need to “revise” outdated Law no. 633/1941 in a more cohesive way and implement a more organic approach to copyright protection.

Given today’s easy access to new technologies ensuring immediate use and distribution, it becomes necessary to face the industrial piracy activities, while moving the copyright protection (and related sanctions) from the author to the media format incorporating a copyrighted work. Eventually lawmakers decided to pursue a case-by-case approach, based on an analytical description of consequent sanctions and on the new technologies for the reproduction of intellectual works. Indeed, the development and diffusion of new technologies that ensure immediate reproduction have actually increased the need to define copyright protection as well as a sanctioning structure that are more effective in establishing user liability. Regarding this issue, article 171, paragraph 1, letter *a bis*, considers liable “*anyone who makes available to the public an intellectual work, or part of it, under copyright, by distributing it through electronic communications networks*”³⁵. This provision, introduced with article 3 of Law Decree no. 7/2005, is similar to letter *a bis* of article 171 ter already introduced, albeit with some slight differences, in Law Decree no. 72/2004³⁶. This latter provision requires a for-profit aim and the explicit *communication to the public*, by distributing that work over the Internet — while letter *a bis*, paragraph 1, of article 171 targets *anyone who makes available to the public* a copyrighted work, by distributing it over the Internet.

³³ The publisher and the managing editor of a news media outlet are liable according to article 57 of Italian Criminal Code (as modified by Law no. 127/1958), which follows the Constitutional mandate by affirming a personal accountability: “*Along with the author of a publication and other possible co-authors, when the managing editor or deputy managing editor fail to prevent their publication from committing a crime through its published content, he is punished, when that crime has been confirmed, with the appropriate sanction, lessened by no more than a third part*”.

³⁴ The Law no. 248/2000 modified articles 171 bis and 171 ter and introduced other articles (up to 181 bis). The Law Decree no. 72/2004, then transformed in Law no 128/2004 (the so-called “Legge Urbani”), introduced a new provision in article 171 ter and specified the “for profit” aspect, later modified again by Law 43/2005. The Law Decree no. 118/2006 adopted the EU Directive 2001/84/CE by decriminalizing the fraudulent provision included in art. 171, and finally the Law Decree no140/2006 adopted the EU Enforcement Directive 2004/48/CE.

³⁵ This provision was first applied by the Milan Court (ordinance of 09.03.2006) regarding some soccer games exclusively licensed to Sky TV and re-broadcast on the Internet by a Chinese company. According to the Court, this case was only limited to someone who made available to the public an intellectual work under copyright by distributing it over the Internet.

³⁶ Article 171 ter, letter *a bis* states: “in violation of art. 16, anyone who makes available, to the public, for a profit, a copyrighted work, or part of it, by distributing it over electronic networks”.

After the new regulation took effect, the jurisprudence³⁷ decided that the specific reference to the active subject of the unlawful activity (“*anyone*”) allows the application of article 171, paragraph 1, letter *a bis*, to both a final user of the access service (intended as a Content Provider) and a common consumer without professional or business purposes³⁸. By also applying this provision to the consumer, lawmakers intended to target the so-called *peer-to-peer* networks. Indeed, a peer-to-peer network promotes file sharing activities, in violation of current copyright laws, and nevertheless outside the ordinary and legit situations that define the commerce of intellectual property. Therefore anyone pursuing such unlawful activities is liable and punishable with administrative and criminal sanctions³⁹. In particular, when the infringement is carried out through a website, the most effective preventive measure in protecting the author rights is to block that website. Other provisions also include the possibility of forcing the ISP to prevent and stop users from accessing that website.

³⁷ For more details, see Marchetti-Ubertazzi, *Commentario breve al diritto di concorrenza*.

³⁸ For a definition of the term ‘consumer’, see the Law Decree no. 205/2006 that adopted the EU directives for consumer rights protection and provides a useful aid in reaching a more cohesive and organic approach to the whole field.

³⁹ Regarding such file sharing issues, see Rome Court ordinance of 9.02.2007 and ordinance of 19.08.2006 (about www.thepiratebay.org)

2. TECHNICAL ASPECTS OF COPYRIGHT INFRINGEMENTS

2.1 Technical description of copyright infringements over the Internet

The technical instances of copyright infringements over electronic communications networks, and particularly over the Internet, are numerous and constantly evolving. However, we must note that the same tools that are utilized most often to carry out infringements against audiovisual content under copyright— described here below — are used equally to transmit and distribute perfectly legal content.

a) Download

The term means to receive or start receiving a file, with either textual or audiovisual content, from a remote node on the Internet to your own personal computer. This action requires a centralized machine to store the original content.

b) Peer-to-Peer (P2P)

The term refers to any distributed network architecture where each node is at the same client and a server. Although the same network architecture is employed by Microsoft Windows and Skype, the definition is mostly, and erroneously, used to refer to the practice of unlawful file sharing among users. This action requires decentralized machines to store the original content.

c) Streaming

The term refers to a sequence of audiovisual content transmitted by a server on the Internet to several clients and reproduced as soon as they reach their destination. We should distinguish between on demand and live streaming. With *on demand streaming* the original content is permanently stored on a server (i.e., *YouTube*) and then transmitted to a client which requests such content. A *live streaming* sends audiovisual data straight to the client without any request from the client and it is available at one time only. For example, this latter option is generally used for live sports events. This action does not require a permanent storage for the original content, which is instead transformed ‘on the fly’ in an audiovisual flow of data — even in the case of a traditional broadcast of a satellite or terrestrial TV channel.

d) Link

Given that the nature of the World Wide Web is based on a hyperlink structure, we should also distinguish between servers that actually store unlawful content and *web* servers that just publish links to that content. This action vastly multiplies the options for an Internet user to access that content, thus representing some kind of third dimension in a theoretical map about the technical means of piracy activities. The *web* servers that publish those links can belong to any field, including the most-known search engines and social networking sites.

e) Satellite TV channels and the Internet

Today most access systems to satellite and digital terrestrial *Pay TV* channels are quite robust and the practice of *smart card* cloning seems completely lost in the past. There is, however, an exception: the so-called *card sharing* technique. This copyright infringement is based on a smart card regularly registered for a single user subscription, which later is

being shared with one or more users linked through the Internet with the original subscriber. In order to achieve such result, users need a programmable satellite decoder furnished with a LAN port. This activity is quite limited, though, also due to frequent protocol changes implemented by the access providers.

2.2 Technical tools and measures to counteract piracy

There are several tools currently available on the market to prevent copyright infringements. They are mostly implemented by public and private organizations to limit Internet access to their employees, while they are of little use for the broadband residential market (also due the technical easiness of user circumvention). Other measures, sometimes used by TLC operators for network management, can produce a discriminatory outcome.

Here below is a short description of the technical tools and measures currently available to Internet operators, including some of the limitations in applying them to a single residential user.

a) Port Blocking

Broadband providers can block the P2P traffic by blocking common service port generally used by P2P applications. Business and Public Administration organizations resort to this measure to successfully limit Internet use according only to their own policies. Usually this technique requires the implementation of a perimeter professional firewall and/or a personal firewall. The average residential user could circumvent such measure by modifying the port configuration access of his P2P client. The application of such technique on a large scale is also adverse to the Internet neutrality principle.

b) Content Filtering

With this method someone can block or enable user access to a certain content according to the analysis of the content itself, its source or other criteria. This is the most used measure to filter access to web content, mostly within public and private organizations to avoid access to inappropriate material. Usually the organization's IT department decides the filtering level and the system operates as an additional firewall or a software program installed on single computers. The system verifies the surfing requests and checks them against a database, regularly updated and available through a paid subscription, before allowing or denying access to the requested websites. This method enables the user to easily filter out sites with inappropriate, unlawful or potentially dangerous content. Based on the specific options available, it is also possible to differentiate the access levels for each Internet user. These measures are also normally implemented to filter out unsolicited electronic mail, the so-called *spam*, and can be used on home computers to limit minors' access to inappropriate websites (that is, through *Parental Control software*).

Considering the great fluidity of today's web, and particularly the new websites launched at any given moment, this method cannot ensure an absolute security. It is also in contrast with the basic principles of user privacy and Internet neutrality.

c) Traffic Shaping

This term refers to a series of traffic monitoring operations that can optimize or ensure transmission performance, reduce or limit the latency gap and take advantage of

the broadband available by adjusting data packet transmission according to specific criteria. Formally this is a method to manage (and control) data traffic on a network, applied by the ISP, when providing ADSL or other services, and by the system administrator in a LAN structure. As suggested by the term itself, it is a matter of *giving shape* to the traffic moving back and forth on one's network according to some internal guidelines.

Traffic shaping is a particular measure used by the ISP to limit or block certain P2P services. There are two main reasons for resorting to this action: (i) the provider is not able to meet the demand for a heavy volume of traffic due to his limited bandwidth; (ii) a certain provider can decide to limit or block the file sharing activity because it could include some exchange of unlawful data.

This method also denies the Internet neutrality principle, and can be avoided by applying the so-called *protocol obfuscation* technique.

d) Deep Packet Inspection

This filtering measure attempts to verify the content of the data packet's payload moving on a network communication stream (such as the Internet), in order to establish whether they conform to the ISP guidelines. The operation target can be the identification (and possible intervention on) of protocol anomalies, malicious attacks, virus spreading, or also the optimization or data-gathering about the network traffic.

In contrast to the *Packet Inspection*, the DPI technologies do not just inspect the packet header, which includes such data as the IP address of the sender and recipient, and the network protocol used (port numbers), but they also check the content itself of a single packet and/or the entire packet stream. Such technique is being used by ISP and TLC operators to optimize and prioritize their network traffic, and also by government agencies as part of their *intelligence* activities.

This measure can also be implemented along with a local firewall to protect against P2P traffic surreptitiously activated within the company intranet toward an external network such as the Internet.

The limitations of this method are possible user privacy infringements, its complex deployment and high cost, and its threats to the Internet neutrality principle. Also, when applied on a large scale, the DPI technique can run against the very principles of democracy and freedom.

e) Digital Rights Management Systems

The term DRM essentially includes a series of policies, techniques and tools defining the appropriate use of a digital content through the correct steps along the entire chain process. Specifically, the DRM systems enable: (i) content encrypting to prevent its unrestricted access; (ii) management and distribution of deciphering keys; (iii) full control of conditional access and content usage (quantity of copies allowed or copy prevention); (iv) an interface based on invoicing mechanisms linked to monetary transactions; and (v) identification and tracking of any digital content. However, the DRM systems also raise critical issues in relation to privacy protection⁴⁰, transparency,

⁴⁰ DRM systems can easily locate, transmit and store large quantities of data related to the personal use of digital content.

lack of interoperability, observance of required security levels and adherence to the technological neutrality principle⁴¹.

f) Creative Commons licenses

The Creative Commons (CC) licenses were created in the USA to enable different contractual terms for copyright licensing in order to provide Internet users with a more favourable access to protected digital content. Introducing some flexibility to the copyright regime, CC makes four slightly different licenses available to the authors for their works⁴². From a legal standpoint, CC licenses allows users to reproduce, distribute, show and execute such works, according to the specific combination of terms chosen by its authors⁴³. From a technical standpoint, a CC licence can be easily obtained by filling out a form on its website. From a financial standpoint, a CC licence has the double advantage of being free of charge and recognized at an international level. Therefore, it could become an incentive to creative activities and business model innovation and it could also increase the circulation of works by authors not involved in the traditional commercial market, or uninterested to the economic benefits of their works⁴⁴.

⁴¹ The report “Digital Rights Management Systems: Recent Developments in Europe” (F.J. Cabrera Blázquez, 2007), released by the *European Audiovisual Observatory*, highlighted several critical issues regarding the implementation of DRM systems, including: 1) A possible discrepancy between DRM capabilities and personal copy exception; 2) An apparent overlapping of DRM systems application and other copyright-related taxations; 3) The DRM systems’ lack of interoperability; 4) A potential threat to market development of digital content due to proprietary and non-interoperable DRM systems; 5) A possible discrimination about fees for on-demand content according to providers based in different countries.

⁴² *Attribution (BY)*, requiring specific attribution to the original author, according to art. 8 of Copyright Law; *Non-Commercial (NC)*, requiring that the work is not used for commercial purposes, according to second paragraph of art. 12; *No Derivative Works (ND)*, allowing no derivatives whatsoever of the original work, according to art. 20; *Share Alike (SA)*, allowing derivative works under the same original license, according to art.4.

⁴³ In its Italian version, the CC license states in art. 2: “*This license does not prevent, limit or restrict any right to apply any provision related to the exclusive rights deriving from the copyright law or other applicable laws.*”

⁴⁴ In Italy over 8 million CC licenses have been issued so far (second top country for licenses issued), even if Italy occupies the 43rd place for license “liberality” (Giorgio Cheliotis, Warren Chik, Ankit Guglani and Giri Kumar Tayi, “*Taking Stock of the Creative Commons Experiment – Monitoring the Use of Creative Commons Licenses and Evaluating Its Implications for the Future of Creative Commons and for Copyright Law*”, 35th Research Conference on Communication, Information and Internet Policy (TPRC), National Center for Technology and Law, George Mason University School of Law).

3. THE ECONOMIC IMPACT OF PIRACY ACTIVITIES

3.1 The economic impact of audiovisual piracy in Italy

3.1.1 The difficulty of defining and measuring piracy activities

The term *online piracy* refers to the unlawful downloading and streaming of video and audio content on the web. To estimate the overall dimensions of this practice, often the current literature refers to *file-sharing* and *peer-to-peer* (P2P) activities, while it should be noted that P2P traffic data actually includes both legal and unlawful activities and that such traffic data are available exclusively to Internet access providers. In general, piracy activities are linked to the widespread use of broadband access, which for video content is a crucial service — while the download of audio files, both legal and unlawful, requires only a limited bandwidth. This implies that video piracy on the web is an emerging phenomenon, probably with a confined growing perspective when considering two current trends: the diffusion of streaming services, as preferred distributing options, and the growing interaction of online video content — both requiring a server-client connection that is much less prone to piracy attacks. Indeed, the ongoing technological evolution is greatly influencing users behaviour on the Net, whose idea is moving away from a “vehicle of content” (to be stored on individual user computers) toward a broader “container” of audiovisual material. For users with a regular and reliable broadband access, it makes much more sense to immediately enjoy such online content rather to download it on their own machine and savour it later on (*experience-now vs. experience-later*). The streaming technology also requires very little space on the user’s computer and is often optimized for handset terminals, while ensuring at the same time that any indexing and searching is much faster on the Internet rather than on the user machine.

As a consequence, P2P activities are decreasing across the world and streaming technologies are prevailing everywhere. Therefore, in order to prevent copyright infringements carried out by file-sharing activities, probably a wider broadband implementation in Italy will produce a deterrent impact on P2P practices and a positive effect on the authorized exchange of digital content. It should also be noted that the creation of a more effective and distributed network (the so-called *next generation network*) would foster the development of a legal market for audiovisual content, even if at the moment users seem unwilling to pay a fee to access such content⁴⁵.

3.1.2 Industry research studies

Among the various research carried on by the content industry itself, the IFPI (International Federation of the Phonographic Industry) says that in 2008 the digital music sales of the International record labels increased by 25%, reaching US \$ 3,7 billion. Today digital platforms cover about 20% of the entire market, up from 15% in 2007. The regular increase of digital content sales is counterbalancing the decreasing sales of recorded music. In 2008 the single file download grew by 24%, topping 1,4 billion units and leading the online market, while digital album sales also went up by

⁴⁵ Commission staff working document, *Europe’s Digital Competitiveness Report i2010* — Annual Information Society Report 2009 Benchmarking i2010: Trends and main achievements.

37%. Despite these figures, the IFPI still maintains that online music piracy amounts to 95% of the global music market⁴⁶.

In Italy, the digital sector is relying more and more on the Internet as a music distribution channel, although still unable to fully balance the sale decline in the traditional market — which in 2008 decreased by 21% (down from € 197,6 million in 2007 to € 156,2 million in 2008), while sales on the Internet and on mobile devices reached 4%, growing from € 15,2 million to € 15,7 million in the same year period. File downloading on the Internet is showing a steady growth (with a 37% increase), with an opposite trend for mobile phones (35% less compared to 2007). According to some estimates by the Federazione contro la Pirateria Musicale (Federation against Music Piracy), 23% of Internet users resort to unlawful download via P2P networks and each PC enabled with a P2P software hosts an average of 1,300 unlawfully-downloaded songs, for missing sales of about € 300 million per year.

At the same time, the IFPI, while remaining focused on unlawful P2P activities, added that year 2008 has seen a steady growth of legal music download on the Web for the sixth time in a row, with a 25% increase when compared to the previous year⁴⁷. Quite compelling the success of iTunes: its online store sold over 5 billion songs in less than 4 years⁴⁸.

Regarding the movie industry, over 80% of new movies become available on Internet sites as early as two days after their opening in theatres — with Italy covering about 13% of unlawful downloads worldwide (and 5% of the legal market), according to research led by the Federazione Anti-Pirateria Audiovisiva (Federation against Audiovisual Piracy).

3.1.3 Official sources

According to a study released in the US in October 2009 on the worldwide traffic data generating from 110 operators including major cable providers, international backbone transmission, regional networks, and content providers, there is a global decline of P2P usage (down from 40% in 2007 to 19% in 2009) along with a consistent increase of video streaming traffic⁴⁹.

The *Survey on ICT Usage by Households and by Individuals* carried by Eurostat also analyzes the emerging differences in Web trends, including P2P practices. In 2008, 35% of Internet users in Europe used P2P and file-sharing networks to exchange music and movies, mostly young people between 16 and 24 years of age. However, even this estimate does not differentiate between legal and unlawful content consumption.

The latest report released by the OECD (*Information Technology Outlook 2008*) underlines a steady increase of total sales (online and offline) for both video and audio products throughout 2007; online sales for the movie industry topped a 100% growth, while record industry sales grew by 27% in that year. As a scale of reference, online sales cover 16% of total sales for the audio industry, while the online segment has a minimal impact for the movie industry, which still relies mostly on traditional distribution channels despite some recent advancement on the Web.

⁴⁶ Source: IFPI digital music report 2009.

⁴⁷ Source: IFPI digital music report 2009.

⁴⁸ Source: Apple Press Release, <http://www.apple.com/pr/library/2008/06/19itunes.html>

⁴⁹ C. Labovitz, S. Iekel-Johnson, D. McPherson – *ATLAS Internet Observatory 2009 Annual Report*, Arbor Networks.

3.1.4 International research outcome

A broad collection of literature worldwide studied the effect of P2P and download practices on those industries. In general, most of the research focused on music content: as mentioned above, the music market had been hit by online piracy even before the diffusion of broadband access and thus there is already a wide array of data and information available.

All studies analyzing the effect of P2P and file-sharing activities on online sales of legal music content seem to confirm that such activities do not only produce negative effects, but rather they appear to foster an increase of such sales on the Web. For example, B. Anderson and M. Frenz (2007)⁵⁰ exposed a positive relationship in the Canadian market between file-sharing and audio CD purchases, while F. Oberholder and K. Strumpf (2004)⁵¹ covered the same segment in the US users and concluded that online downloads have essentially a nil effect on the overall music sales. Such estimates directly oppose the music industry's claim that file-sharing activities are the major reason behind their recent purchase decrease. In fact, this research study explains that a decline trend is due to other factors, including the widespread economic recession, the growth of other competing media (videogames and DVDs), and possible boycott practices against record labels. According to the same research, by sharing music files and further discussing them in the chat-rooms, users may actually acquaint themselves with music that s/he would otherwise never have listened to — thus creating a new channel for promoting such music. A 2009 report commissioned by the Dutch Government details the positive outcome regarding the economic implication of file-sharing activities, in the short as well as the long term; file-sharing, particularly, provides users with access to a broad collection of cultural products and thus even increases the users well-being⁵².

Lawrence Lessig, Law Professor at Harvard and Stanford and major expert on Internet Law, underlined the adverse effects of content sharing technologies for our society at large, stressing the need to “*avoid that society should be deprived of the peer to peer advantages (including those positive outcomes that do not create any problem to copyright holders) to just ensure that copyright infringements are not carried out through the such peer to peer networks.*” In particular, Lessig details four kinds of P2P practices: a) file-sharing as a substitute for purchasing (thus causing a decline of music sales); b) file-sharing to sample songs before actually purchasing them (thus causing an increase of music sales); c) file-sharing to access copyright-protected material currently out of print (thus causing zero economic damage, since the copyright holder does not sell that material anymore); d) file-sharing to access content not covered by copyright law or whose copyright holder wants to distribute free of charge (thus causing zero economic damage). According to this classification, the actual economic damage to the industry equals the difference between the a) and the b) kinds of file-sharing. Therefore, many scholars point out that the overall impact of online piracy, measured through data related to file-sharing and peer to peer activities, is the result of several effects belonging to three main categories: effects on the industry, effects on the society and citizen well-being, and general effects in the medium-long range. Regarding the first case, sources disagree about

⁵⁰ B. Anderson and M. Frenz, “*The Impact of Music downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada*”, (2007).

⁵¹ F. Oberholder and K. Strumpf, “*The effect of file sharing on record sales. An empirical analysis*”, (2004).

⁵² TNO, “*Economic and cultural effects of file sharing on music, film and games*”, 2009.

a decreasing trend for legal market sales; the table below details the major findings resulting from empirical analysis. As for the well being of society, online piracy could actually have a positive influence on the users well-being by increasing the variety of available content and pushing toward lower selling prices for CDs and DVDs. Finally, the medium and long terms effects also deserve attention, particularly concerning a possible positive outcome for market competition and innovation, even if the empirical data, so far, does not provide consistent results.

Table: Overall effects of file-sharing practices

| | |
|-------------------------|--|
| POSITIVE EFFECTS | <ul style="list-style-type: none"> - <i>sampling effect</i>: file-sharing can create new demand in the legal market (Shapiro and Varian, 1999, Liebowitz, 2006); - file-sharing can help to increase the overall demand; - additional demand: file-sharing can push users to pay for related products (ie, live concerts and theatre movies); - <i>network effect</i>: file-sharing can help to launch products with a low purchasing power; - file-sharing can have a positive influence on neighbouring sectors (ie, consumer electronics and TLC operators). |
| NEUTRAL EFFECTS | <ul style="list-style-type: none"> - file-sharing attracts people who would otherwise not have been interested in purchasing a legal product; - file-sharing allows people to find some products that the industry would not normally keep on the market. |
| NEGATIVE EFFECTS | <ul style="list-style-type: none"> - file-sharing could be used as a substitute for legal purchase; - file-sharing could encourage people to wait for lower price to purchase products; - the <i>sampling effect</i> could produce a general purchase shifting. |

4. BENCHMARKING AND THE INTERNATIONAL DEBATE

4.1 A comparison between Copyright Laws

National copyright laws and related regulatory systems are strongly influenced by the EU Law and international treaties aimed at harmonising the various provisions that prevent online piracy. Given the wide spreading of copyright infringements via the web, this phenomenon is gaining global dimensions and requires active cooperation among States worldwide.

Along with the international agreements, negotiated within the WIPO framework⁵³, the EU Directive 2001/29/CE *on the harmonisation of certain aspects of copyright and related rights in the Information Society* leaves room for national lawmakers to adopt those regulatory, administrative and legal measures needed to ensure the effective protection of works under copyright. At the same time, Member States are required to safeguard the basic rights of privacy and Internet access. Therefore, it should not be surprising that, when comparing legislations adopted within the OCSE (Organization for Security and Co-operation in Europe), there are crucial differences among EU member States about major issues such as criminal charges for online piracy activities, along with interesting similarities between the USA and some of the laws in the EU countries⁵⁴. However, certain behaviour that is perfectly legal in some EU Member States can be a civil or criminal crime in other States that provide different accountability levels and legal protection.

All OCSE member States provide for some kind of civil sanctions regarding copyright infringements and there are no specific provisions about unlawful behaviour committed through electronic communication networks. In any case, the various penalty systems have been somewhat harmonised by the TRIPS (Trade-Related Aspects of Intellectual Property Rights) agreement drafted with the WIPO establishment (1994): any infringement of copyright-protected work for commercial purposes should be prosecuted according to the criminal law. However, the agreement does not differentiate between copyright infringements carried out by traditional means and those pursued instead on the Internet. While a 2007 OCSE Report⁵⁵ suggests a broad increase of sanctions against online piracy, there are still objective difficulties in applying these remedies to curb the unlawful behaviour, as both a deterrent and a restraining measures.

4.2 The ISP's role within National Laws

According to Directive 2001/29/CE, Member States shall ensure that right-holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe copyright or related rights (Art. 8, paragraph 3)⁵⁶. In regards to infringements carried out on the Internet, there are even more chances that services provided by the intermediaries can be used for unlawful activities by a third party and, in most cases, the same intermediaries are best suited to block such unlawful activities. Therefore, beside other sanctions and related means available, the right-holders should be

⁵³ WIPO Copyright Treaty, Geneva 1996, http://www.wipo.int/en/ip/wct/trtdocs_wo033.html

⁵⁴ Piracy of digital content, OCSE, 2009, <http://browse.oecdbookshop.org/oecd/pdfs/browseit/9309061E.PDF>, p.10

⁵⁵ OECD, *The Economic Impact of Counterfeit and Piracy*, 2007, <http://www.oecd.org/dataoecd/11/38/38704571.pdf>

⁵⁶ Directive 2001/29/CE, Art. 8, paragraph 3: “Member States shall ensure that right-holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.”

able to somehow apply for an injunction against intermediaries that allow a third party to infringe a copyright or a related right. The conditions and procedures regarding such injunction should be defined by the Member States' national laws (see footnote 59). However, in regards to the provider liability for *mere conduit*, *caching* or *hosting* services it should be noted that, as explained in Chapter 1, the Directive on electronic commerce no. 2000/31/CE (see articles 12, 13, 14) explicitly excludes such provider liability, even if with certain limitations, while a Member State can still adopt a national legislation enabling a legal or administrative authority to force the provider, through an injunction, to block or prevent an infringement, and also to execute the necessary procedures to remove or disable access to such data. At the same time, however, the provider has no general obligation to monitor the information transmitted or cached, nor is he subject to actively search for events or circumstances that could suggest the presence of unlawful activities. A recent study carried out by the European Commission highlighted the coordination problems emerging from the Directive on electronic commerce regarding the protection measures mentioned by same Directive, particularly about the ISP's role⁵⁷. While waiting for future development at the European level, Member States have adopted Article 8 of Directive no. 2000/31/CE in their own way, by adapting it to the civic liability system of each national legislation (see Table below).

Only in Austria, Greece and Lithuania does the national law provide for a specific injunction against the ISP in accordance with Article 8, paragraph 3 of the Directive⁵⁸. Therefore in these countries the copyright holders can resort to specific measures to force some kind of ISP reparation for infringements carried out through their services. This is also the approach of a copyright reform recently adopted in France. Such forms of reparation include monetary compensation or technical measures to block and suspend the ISP account, also as a precautionary measure imposed by the Court while waiting for the final sentence against the actual infringer.

In other Member States, the option for such ISP liability relies on the general principles regulating similar liabilities for civil or criminal violations, or on the national measures which implement the Directive on electronic commerce. The latter includes the possibility to force the ISP to "promptly inform the competent public authorities of alleged unlawful activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements." (article 15, paragraph 3). Based on such provision, Finland introduced a particular procedure in order to notify and record any infringement infringements in regarding ISP liability. Similar obligations to notify and document have been introduced in Belgium⁵⁹, whose General Attorney explained that, even if the ISP cannot be considered directly liable for infringements carried out by its users, the power to force upon the provider such notification or blocking measures is justified by the need to ensure an effective protection to the copyright holders⁶⁰. This ruling raised some

⁵⁷ European Commission, *Legal analysis of a Single Market for an Information Society, draft final report*, 2009.

⁵⁸ See paragraph 81 of Austria's and article 64 of Greece's copyright laws (source: InfoSoc Study, p. 77).

⁵⁹ In its article 87, Belgium's copyright law includes an "action en cessation" procedure to be filed by the copyright holders, asking the civil Court to force the provider to implement the necessary actions to stop and prevent any threat to copyright infringements.

⁶⁰ Court of First Instance, Brussels, SABAM v. SA Tiscali, 24 June 2004. In this case, SABAM asked the Court to apply the Directive on copyright based on the above article (see footnote 59), thus forcing the ISP collaboration

interest, given its suggestion of a technical solution toward selective filtering methods to prevent digital piracy activities. However, SA Scarlet filed an appeal, arguing that standard filtering applied to content carried through provider access services goes against the general lack of obligation for the ISP to monitor the information transmitted or cached, as stated in the same Directive on electronic commerce⁶¹.

In the Netherlands the option of a restraining order against the ISP is provided by the general rules related to criminal liabilities. In UK, the article 8, paragraph 3 has not been directly adopted, but the Court can nevertheless exert a possible and temporary restraining order, based on the general principles governing the adoption of precautionary measures within the British civil law procedures.

The above overview of the legal framework seems to suggest two major issues. The first issue concerns a possible configuration for the direct or indirect liability for the ISP. In 2002, the Netherlands Attorney General excluded that the access to file-sharing sites could infer any indirect provider liability, given that the related software is primarily used for various instances and does not constitute in itself a facilitating tool for copyright infringement⁶². The second issue concerns the relationship between copyright laws and other provisions protecting the right to user privacy and communication confidentiality. In this regard, the substantial difference between the US and the European approach should be pointed: the US Copyright Act (Sec. 512 (g) (1)) states explicitly that the ISP must provide the personal data of copyright holders requiring specific protection, given certain conditions⁶³. The EU Court of Justice in 2008 on the other hand, revealed a more vague approach: the ruling about a Spanish case (*Promusicae v. Telefónica de España*) simply does not exclude the possibility to publish personal data of copyright holders by the ISP, leaving to the Member States a further harmonization with regulations covering privacy and ownership protection.

Within this general European framework, an Irish Court ruling deserves attention: it imposed the public dissemination of the provider personal data, after their involvement in copyright infringement had been clearly proven⁶⁴. Similar obligations have been introduced in the recent UK law reform against online piracy. Therefore, the existence of an obligation to make the personal data of an ISP public — even if under specific conditions and safeguarding the right to privacy protection — is now part of the common law provisions, based on the principle that such individual, although not liable for

regarding an infringement prevention. SABAM wanted the Court to order Tiscali to block the access to such P2P sites as Grokster and KaZaA, used for the unlawful downloading of copyrighted content, to draft a list of technical measures that the ISP was implementing to block the access to those sites, and to publish on its website such list and the news about its measures against piracy. The legal prosecution also included technical consultation to verify the actual instance of adopting some selective filtering methods to prevent unlawful file-sharing activities. Based on this latter remedy, in 2007 the Court ruled in favour of the Belgian organization SABAM by imposing to the SA Scarlet (FAI) provider the implementation of all technical measures necessary to block any attempt aiming at copyright infringements carried out by its users, by preventing any form of exchange (based on the common functionalities of P2P networks) of electronic music files whose content was under a copyright hold by SABAM. http://www.droitbelge.be/news_detail.asp?id=197

⁶¹ <http://www.ulyes.net/fr/articles-1240/la-riposte-graduee-est-elle-une-solution-dans-d-autres-pays-l-exempl.html>

⁶² Hof Amsterdam, 28 March 2002 (*Kazaa v. BUMA*) LJN: AE0805.

⁶³ See next paragraph on the US framework.

⁶⁴ The High Court (Commercial), *EMI Records (Ireland) Limited, Sony BMG Music Entertainment (Irl) Limited, Universal Music Ireland Limited, Warner Music Ireland Limited v. Eircom Limited and BT Communications Ireland Limited*, 8 July 2005.

unlawful activities carried out by the actual infringer, has an obligation to cooperate with the victim in order to ensure his/her effective protection.

Along a similar interpretation, in 2006 a Dutch Court imposed the obligation on an ISP to make the personal data of some hosted sites that carried unlawful activities in violation of article 14 of the Directive on electronic commerce public⁶⁵.

Despite the difficulties of assessing specific liabilities for the ISP, recent studies maintain that an effective strategy for copyright protection cannot lack the implementation of the necessary forms of cooperation with the same provider, whose market position nevertheless has a catalytic effect in civil lawsuits about copyright protection. Indeed, contrary to a single infringer, the ISP is easy to identify and has the economic strength that attracts those willing to pursue some form of compensation for damages caused by copyright infringements⁶⁶.

Comparative table on ISP position within National legislative bodies

| COUNTRY | LIABILITIES | OBLIGATIONS | LEGAL AUTHORITY |
|-----------------------|--|---|-----------------|
| Austria ⁶⁷ | Beside any criminal charge investigation, the ISP liability for unauthorized distribution of works under copyright covers all ISP services. In order to open a liability case, the provider is required to sustain an active and full cooperation. | The ISP has an obligation to provide the right-holder(s) who request them with personal data about possible infringers. The ISP must also adopt the restraining measures ordered by the Court. | Court |
| Belgium | While the provider cannot be liable for unlawful behaviour carried out by its users, the Court can impose restraining measures. The ISP can also be subject to the “action en cessation” rule. | The ISP must implement selective filtering measures, as a sanctioning method, if ordered to do so by the Court. | Court |
| Denmark | Providers are liable in accordance with both the civil and criminal laws – with the exception of mere conduit, caching and hosting activities, according to art. 12-14 of the Directive on electronic commerce, adopted in art. 14-16 of the Danish Ecommerce Act. | In February 2008 the Court ordered the ISP Tele2 to block “The Pirate Bay” website that was merely indexing the un-authorized Torrent files circulating online. The ruling was upheld in Summer 2008. | Court |
| France ⁶⁸ | Article L336-3 of the Loi 669/09 states that providers are not criminally liable, but the Court can impose any restraining measure to the ISP, if requested to do | According to art. 5, the HADOPI can regulate and impose the necessary obligations to the ISP to ensure an effective ascertainment of copyright | Court/HADOPI |

⁶⁵ Hof Amsterdam, *Lycos v. Pessers*, 2 February 2006. This was a defamation case.

⁶⁶ I. J. Lloyd, *Information Technology Law*, Oxford, Oxford University Press, 2008, p. 572.

⁶⁷ The English version of Austria’s copyright law is available at: http://www.wipo.int/clea/en/text_html.jsp?lang=EN&id=204

⁶⁸ The full French text of France’s copyright law is available by searching at: <http://www.legifrance.gouv.fr>

| COUNTRY | LIABILITIES | OBLIGATIONS | LEGAL AUTHORITY |
|---------|--|--|-----------------|
| | so by the right-holders and in case of clear possibilities of copyright infringements. The HADOPI II Act created a specific Authority whose sanction power includes also the Net disconnection for a serial infringer. | infringements. | |
| Germany | Established by the 1997 TGD, Act on the Use of Information Services, ISP liability can be applied only if it can be proved that it had actual knowledge of a user's unlawful activity and could implement the technical measures to block it but did not intervene. | The ISP is not required to exert any monitoring activity on content exchanged by its users. | Court |
| Italy | Law Decree no. 70/2003 states that the provider cannot be liable for unlawful behaviour carried out by online users, while mentioning a general need to cooperate. Based on the Directive on electronic commerce, the ISP can only be charged in regards to "mere conduit" services, when it a) does initiate the transmission; b) does select the receiver of the transmission; c) does select or modify the information contained in the transmission. | The ISP is not required to exert any general monitoring activity, but must provide useful information to isolate any unlawful behaviour. | Court |
| Norway | The National legislation points directly to the Directive on electronic commerce. However, Copyright Code, sec. 55, extends criminal liability to the ISP that participates in copyright infringements, while the Court rulings unveiled several cases of the ISP involvement. It's the same situation for Civil liability, where ISP participation must be checked against specific conditions (negligence, causality, economic loss). | The ISP must exert positive practices to prevent possible copyright infringements. | Court |
| UK | The ISP is liable in accordance with the <i>secondary liability</i> provision. | The ISP must exert positive practices to prevent possible copyright infringements. | Court |
| Spain | The ISP liability is regulated by Ley 34/2002 | The ISP must store all traffic data related to | Court |

| COUNTRY | LIABILITIES | OBLIGATIONS | LEGAL AUTHORITY |
|------------|---|---|------------------|
| | <p>which adopted the Directive on electronic commerce. The ISP is liable only if it made content publicly available under copyright without proper authorization. Article 138 of the Copyright Act lists specific reparatory forms for damage caused by copyright infringements over the Internet – particularly about a possible injunction to remove all unlawful content from the ISP servers.</p> | <p>electronic communications.</p> | |
| <p>USA</p> | <p>The legislation states a vicarious and contributory liability for the ISP, with damage reparation based on civil liability charges. Some recent changes (OCILLA) assigned <i>de facto</i> immunity to the ISP for users behaviour.</p> | <ul style="list-style-type: none"> - The ISP must include a mandatory clause in the user contract to impose a termination clause if the user carries out major unlawful activities. - Notice and takedown procedure (DMCA, par. 512): injunction to remove all unlawful content, notification to the user about the infringement charges. - Obligation to make the personal data of suspected users public, upon request from right-holders and without any further Court order. | <p>Court/FCC</p> |

4.3 Copyright Law in France

Before the introduction of Law no. 669/09 of 12 June 2009 (about the *distribution and protection of creative works on the Internet*), the copyright protection regulations in France considered unlawful counterfeit as a criminal crime punishable with a fine and up to three years in jail, in addition to damage compensation based on a civil code prosecution⁷⁰. Indeed, articles L 335-2, 335-3, 335-4 of the Intellectual Property Code extend counterfeit crimes and related penal sanctions to users who unlawfully download copyrighted content on the Internet. However, such sanctions fit large scale infringements executed by a limited number of people, yet lack consistency when applied to millions of individuals.

The need to establish a system able to protect and promote the cultural industry led to a November 2007 agreement including representatives of the audiovisual, film and Internet sectors, who decided to promote the legal availability of music and movies online, and to establish a system that opposes piracy based on prevention, suggesting that piracy was a useless risk for Internet users. The Act passed on 12 June 2009 includes two major key-points: 1) providing more legal options by making movies on DVD rapidly available (Art. 17) and lessening the bureaucratic burden for necessary investments to launch new and diversified business venues online; 2) step up the fight against digital piracy. In particular, Art. 10 defines the procedures and powers assigned to the *Tribunal de Grande Instance* to fight piracy activities carried out by professionals through centralized technologies (such as unlawful streaming websites) and Art. 5 details a step-by-step mechanism implemented by public officials according the crime committed, thus establishing an independent Authority (*Haute Autorité pour la diffusion des œuvres et la protection de droit sur Internet*) in charge of preventing piracy activities executed by the users of peer to peer networks. Such Authority is entitled to warn, initially via email and later also with a traditional letter, those Internet users whose account has been used for the unlawful downloading of copyrighted material.

In order to ensure that such warnings would have a deterrent effect, the lawmakers also provided the same Authority with the power to eventually suspend the Internet account of the suspected user(s). However, on 10 June 2009 the Constitutional Council decided that, considering that such sanctions could “restrict that freedom of speech that includes access to the Internet”, the administrative Authority could not exercise such provision. Only the Court could impose a limitation to the right of Internet access.

Here are the major provisions of the so-called Hadopi II legislation:

- a) AGCOM has investigative powers, and is therefore entitled to monitor infringements and gather evidence;
- b) a simplified prosecutorial path with a single judge entitled to issue a criminal injunction;
- c) the introduction of a new article (L335-7) in the Intellectual Property Code imposing, in the case of infringements carried out online, the suspension of Internet access for one year, along with the ban from signing a contract with

⁷⁰ The penalties could reach up to a € 500,000 fine and 5 years detention when these crimes were committed in a collective and organized fashion. See *Code de la propriété intellectuelle*, Art. L 335-2, Law no. 2007-1544, 29 October 2007, and Art. 41 of JORF, 30 October 2007 – <http://www.legifrance.gouv.fr>

- another ISP and the obligation to pay the yearly fees to the original provider anyway;
- d) the suspension of Internet access could be executed only in accordance with the severity of the unlawful activities and the personality of that specific user;
 - e) when the suspension becomes final, AGCOM must notify the original ISP that will execute it, with a € 5,000 fine (art. 7) if not compliant;
 - f) the ISP can also be fined up to € 3,750 for violating the Court order to impose the Internet access suspension to that user (art. 3);
 - g) the ban from signing a contract with another ISP during the suspension period is similar to those detailed by art. 434-41 of the Criminal Code for lack of compliance with other Court restraining orders (ie, driver's licence suspension, interdiction to use credit cards or personal checks, etc.).

4.4 Copyright Law in the United Kingdom

a) the current legislative framework

In the United Kingdom the protection of intellectual property for literary, audiovisual and graphical works is ensured through the copyright, which bans their economic exploitation without the proper right-holder authorization⁷¹. Similar to the Italian Civil Code, the copyright is born with the creation of an original work, but in the UK there is no obligation to record it in any public registry. Copyright is automatically granted to any original work⁷² — somewhat supported by documentation based on a paper, audiovisual or electronic format, or even presented on a web page — and it is not subject to any declaration or public notice. Unlike in other European countries, the author protection is linked not to the original creative idea in itself, but it is rather related to the way that work has been transferred in one of the categories (writing, audio, video, etc.) defined by the law, regardless of author authorization, and to the minimal human creativity involved (skill, labour or judgement). In addition, the UK system differs from other ones given its tendency to also ensure the right to access of knowledge and information considered as “commons”.

In order to support other fundamental values beside the right-holder protection, there are several exceptions to the copyright rules, including: review and critique, reproduction for blind people or for non-commercial purposes, research, and study, reproduction for public archives and reuse for public education. To underline the importance of such collective interests within the general legal structure, such exceptions are defined as “fair dealing” or “fair use” exemptions. Unlike most EU Member States and the USA, the UK law does not have an exception for the personal copy: therefore this system appears less flexible than other copyright-based systems, since it does not provide any safeguard in regards to file-sharing practices, both about public availability and downloading: they become an automatic copyright infringement, given the fact that they generate a copy of the original work in the computer memory. To remedy this situation, in 2003 a regulatory reform was launched addressing the copyright-protected works circulating over the Internet.

⁷¹ Including reproduction, distribution, loan, rental, public execution and communication.

⁷² This principle was established by the Statute of Anne in 1710, directly assigning the copyright to any new intellectual work.

There is no sales tax system in the UK similar to the Italian “stamp or mark” surcharge for SIAE on CDs and other media carrying copyrighted content. Instead, the law explicitly states that author compensation for the right to utilize their works is regulated by license contracts (Sec. 118 CDPA, Copyright, Designs and Patents Act 1988). Any controversy about such license contracts is directed to a specialized Court, the “Copyright Tribunal.” The organizations managing the collective rights must notify the contract standards to the appropriate Minister. A typical contract assigning exclusive rights also includes the “fair dealing” clause that excludes any payment for the non-commercial use of a certain work. In adopting the EU Directive on electronic commerce, the UK government introduced a sanction system aimed at directly opposing online piracy and new crimes related to the Internet development. The censored behaviour concerns the public communication and availability of copyright-protected digital content without authorization from its author or right-holders. The sanctions are linked to the commercial purposes or also to the infringement extension, which must bring a tangible damage to the right-holders and be based on an intentional behaviour⁷³. In regards to file-sharing, the UK legislation qualifies only the uploading of large quantities of copyright-protected material as unlawful behaviour. Ignorance about such behaviour is considered an aggravating circumstance. Section 296ZB (4) of the CDPA includes a criminal liability for copyright infringements that circumvent specific technical measures ensuring copyright protection, only if these measures have been previously authorized by the author or his representatives. The related sanction is up to three months in prison and a fine up to a maximum set up by a specific law. For repeated crimes, the sanction goes up to two years in prison and a Court could enforce a search and seizure of charged material. Instead, there is no criminal crime provision for electronic data infringement related to a copyright-protected work (art. 7 EC Directive). The actions earlier reserved only to license holders for assigning exclusive rights are now also available to the so-called open licensing, including the Creative Commons licenses.

As mentioned earlier, Section 24.2 of the CDPA specifically states a “secondary liability” — that is, an indirect liability⁷⁴ — for those individuals who make copyright infringement through electronic communication networks possible. However, in order to also apply such liability to an ISP, the damaged party must first prove that the ISP had full knowledge of such violation — thus making it quite difficult to employ this liability provision. Also due to the liability option detailed in the Defamation Act of 1996, in general the ISP is not liable for content created by a third party, with the opposite approach when the same ISP is required to perform monitoring activities based on average standards and enforced by some specific regulations. This interpretation is also similar to the EC provisions on this issue. Indeed, Section 97A of the CDPA, which adopted article 8 of the Directive 2001/29/CE, acknowledge to the right-holders the right to ask the Court for an injunction order against an ISP who has access to the personal data of an account holder charged with copyright infringements through the Internet.

⁷³ Sec. 107 and 198 of the CDPA, as modified in 2003.

⁷⁴ Bugiolacchi L., *Principi e questioni aperte in materia di responsabilità extracontrattuale dell'Internet Provider. Una sintesi di diritto comparato*. Dir. Inf. 2000, p.829+.

b) the current debate about copyright reform

The English Government has promoted a public debate about future reforms in order to fight copyright infringements carried out on the Internet. The action plan can be summarized with three key-factors: convenience, accessibility (technical and monetary), equitable legislative system (fair right-holder compensation). The reference documents for this discussion are the Gowers Review of Intellectual Property (2008) and the Digital Britain program.

The most relevant recommendations proposed by the Gowers Review are: 1) simplifying the complaint procedure concerning the DRM through a basic interface on the Patent Office website; 2) promoting voluntary agreements between the ISP and right-holders to oppose online piracy, with the Government stepping in only if those agreements fail.

The Digital Britain program provides for not just penalties against infringers, but also initiatives aimed at promoting well-run market options to access authorized downloads of copyrighted works. Under this model, it is crucial to establish commercial agreements involving individual right-holders, collective organizations and operators of broadband services and networks. The program also intends to promote business models for paid content based on efficient and quality systems. Also planned are “persuasive” and information campaigns aimed at driving consumers and families toward these legal choices, based on easy-to-understand messages to help consumers to successfully navigate the complex copyright regulatory body. This “soft law” framework should eventually include the appropriate sanctions against those who persevere in carrying out those infringements. The effectiveness of this overall program depends on the direct involvement of the cultural industry, whose business and organizations are in charge of informing the public and launching attractive market options. Indeed, the commercial outcome approach is a crucial element in the Government strategy, which also includes the adoption of new legislation able to support those business models and create a political environment propelling consumers to purchase legal content online.

c) Ofcom's role

The Digital Britain program asks for an open collaboration among Ofcom (*Office of Communications*, the independent regulator and competition Authority for the UK communications industries), the appropriate Ministers and other regulator Authority bodies to draft the necessary documentation and guide-lines on how to incorporate protection standards and technical measures into commercial contracts or agreements, without altering the balance with other opposing interests, such as the right to privacy. A public consultation is currently underway addressing a bill that puts Ofcom in charge of adopting measures to directly fight copyright infringements on the electronic communications networks. In particular, the bill proposes to regulate the ISP's role in order to promote their cooperation with public officials against serious and repeated infringements. Particularly important seems the introduction of provisions forcing the ISPs to adopt specific contractual terms to inform his users in advance about the risk of infringement activities, including public disclosure and informing the specific right-holders. Ofcom is also expected to set up an effective notification system for the ISP including (1) the “notification obligation”, to inform users that their account is being monitored by the ISP and has been used for copyright infringements; the notification is

not due to the monitoring activity but upon request from the right-holder or representative who noticed an infringement according to measures detailed in the self-regulatory code⁷⁵; and (2) the “serious infringers obligation”, enabling an anonymous record-keeping of account holders who received several notifications and make it available to right-holders to identify the IP address associated with those repeated infringements; the disclosure of personal data is allowed only during an investigation, under a specific Court order.

However, the program specifies that the ISPs will not be asked to perform a general monitoring activity on their users behaviour. Rather, they would just need to gather and provide the right-holder with anonymous information about the quantity of notifications delivered to their users. Only in case of “serious infringers” of unlawful content and upon specific request from authors or their representative, the ISP would alert the right-holders and provide the suspected account reference, still in an anonymous way. This step could then be used for a further legal action to disclose the user personal data; in other words, the ISP could reveal the identity of an allegedly repeated infringer only upon a specific Court order.

The effectiveness of such obligations presumes the adoption of a self-regulatory “code of practice” drafted by some collaborative entity involved in the entire process and part of market industry: that is, it is explicitly excluded the establishment of an *ad hoc* organization such as Hadopi in France⁷⁶.

The code of practice should list practical suggestions on possible measures to be introduced, including procedures, means, and technical requirements to gain evidence about alleged infringements and to compute expense costs for all parties involved. In other words, the perspective is to create a market self-regulatory process under the coordination of an independent organization voluntarily joined by authors of multimedia

⁷⁵ This obligation is based on the evidence disclosed, as detailed in the *MOU between ISPs and right-holders* (that is, the BPI, British Record Music Industry) signed in July 2008. According to this document, during a three-month test period the participating ISPs will notify up to 1,000 users per week about infringements provided by the right-holders, based on a broad behaviour standard implying some kind of unlawful access to digital content. The traffic data will be analyzed by the ISPs and BPI, and then forwarded to Ofcom which could isolate, jointly with the MOU signers, the behaviour models and levels of seriousness (based on quantities and scope of unlawful content acquired) necessary to define a minimal threshold standard to be used as evidence of copyright infringement. The ISP notification should include: details of alleged violation, recommendations on how to increase the security level of wireless networks used, regulatory provisions upon which the notification is based, suggestions on how to legally acquire the same digital content and measures and sanctions to face for repeated infringements. More details at: <http://www.bpi.co.uk/our-work/protecting-uk-music/article/joint-memorandum-of-understanding-on-an-approach-to-reduce-unlawful-file-sharing.aspx>

⁷⁶ The Interim Report of the Digital Britain program mentions an “industry body” or more recently, during the public consultation period, a “rights authority”. In a document entitled *Copyright in a digital world: What role for a Digital Rights Agency?*, issued by the Intellectual Property Office (<http://www.ipo.gov.uk/digitalbritain.pdf>), the Government proposes a “rights agency” in charge of helping public officials promote new business models to manage copyright issues on the Internet, and identifying best business practices without substituting to the market itself in creating new options for digital content distribution. The proposal specifies that such entity must be rooted in market practices and must operate as a self-regulatory body, with no resemblance whatsoever to an administrative agency. The document further explains that the agency would not pursue an execute-and-sanction approach but rather a market-based one, thus enabling the development of lawful exchanges while still protecting the intellectual property. This approach includes: a) informing the public about damages and risks of copyright infringements over the Internet; b) launching initiatives to facilitate commercial ventures and public debate about possible protection standards and related competition issues; c) adopting a system to resolve controversies in a quick and simple way to ensure consumer rights protection; d) activating a discussion forum reserved to the operators; e) identifying the legal remedies to be included in a law regulating unlawful P2P usage and broadening the debate on restraining tools for repeated infringers, including the introduction of experimental measures at the technical level; f) promoting a specific behaviour code and applying preventive and sanction measures to fight online infringements.

works and other economic operators. In this context, Ofcom plays the role of “backstop power” when the market is unable to self-build effective systems to coordinate and regulate the activities that are potentially threatening intellectual property rights. In particular, Ofcom should be able to review and approve the code of practice, when crafted by the economic actors involved, but also to intervene when the market forces are unable to create such self-regulatory entity with coordination and regulatory functions as detailed by the Digital Britain program. Briefly, the proposed role of Ofcom in the current bill is to support self-regulatory systems and information policies towards consumers, and to activate obligation standard for the ISPs and other general provisions in order to build a regulatory framework as a reference point for operator business agreements and user contracts as well.

Therefore these restraining obligations to the ISP are intended as an *extrema ratio*, an extra-ordinary option in the battle against digital piracy. In particular, the UK program underlines a gradual regulatory approach: only if and when the injunctions and codes of practice, supported by information campaigns, should be unable to reduce unlawful file-sharing activities, then the Ofcom could exert its authority to impose the introduction of regulatory and technical measures in the ISP contracts. Ofcom will need to define the initial level of infringement (i.e., percentage points of users who unlawfully access digital content through file-sharing programs) as a reference baseline, also to check the possible results of any legal actions launched by the right-holders six-months or one year later.

The UK government⁷⁷ decided to open this gradual mechanism to a public consultation, including some changes about Ofcom power to impose technical restraining measures – in particular, the possible Internet account suspension for heavy infringers as an extra final measure⁷⁸.

d) recent developments in the Digital Economy Bill

After the public consultation results on the *Digital Britain* program, the UK Government introduced a new bill (the *Digital Economy Bill*), recently passed by the Parliament⁷⁹. The final version includes a detailed section about the notification system that Ofcom will impose to the ISPs. In general, this system is based on a notice by the original right-holder, that could request the ISP to deliver to the alleged infringer a “copyright infringement report”. An alternative resolution system ultimately managed by Ofcom will also be put in place, which eventually could also apply some sanctions directly to the ISP.

Regarding this ISP notification, the UK approach can be exposed to some critics about the way the right-holder receives information about specific infringements, that is,

⁷⁷ <http://www.berr.gov.uk/files/file52658.pdf>; <http://www.berr.gov.uk/files/file51703.pdf>

⁷⁸ It should be noted that Ofcom would exert such restraining powers in accordance with the appropriate Secretary of State, which will proceed in two separate steps. The first one will gather basic information about such technical protection measures, including: a) preventive evaluation efficacy on different networks; b) adoption of the self-regulatory code which considers such measures an additional tool; c) public consultation on the final results of such activities. In the second step, the appropriate Government Department must approve such technical protection measures with a specific injunction specifying Ofcom as the enforcing authority. The approval of the injunction is subject to an evaluation about such measures as prospected by Ofcom, which the Government can check against more information provided by other parties participating in the public consultation.

⁷⁹ The *Digital Economy Bill* has been approved on 2 December 2009. Its full text is available at: <http://www.publications.parliament.uk/pa/ld200910/ldbills/001/10001.6-12html#j154>

through the IP address of the alleged infringer. Such procedure could infer the risk of improper use by the same right-holder, who could then join a P2P network with the only purpose of gathering the users IP addresses as *ad hoc* evidences. This perspective could lead the right-holder to unlawfully increase the quantity of evidence gathered, by including IP addresses unrelated to the alleged infringements. This practice could also reduce the expenses for carrying out the investigation. Therefore, the introduction of the *code of practice* in the bill also aims at reducing these risks, by regulating the details of such evidence-gathering and enabling the ISP to ensure the validity of the alleged infringement notice based on precise technical requirements.

4.5 Copyright Law in Spain

a) the current legislative framework

Spain only implemented the various EU directives on copyright in 2006 with the *Ley 23/2006*, which modified the national legislation on Intellectual Property dated back to 1996⁸⁰. A particularly difficult result was the adaptation of Directive 2001/29/CE, given its emphasis on a collective reform process in addressing intellectual property issues. Similar to the Italian legislative body, copyright protection in Spain is based on the exclusive claims of authors about their financial and moral rights. The transfer of those rights to other subjects is regulated in the second part of *Ley 23/2006*, addressing the rights procedures related to executors, audiovisual producers and broadcasters.

The provisions for reproduction rights are similar to regulations outlined in article 2 of Directive 2001/29/CE, although based on a broader notion of copying which includes the “fixing” of a work content on any media or means enabling its reproduction or communication to the public, even if just partial, temporary or incomplete. The exclusive right to prohibit or authorize public execution also includes any form of copyrighted works online. The adoption of article 3 of Directive 2001/29/CE ignited a wide debate in Spain, where authors and executors of musical works argued in favour of a specific compensation scheme for the availability of those works on the Internet. Therefore, article 90 of the Spanish law on intellectual property has been modified by introducing a clause that states the explicit right of authors of audiovisual works to directly receive, upon their request, the royalties for license agreements established with collective providers. Similarly, there is a specific notice to provide for the inviolable right to a fair compensation for the public execution of any work, as detailed in article 108. Such compensation is due to any subject exploiting a work for commercial purposes, based on a legal obligation for the producers (ie, movie and show business) to make their works available to the public through electronic communications networks.

Therefore, the Spanish Law has already put in place a fair compensation system for authors based on licensing contracts to transfer their exclusive rights as an alternative to the traditional compensation procedure. This distribution procedure perfectly matches article 4 of Directive 2001/29/CE.

With regard to exceptions and limitations, the personal copy provides for a compensation system based on a sales tax similar to the “SIAE stamp” in Italy. For

⁸⁰ Ley 23/2006, de 7 de julio, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por el Real Decreto Legislativo 1/1966, de 12 de abril (<http://www.boe.es/boe/dias/2006/07/08/pdfs/A25561-25572.pdf>). The full legislative framework about copyright in Spain can be found at: http://www.cedro.org/normativa_nacional.asp

personal use of a digital media reproduction, the legislation gives the option of possible agreements among the parties involved in the production system, with the appropriate Government Department implication in case of a failed agreement. The increase of consumer price for such products must take into account the introduction of DRM and other variables detailed by law. The circumvention of these technical measures is punishable according to article 240 of the Criminal Code, while at the same time article 162 of the intellectual property right law imposes specific obligations to producers concerning consumer rights protection. In addition, articles 270, 271 b) and 272 of the Spanish Criminal Code, focused on intellectual property right protection, provides for a maximum sentence of six months in prison for anybody who, for commercial purposes and with help from other parties, reproduces or utilizes copyrighted works without the proper authorization from its author. Under aggravating circumstances, the sanction can reach four years in prison and the disbarment from professional occupations up to five years.

b) the ISP's role

In applying the sanctions listed in Directive 2004/48/CE, article 138 of the Intellectual Property Spanish law has been modified in order to include, along with the general rules about civil and criminal liability for copyright infringement, a specific remedy aimed at obtaining from the Court an injunction against the intermediaries, including online providers. Consistent with article of the Directive 2001/29/CE, it is also possible to gain seizure of material unlawfully exchanged. Regarding the civil liability for damages caused to the authors, the intellectual property law makes a specific reference to Ley 34/2002 ("LSSI") that adopted the CE Directive on electronic commerce. Therefore, according to art. 12-14 of that Directive the ISP is liable only if he had an active participation in those unlawful activities, such as the unauthorized publication on his website of copyrighted material, while there is no liability for actions such as the mere transportation of copyrighted content. However, in the case of liability issues based on the CE Directive, the law also refers to the general provisions about copyright protection already part of the national legislation.

In 2008 the Spanish Court decided that the provider Sharemula.com, which published an index of links pointing to copyrighted content, could not be hold liable for copyright infringement⁸¹. Therefore, beyond a few specific sentences, the Spanish legislative framework leaves room for broad uncertainty regarding ISP liability⁸². It is also interesting to note that, beside possible liability provisions, article 12 states the obligation of the ISP to archive traffic and connection data generated during a service produced for the information society, up to 12 months, for possible use during a criminal investigation or in a public safety situation. Upon request, such data can be made available to a Court or a judge according to current regulations about personal data protection⁸³.

⁸¹ <http://www.edri.org/edriagram/number6.18/link-torrents-not-infringement>

⁸² R. Julia-Barcelo, "Liability for online Intermediaries: A European Perspective", E.I.P.R., 1998, vol. 20, n. 12, p.1-10

⁸³ Ley 34/2002 *de servicios de la sociedad de la información y de comercio electrónico*, art. 12: "Obligation to store traffic data about electronic communications":

"1. The operators of the Internet and electronic communications services, access providers to telecommunications networks and database service providers must archive traffic and connection data generated during a service produced for the information society, up to 12 months, in accordance with this article and its implementation provision.

c) the current debate

While envisioning a wide program for broadband expansion, the Spanish Government recently announced a copyright law reform including major innovations in the battle against online piracy (along with a universal service obligation for a bandwidth access speed of at least 1Mbps)⁸⁴. The main idea is to provide incentives for the adoption of tools able to combine author protection and market development, ensuring “more choices in better conditions” for access and distribution of online content while protecting right-holders. As seen in the UK, in Spain there is also a general tendency to set up some kind of agreement among interested parties, with audiovisual producers and collective agencies on one side and the Redtel Association, representing Telecom operators, on the other. In the past, this Association already proposed the creation of “a technologically-neutral platform able to take into account the authors rights”, as a legal distribution system approved by the ISPs. In the meantime, the music label Promusicae started working on a new portal, elportaldemusica.es, thought to be an aggregator for sampling and purchasing Spanish music and as a showcase to redirect users towards legal distribution services such as YouTube, Spotify, iTunes, Yes.fm, Vodafone Music, Nokia Music Store, Movistar, Orange or Rockola.fm. Since 3 December 2009, the Spanish Government launched its reform process by setting up an institutional discussion table with various operators, from which the Department of Culture drafts a list of formal proposals⁸⁵. In particular, such discussions addressed Government support to strengthen the Internet and the development of innovative content and business models, able to hinder online piracy by promoting lawful ways to access multimedia material. In this perspective, during the last few years the Minister of Culture launched an information campaign aimed at fighting copyright infringements on the Internet and raising public awareness on the damage caused to the cultural industry⁸⁶. Similarly, since 2005 it also launched an action plan to fight piracy whose main policies were cooperation among the main parties involved, innovative business and compensation models, information and awareness campaigns for users, and trans-institutional and international cooperation. These measure were reinforced by an organic framework promoted by the Government in recent years, including tax relief options and new websites for the lawful purchase of audiovisual content⁸⁷.

2. (...) *The operators of the Internet and electronic communications services, and service providers subject to this article cannot use the archived data for purposes other than those detailed in the next paragraph or according to the law, and must adopt the appropriate measures to avoid loss or alteration of such data or unauthorized access to such data.*

3. *These data will be archived for their possible use in a criminal investigation or in case of public protection and national defense, and will be made available to a Court, a judge or a prosecutor that requests them. The transmission of such data to police officials will be carried on according to current regulations about personal data protection (...).*”

⁸⁴ The bill introduced by the Government on 27 November 2009, *Anteproyecto del Ley de Economía Sostenible*, includes four major proposal to reduce the digital divide and promote universal access to Internet broadband. The same bill also contains guidelines for reforming the intellectual property system, with an approach based on possible agreements among the interested parties. More details at: <http://www.la-moncloa.es/ActualidadHome/2009-2/271109-enlaceley>

⁸⁵http://www.mcu.es/gabineteprensa/mostrardetalleGabinetePrensaAction.do?prev_layout=notas&layout=notas&html=18942009nota.txt&language=es

⁸⁶ <http://www.siereslegalereslegal.com/portada.php>

⁸⁷ More details on other initiatives launched by the Government are available on the website of the Minister of Culture at: <http://www.mcu.es/propriedadInt/CE/LuchaPirateria/LuchaPirateria.html>

In this context, the introduction of the *Economia Sostenible* bill raised a large debate concerning the measures about the protection of intellectual property and the battle against online piracy. In general, the bottom line is that the economic recovery should necessarily rely on the development of the Information and Knowledge Society, and therefore it becomes paramount to limit the negative impact of online piracy on the audiovisual industry. Such reform of the regulations about intellectual property should take into account the need to ensure an effective protection of the industry, also listing specific sanctions against unfair competition practices upon which piracy activities often flourish. At the same time, the freedom of artistic expression over the Internet and the basic right to Internet access must be secured by explicitly adopting the new CE Directives regarding electronic communications. As a consequence, the bill proposes the introduction of an administrative sanction system, similar to the initial premises that led to the Hadopi Act in France, but with the major difference that such sanctions target only the unlawful content publication on the web, without restraining the individual right to Internet access, even when facing confirmed copyright infringements.

The Spanish Government's proposal was heavily criticized by author organizations, that see it as completely ineffective, and especially by Internet operators, that instead think it is way too restrictive about free access and Net surfing⁸⁸. Regarding some to critics that equate the sanction system to the Hadopi approach, the Spanish government replied that the functions assigned to the Comisión de Propiedad Intelectual do not characterize it as restraining authority, that is, equipped with generalized monitoring powers. On the contrary, the Commission will act to solve judicial controversies and could step in only upon request from a party, when a right-holder or a collective subject files a lawsuit for online infringement. Similarly, the data gathered will be limited to IP addresses and web-page ownership, without any possibility to disclose personal data of involved users. Also, the Commission will operate according to fair investigation principles with the only purpose to block unlawful infringement by removing the unauthorized content publication. Indeed, the sanction process explicitly provides for the right to cross-examination, echoing article 11 of the LSSI for procedures related to basic rights and freedoms addressed in the Constitution, and for filing a Court appeal about the sanction measures imposed by the Commission⁸⁹.

4.6 The current debate on copyright issues in the USA

a) current legislative framework

Copyright protection in the United States of America is based on Article 1 Section 8 of the Constitution, which gives the Congress the power "...*To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries*". In other words, the US Constitution's goal of intellectual property protection is to promote knowledge as a primary public interest, where the safeguard of that individual property right becomes just a practical tool. Indeed, according to the Constitution a creative property has a

⁸⁸ http://www.nytimes.com/2009/12/04/technology/internet/04piracy.html?_r=2

⁸⁹ A summary of the reform bill is available at:

http://www.mcu.es/gabineteprensa/mostrardetalleGabinetePrensaAction.do?prev_layout=notas&layout=notas&html=18932009nota.txt&language=es

different value when compared to the property of other goods – being often defined as “*the opposite of property*”⁹⁰. Briefly, while the private property protection has an absolute value (as it is also the case in most Western countries’ Constitutions) where public Institutions can only exert their powers in order to safeguard the public interest, the exclusive rights on intellectual works are established in order to ensure that, after a certain period of time, the society at large can have free access to that information and knowledge, intended as “public domain” or at the most “commons”. Essentially, the US copyright structure is based on the “fair use” doctrine, which provides for a larger safeguard system than the exceptions and limitations enlisted by Directive 2001/29/CE.

Currently, the US system requires for a work to be registered⁹¹ and its copyright covers the author’s life plus 70 years after his-her death. The copyright length can never exceed 120 years. It covers both literary works and software programs, and mostly concerns not the creative idea in itself but rather its actual manifestations⁹². With the Digital Millennium Copyright Act (DMCA)⁹³ of 1998, the USA was the first Western country to try to find an answer to the digitalization of creative works by adapting copyright regulations to the changing opportunities for distributing copyrighted content over the Internet. The DMCA provisions are divided in five Titles; particularly relevant is Title I — *WIPO Copyright and Performances and Phonograms Treaties Implementation* —which imposes bans similar to those listed in art. 6 and 7 of the Directive 2001/29/CE.

The main difference between the two documents is that, while it is up to single EU Member States to activate their own copyright protection rules, the USA provides for a generalized prohibition to use, reproduce any marketing technologies and tools whose exclusive or major goal is to circumvent or modify some original data, and the infringer will face civil and criminal charges. Such generalized prohibition, which theoretically also includes lawful uses of those tools, faces the evident difficulty of establishing with certainty when these technologies are used to actually perform a copyright infringement. This prohibition system also provides for several “safe harbour” exemptions, particularly with regard to not-profit libraries, archives and cultural institutions; public administrations, Court offices and intelligence agencies; reverse engineering of software programs for format inter-operability; encryption research; protection of minors; circumvention of copy-prevention systems (also called “technical protection measures”) for personal data protection; and security testing.

The DMCA also provides for a three-year rulemaking revision, enabling a public consultation aimed at extending the exemptions to other instances deserving protection. This extension is based on the impact of such exemptions in their market segment in regard to specific kinds of protected works and to the freedom of information, communication and research acknowledged to the users.

⁹⁰ Regarding the new challenges facing the intellectual property protection in today’s Information Society, a very relevant academic debate took place in 2001 at Duke University’s Law School, whose proceedings have been published in a special issue of the “Law & Contemporary Problems” Journal, available at: <http://www.law.duke.edu/journals/journaltoc?journal=lcp&toc=lcptoc66winterspring2003.htm>

⁹¹ 1976 Copyright Act, par. 408: “Copyright registration in general”, <http://www.copyright.gov/title17/92chap4.html#408>

⁹² “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and coreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”

⁹³ <http://www.copyright.gov/title17/92appb.html>

The US system reveals several liability levels for the ISP regarding copyright infringements executed over the Internet. In particular, since the late 1990's the unlawful activities carried out on ISP sites were defined as a "direct liability", when charging the individual that executed the actual infringement (a provision similar to art. 2043 of the Civil Code⁹⁴), and a "indirect liability", when charging a subject who has control power on the activities carried out by the actual infringer⁹⁵. This second kind of *vicarious liability* is rooted in the legal relationship existing between the controller (the ISP) and the controlled (the user) eventually resulting in an economic income for the controller. Therefore, while the direct liability works in a similar fashion to the provisions detailed in art. 2049 of the Civil Code, the indirect liability is similar to the liability of a company owner or a principal as stated in art. 2049 of the Civil Code. And there has been a constant tension between the imposition of monitoring or filtering activities to the ISP and the need to reaffirm the right to privacy and security for all user communications. Therefore, since the ruling about *Zeran v. America Online* (1996) the general orientation is to avoid linking ISP liability with any control activity. This approach is leading to a third kind of liability, ISP "contribution without malice" to the unlawful activity, given its awareness about the violation committed by the actual infringer (*contributory infringement*)⁹⁶.

Currently the DMCA has crystallized a legal system broadly based on the contributory and vicarious liabilities. The first option is in place when the ISP is fully aware of the infringement executed by one of its users, while the second case emerges when an ISP, even if unaware of it taking place, is gaining an economic benefit by the an unlawful activity taking place, even if it is unaware of such activity and despite its possible technical and legal intervention to control it⁹⁷. To avoid having the ISP liability system stifle new investments in technological innovations, the DMCA adopted a compromise position, limiting the legal actions available to damaged authors or parties against copyright infringers. This position is supposed to provide a necessary incentive to the ISP in adopting technical measures able to prevent or block unlawful access to copyrighted online content and, at the same time, to limit the operator's exposure to legal requests for damage compensation based on contributory or vicarious liabilities⁹⁸. This system, defined by the US legislative system as a "safe harbour", has been detailed in the Online Copyright Infringement Liability Limitation Act (OCILLA) of 1998. By exempting Internet intermediaries from copyright infringement liability provided they follow certain rules, OCILLA attempts to strike a balance between the competing interests of right-holders and digital users.

⁹⁴ In *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (MD Fla 1993), the provider Frena was considered directly liable for distributing on BBS photographic content owned by Playboy Inc.

⁹⁵ *Sony Corp. v. Universal City Studios, Inc.*, 464 US 417 (1984). In *Chubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (SDNY 1991) the Court ruled that, although as a general principle an ISP can be considered liable for infringement carried out by its users, this option relies on the effective possibility of exerting some control on their activities. Also, in *Religious Technology v. Netcom*, the ruling pointed out that an ISP cannot be considered liable if the copyrighted material is being distributed through a newsgroup with access granted by the same ISP, since the latter was not and could not be aware of such unlawful activity.

⁹⁶ The *Zeran v. America Online* case has been confirmed as a copyright infringement case.

⁹⁷ M. Scott, "Safe harbors under the Digital Millennium Copyright Act", New York University Journal of Legislation and Public Policy, 2005, 9:99, p. 104; P. Menell & D. Nimmer, "Legal realism in action: indirect copyright liability's continuing tort framework and Sony's de facto demise," in UC Berkeley Public Law Research Paper, no. 966380, p. 26.

⁹⁸ J. M. Urban & L. Quilter, *Efficient Process or 'Chilling Effects'? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 Santa Clara Comp. & High tech, L.J. 621 (2006), p. 622.

In addition, paragraph 512 of the DMCA details a complex notice and takedown procedure for content derived from an alleged copyright infringement. As a consequence, the ISP can avoid a liability charge if, after receiving a notice about an alleged copyright infringement, it promptly activates the steps necessary to block access to such content — given that this notice provides precise details about that suspicious content and gets to the right person within the provider organization. Finally, if the takedown procedure is requested by an infringed party, which is instead aware of a lack of unlawful activity, this party is fully liable for damage compensation to the ISP⁹⁹.

The US system of online intermediaries has also been analyzed, with its limitations and opportunities, by the EC in regards to the copyright reform in Europe. In particular, the OCILLA has been compared with the EC Directive on electronic commerce, including their differences and similarities as summarized in the following table.

⁹⁹ C. Beams, *The Copyright Dilemma Involving Online Service Providers: Problem Solved... For Now*, in *Federal Communications Law Journal*, vol. 51.

Table: Comparison between the EU and US legislative copyright frameworks

| Issues | EU legislation | EU description | US legislation | US description |
|----------------------|--|---|--------------------|--|
| <i>Online piracy</i> | Directive 2001/29/CE on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society; Directive 2004/48/CE on the enforcement of Intellectual Property Rights | <ul style="list-style-type: none"> - No difference between infringements carried out through “material” means or “immaterial” means as file-sharing activities; - Rules are applied (along with exceptions and limitations) to protect some general interests, but Member States have plenty of discretionary space; - Unlawful activities, sanctions and remedies are eventually defined by different solutions drafted by each Member State; - Affected right-holders are always entitled to file a damage compensation lawsuit (art. 8); - It affirms an “adequate” protection against a willing circumvention of technical measures. | US Copyright Law | <ul style="list-style-type: none"> - Par. 104-106 specifically refers to infringements carried out on interactive communications systems; - Any electronic transaction about an unauthorized copyrighted content is a crime, for commercial purposes, is a crime (and a civil liability issue); - Exceptions are strictly related to market and technological developments, with a regular rulemaking revision including public consultation; - Protection against circumvention of technical measures is broader and subject to criminal charges. |
| <i>ISP liability</i> | Directive 2000/31/CE on electronic commerce | <ul style="list-style-type: none"> - Services considered are mere conduit, caching, hosting; - Application covers any civil or criminal unlawful activity; - No obligation for a general monitoring activity; - General obligation to block known infringements (art. 12.3 & 14.1b), while Member States will define detailed procedures and obligations for operators; - ISP can disclose user personal data only upon injunction issued by a Court or an administrative | “OCILLA”, par. 512 | <ul style="list-style-type: none"> - Search engines are also included in the services considered; - Application limited to copyright infringements; - No obligation for a general monitoring activity; - Obligation to adopt reasonable measures to prevent violations, including a contract cancellation policy for heavy infringers; - Detailed notice and takedown procedures for removing unlawful content (par. 512, c 3); - No ISP liability as an incentive to remove unlawful |

| Issues | EU legislation | EU description | US legislation | US description |
|---------------------------------|--|---|---|--|
| | | <p>authority;</p> <ul style="list-style-type: none"> - Specific liability exemption only for 'traditional' operators, such as ISP and hosting services; - Large differences among national provisions; - Alternative systems to resolve disputes are encouraged (art. 17). | | <p>copyrighted content;</p> <ul style="list-style-type: none"> - Specific protection and remedies for users wrongly accused of unlawful infringements; - ISP can disclose user personal data upon request by the affected right-holder (par. 512, h); - Liability exemption for all kinds of ISP; - Unified and positive-law framework; - No alternative resolution systems are specifically mentioned. |
| <i>Personal Data Protection</i> | Directive 1995/46/CE on Personal Data Protection | <ul style="list-style-type: none"> - Basic rights, holistic approach; - Broad approach to personal data, including any information about any physical person; - Several limitations to user monitoring activity to prevent online piracy. | US Constitution (amend. I, IV, IX), other sources | <ul style="list-style-type: none"> - Limited scope, sectional interests approach; - Limited only to data needed to identify a physical person; - Self-regulation agreements to balance user privacy right and copyright protection. |
| <i>Licensing</i> | Recommendation 2005/737/CE on cross-border and collective management of musical rights | <ul style="list-style-type: none"> - Promotes the adoption of collective cross-border licensing favouring commercial operators and online services development, thus increasing right-holders income. (However a recent study carried out by the EP highlights the limitation of this approach¹⁰⁰). | US Copyright Law | <ul style="list-style-type: none"> - Par. 115-116 provides for mandatory negotiating and licensing about services/tools for audiovisual reproduction. Open Access and Creative Commons licences reflect the negotiating autonomy of copyright US system. |

¹⁰⁰ European Parliament, *Collecting Societies and Cultural Diversity in the Music Sector*, December 2009.

5. ITALY: SUGGESTED ACTIONS FOR COPYRIGHT PROTECTION PERTAINING TO AGCOM

5.1. Measures to prevent online piracy

This exploratory study confirmed, according to Law 248/00 about the coordination between AGCOM and SIAE (“*within the field of their respective competencies*”), that the Communications Regulatory Authority is the body in charge of monitoring electronic communications networks in order to ensure copyright protection through a wide range of preventive and assessment actions, while SIAE performs operational activities based on an investigative collaboration plan eventually defined by the same Authority. At the same time, AGCOM’s preventive and assessment actions must abide by technical and legal provisions that, on one side, directly mirror the EU Directives (excluding any monitoring obligation for the ISPs, except under specific circumstances) and, on the other side, fully maintain user privacy and Internet access rights, along with the Network Neutrality principle, free speech and fair authors compensation.

5.1.1 Obligations for the Internet Service Providers (ISPs)

Given their position as holders of user traffic data, ISPs play a central role in the potential measures that AGCOM could carry out regarding copyright protection. In order to address the possible promotion of fair and effective measures on the market, it is therefore necessary to first explore possible interventions upon the ISPs. The broader Directive framework¹⁰¹ and the EU Court of Justice rulings¹⁰² provide for the major parameters leading to possible regulatory measures related to monitoring activities on the part of ISPs. In particular, such measures should be balanced against the right to personal data protection, which can barely be put aside only in the case of a strict copyright protection, and the right to privacy in order to guarantee user anonymity (personal data can be disclosed only upon a specific Court injunction)¹⁰³. In addition, these obligations should be proportionate to the evolving situation and therefore abide by the following guidelines:

1) Consistency with the final goals: the regulatory step must be preceded by a general study to find out if and how a possible obligation upon the ISP could actually bring about a decrease in piracy activities. It therefore becomes necessary to promote some prior monitoring and experimental actions in order to quantify such activities and identify the potentially threatening user behaviour for right-holders. After assessing this issue, it will be possible to define the most appropriate measures based on a reasonable cause-effect balance between potential ISP obligations and right-holders protection;

2) Necessity: the restrictions imposed on user privacy cannot outweigh the measures strictly necessary to meet the initial goals. Therefore the implementation of such obligations must be subject to regular revision in order to assess its effectiveness;

¹⁰¹ Directives 2000/31/CE (art. 15) and 2004/8/CE (art. 8).

¹⁰² Particularly the decision about Productores de Música de España (Promusicae) and Telefónica de España SAU of 29 January 2008.

¹⁰³ An additional safeguard measure is a possible linkage between ISP monitoring activity and the user’s informed consent.

3) Strict proportionality: to avoid an over-balance of competing interests, the quantity and quality of possible measures must be weighed against alternative options and a gradual approach, with the introduction of more restrictive measures only after regularly revising the results obtained.

Considering the EU's overall regulatory framework, AGCOM seems to have the option of imposing a monitoring activity on the ISP, finalized to provide the same Authority with regular information about Internet traffic data (in anonymous format and aggregated by service provided, such as peer-to-peer, streaming, etc.), in accordance with user privacy rights and the Net Neutrality principle. While the ISPs already hold such traffic data, forwarding it to AGCOM could help it in quantifying those activities (peer-to-peer, streaming, download) and act as a preparatory step for implementing specific measures to prevent piracy activities.

This action should be accompanied by a transparent and clear notice stating, (1) in the user access contracts, a possible data-gathering on the part of the ISP in conformity with the privacy right, and (2), on AGCOM's website, a similar position about the ISP obligation.

Regarding the legitimacy of this obligation, AGCOM seems entitled to introduce it based on its role to ensure copyright protection. If not compliant with AGCOM's decision, the ISP will be subject to sanctions detailed in art. 1, paragraph 31, Law no. 249 of 31 July 1997. As an alternative route, a dialogue with the ISPs could lead to a MOU detailing the conditions for providing those traffic data without threatening a potential sanction, thus opening up a collaboration stream between ISPs and AGCOM.

5.1.2 Additional prevention and control measures for copyright infringements via the electronic communications networks

Along with the operative framework described in the above section, AGCOM should also activate a discussion forum open to all stakeholders (right-holders, collective copyright organizations, content distributors, Internet access providers, consumer right associations, etc.), with the objective to: (i) promote a culture of legal access to digital content; (ii) identify models able to ensure a fair compensation to all subjects involved in the process and a broader user access to such content; (iii) determine the most appropriate measures to prevent and block unlawful activities.

In order to achieve such objectives, it is suggested the following.

a) AGCOM should promote an informational campaign aimed at raising awareness among users about the regulation covering the copyright protection and risks deriving from piracy activities. Such information campaign should take advantage of various means, including traditional mass media (advertising on radio, TV, newspapers, magazines, etc.); a special section on AGCOM website, detailing the related law provisions, the prevention and assessment activities carried out by AGCOM, the risks deriving from piracy actions; a clause in user contracts for Internet access explaining the related law provisions and the risks deriving from piracy activities.

b) AGCOM should promote a large discussion forum involving all stakeholders part of the entire process (SIAE, ISPs, content aggregators, consumer right organizations, etc.) aimed at drafting a shared regulatory body able to reform Law no. 633/1941 and provide a consistent copyright protection for the electronic communications sector. This step is necessary due to the fact that so far the approach to fight copyright infringements based only on prohibition and sanctions has failed to provide a fair protection for authors

and users alike. Under this perspective, in the last few years the general debate has focused on a few possible options¹⁰⁴. The first option is a general taxation system to guarantee authors compensation through a fiscal revenue. This model, for example, inspired the provisions included in Law no. 286/2006, art. 2, par. 132, regarding right-holders compensation for items lent to citizens by the National book and record libraries. A second possible option is the introduction of an ad hoc tax for Internet users or ISPs to provide for a fair compensation to right-holders of works made available to every user for non-commercial purposes. This solution is also being considered with regard to compensation systems for accessing P2P networks, enforcing legal obligations upon the ISPs to include them in the user contractual agreements. Launched in 2003¹⁰⁵, this idea promotes the user convenience in buying a “P2P licensed account” from the same ISP, with a minimal surcharge of his-her monthly fee (say, by one or two euro), in exchange for the immunity of any possible sanctions for copyright infringements committed via P2P services. As an alternative, an incremental fee system could also be envisioned, similar to the incremental fee system currently applied to radio stations for music broadcasting. Revenues collected with such subscription options will be put in a dedicated Fund to support the industry in exchange for “liberalizing” access to copyrighted music. On the negative side, this incremental fee system will also increase rates for people who do not use the Internet to access copyrighted music and audiovisual content. However, this obstacle could be overcome by requiring the ISP to add the offering of a broadband connection service devoted only to “standard traffic” (web and email). This service will not offer P2P access and therefore its rate will be less expensive than today’s monthly fees (given its limited use of the operator structure) and will save money for families uninterested in P2P applications¹⁰⁶. A third option is based on a revision of current provisions about licensing in order to convince the collective copyright organizations to allow some kind of file-sharing activity. In particular, there are talks about a “compulsory license”: these organizations could be forced by law to renounce their exclusive rights and to negotiate a monetary agreement with the involved parties to access and use their copyrighted content through file-sharing networks. In other words, the collective licensing systems would face a sort of liberalization. However, in light of Directive 2001/29/CE several scholars seem to exclude any future for these three options (general taxation, incremental fees, compulsory licensing) due to the exclusive right assigned to the author about making his-her own work available to the public¹⁰⁷.

¹⁰⁴ Among others, several research studies have been produced by the Institute of European Media Law (EML) and by the Nexa Center for Internet & Society: <http://nexa.polito.it/sites/nexa.polito.it/files/NEXA-filessharing-marzo2009.pdf>

¹⁰⁵ http://stevegordonlaw.com/compulsory_license.html

¹⁰⁶ This option requires a full explanation, in the user/ISP contract, about the limitations of such offer, which could also exclude access to other services, ie, online gaming and VoIP.

¹⁰⁷ While art. 2 of Directive 2001/29/CE establishes the principle that a reproduction right is an exclusive right, in art. 5.2 (b) it also states: “Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases: [...]”

(b) in respect to reproductions of any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right-holders receive fair compensation which takes into account the application or non-application of technological measures referred to in Article 6 of the work or subject-matter concerned.”

This exemption could be applied in a positive way to authorize the reproduction of lawful file-sharing activities — while also taking into account the limitations detailed in art. 5.5 of the same Directive:

“The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with the normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right-holder.”

There are also some discussions about a so-called “extended collective licensing” system, where the collective copyright organizations negotiate a license agreement on behalf of their author associates with the organizations representing ISP and operators that will distribute their digital content over the Internet. The overall content agreed upon with this licensing agreement will then be made available to single licensees. To make this system work, the licensees should receive some incentives to gain a large author participation. After reaching a collective agreement, the license should also be extended to right-holders not associated with the collective organizations signing the agreement (similarly, for example, to collective contracts signed by unions). This approach refers to the so-called “extended licensing model” used to establish the copyright fees due by radio stations in a non-discriminatory way. The advantage of this strategy is that the adoption of extended licenses is based on a prior and voluntary agreement among the copyright collective organizations, while leaving the negotiation about the actual work compensation directly in the right-holders hands. The collective licensing option has been widely applied in the early 1960’s in Northern European countries, such as Norway, for broadcasting and cable programs and more recently about work reproduction for educational purpose and the digitalization of works stored in libraries, museums and archives. According to some scholars, the collective licensing option could be considered as a possible solution since it does not affect the nature of exclusive rights, while enabling free negotiations on specific uses. This option also seems in accordance with article 18 of Directive 2001/29/CE, which leaves the decisions about rights management, including extended collective licensing, to each Member State. Finally, this solution could also require the offering, on the part of the ISPs, of a broadband connection service devoted only to “standard traffic” (thus excluding P2P), in addition to other offerings already in place and targeting users interested in P2P applications.

c) AGCOM should assume a proactive role in removing online unlawful content. In particular, some sources suggest crafting a MOU between ISPs and rights collective organizations¹⁰⁸, including, also, a clause enabling right-holders to inform AGCOM about the presence of unlawful content on a server hosted by a certain ISP. As a consequence, AGCOM could launch its own investigation and eventually order the ISP to remove such content (and to inform the right-holders and SIAE)¹⁰⁹. These compliant procedures are also in line with most recent EU guidelines about copyright protection. In particular, the Recommendation 2005/737/CE on cross-border and collective management of authorized online musical rights invites Members States to also adopt effective measures to provide for dispute resolution mechanisms, in particular in relation to tariffs, licensing conditions, entrustment of online rights for management and withdrawal of rights.¹¹⁰ This approach seems to be a further development of the principles stated in the Directive 2001/29/CE, where the application of means ensures that an effective protection should happen in accordance with paragraph 46: “*Recourse to*

¹⁰⁸ As an alternative, theoretically these provisions could also be included in a formal Statute.

¹⁰⁹ This option would be effective in fighting the unlawful fruition of content on the Internet, but not within P2P networks that do not rely on a fixed hierarchy of clients or servers, but rather on a series of nodes that operate both as servers and clients towards other nodes.

¹¹⁰ The Recommendation also invites Member States to adopt the necessary initiatives to encourage the development of lawful online music services with an appropriate legal structure, within the EU context, related to copyright protection and other related rights for such online services. This approach reinforces the push toward a wider distribution of online music through cross-border licensing and other obligations for collective rights managers.

mediation could help users and right-holders to settle disputes. The Commission, in cooperation with the Member States within the Contact Committee, should undertake a study to consider new legal ways of settling disputes concerning copyright and related rights.” Regarding this latter proposal, such activity could take advantage of the competencies about dispute resolution among users and providers developed by AGCOM according to Law no. 249/97, even without the need to draft an MOU with ISPs and SIAE. In this case AGCOM would just need to adopt a specific procedure to carry out such activity.

5.2 Rethinking the relationship between AGCOM and SIAE

The framework outlined in this study about the roles pertaining to AGCOM and SIAE regarding the prevention of copyright infringements (according particularly to art. 182 bis of Law no. 633/41 and other competencies assigned to AGCOM, such as the electronic communication code) leads to a necessary revision of the current collaborative agreement between the two organizations. The reference provision here is still art. 182 bis, par. 2, of Law no. 633/41, which states that “*SIAE, operating within the field of its own institutional task, will coordinate its activities with the Communications Regulatory Authority as indicated in paragraph 1*”.

As a consequence, the two organizations signed a first agreement to coordinate their activities on 6 July 2001, with a subsequent revision dated 10 May 2007. Under this last agreement, the two organizations decided to share the planning of their ad hoc monitoring activities, and to provide for a regular and effective exchange of data and information leading to preventive and restraining actions against administrative and criminal violations, also requesting the intervention of Police and Border Patrol officers if needed. The agreement also includes shared research studies in common areas, especially regarding audiovisual content and services in their various use formats and takes the field technological evolution into account (art. 4); and the establishment of a permanent Committee, with equal members from AGCOM and SIAE, to solve problems that could emerge about the application of the agreement itself, and to verify the actual activities carried out according to the agreement provisions (art. 5).

Overall these are operational arrangements, finalized only to the coordination of monitoring activities and planning of research studies on joint issues — although art. 182 bis is a long way from describing a working environment based on equal terms. In fact, lawmakers provided for SIAE (which, as mentioned earlier, is in charge of the economic intermediation for copyrighted works, while their protection from possible infringements covers a minor aspect of its mission) to coordinate its action with AGCOM, not the other way around, and always “*within the field of their respective competencies*”.

A revision of such agreement should focus, in the first place, at repositioning the correct aim of each organization, reaffirming the central role about copyright infringement prevention (naturally extended to a monitoring action) that the lawmakers assigned to AGCOM in regards to electronic communication networks — as opposed to a role of mere collaboration and support that seems to belong to SIAE. With that goal in mind, a main effort should be directed toward underlining the exclusive competence of AGCOM regarding all copyright infringements carried out over electronic communication networks. Therefore, AGCOM is the only organization in charge of regulating those activities detailed in paragraph a) of article 182 bis of Law no. 633/41, that is:

1) the reproduction and duplication over computer-based networks, and also the distribution via broadcasting and cable, regardless of platforms and technologies deployed, of audio-visual and editorial content under copyright by right-holder infringers;

2) the unlawful access to premium audio-visual content by infringing on limited access system.

In order to provide for a flexible agreement as related to the on-going technical evolution in this field, an additional clause could extend in advance the jurisdiction of AGCOM to new instances of copyright infringements carried out over electronic communication networks that could emerge after signing the agreement.

The monitoring action executed by SIAE would rather be limited to provisions described in letter b), c), d), d-bis), d-ter) of art. 182 bis. These provisions — which refer to projections in theatres, along with movie rental and selling, and reproduction through photocopy machines — appear to cover “physical piracy” activities, which are therefore traditionally outside the range of AGCOM (with the only exception of limited access systems).

The new agreement should then consider a more effective redefinition of the inspection activities pertaining to the two organizations, reaffirming once again the specific institutional role assigned to AGCOM. Indeed, the Italian Communications Authority should have the exclusive role of planning and carrying out inspection actions as described in letter a), also requesting, if needed, the intervention of Postal Police and Border Patrol officers and even SIAE executives in a supporting role.

SIAE, on the other hand, could execute inspection activities related to its own jurisdictional area (as detailed in letter b and others in par. 1 of art. 182 bis), with a prior coordinating plan with AGCOM if such inspection activities should require the intervention of Police officers acting under AGCOM’s supervision.

SIAE could also be in charge of informing AGCOM about infringements carried out through those activities described in art. 1, letter a), noticed performing its own activities. Finally, the joint research studies provided for in the previous agreement could be maintained depending on their actual usefulness.

Original document (in Italian): <http://www.agcom.it/default.aspx?DocID=3790>