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photographic files in the network: eu regulation and proposals.

1. Introduction

The incorporation of photographic files in the network raises numerous questions from a legal point of view, which are being discussed within the broadest possible framework for copyright, by both domestic laws and by EU legislative authorities, as well as by International Organisations, including the WTO[1] and the WIPO[2]

From among the abundant legislation at Community level we have selected the most recent for this talk, leaving aside, due to lack of time, issues such as the Databases Directive, which is certainly not lacking in interest, and which could be adopted as a legal framework for the protection of collections offered by Agencies and Pictures Archives in the networks.

Notwithstanding the relevance of the matter, as this is a Directive[3] that was approved in 1996 and transposed to the legislation of member States some time ago, we have considered the debate, if not complete, to have been studied in more depth by the doctrine of member States and sector professionals and jurists.

Accordingly, we have decided to concentrate on the most innovative Community Proposals with regard to copyright or related issues.

The profusion of Community rules we are now witnessing dates back to 1988, when the Commission published the Green Book on copyright and technological challenges[4], and established an ambitious agenda for the harmonisation of copyright and neighbouring rights in the European Union.

The European Union, aware of the revolution brought about by what were called information highways and the transformations these new forms of communications were to introduce, not only at Community level but also at world level –let us recall that we are living in the age of globalisation-, dedicated itself to the harmonisation of legal provisions on intellectual property with the firm intention of overcoming the obstacles that could be entailed entail for free circulation of the services and products concerned by differences in the laws of member States.

Following the Directives on computer programmes[5], loan and rental rights[6], on the harmonisation of the protection term of intellectual property rights[7], and broadcasting by satellite and cable[8], adopted some time ago by Community countries, and pursuant to the plan drawn up, in 1995 the Commission published its second Green Book on Copyright and Neighbouring Rights in the Information Society[9], as a result of surveys and reports prepared by its members during those years in order to "extract some political guidelines".

The expression "Information Society" appeared in the Commission's White Book "Growth, competitivity and employment – Challenges and hints for moving into the 21st century", which attributed a special role to the protection of intellectual property as a fundamental part of the regulatory framework to be introduced for creation of the Information Society.

The concept of Information Society, comprises all the products and services that have been possible thanks to the digital technology and it encompasses such vastly different, but so closely linked, aspects as telecommunications and their liberalisation, electronic commerce, consumer protection, personal data protection, among others.

The 1995 Green Book, aware of the diversity of issues affected by the Information Society, announced that it was dedicated exclusively to copyright and neighbouring rights associated with the content of the new services and products of the Information society, leaving aside other aspects related to interoperability of the networks and the services provided thereby, as well as problems concerning patents, trademarks, designs and models, know-how and professional secrets and neighbouring, all of which were influenced by the Information Society.

1. The World Trade Organisation replaced the GATT following the Marrakech Agreement, Abril 15th 1994, which was proved to be not sufficient for the technological revolution that, among others, has occurred the las quarter of the 20th Century.
2. The World Intellectual Property Organisation is an international organism dependent on the United Nations Organisation, founded by the Convention dated July 14th 1947 and whose main objective is centred on studying and protecting the intellectual property in a broad sense, comprising not only copyright and neighbouring rights but also industrial property in all its modalities.
3. Directive 96/9/EC of European Parliament and of the Council (OJ L77 27/03/96).
4. COM (88) 72 final, 07/06/88
5. Directive 91/250/EEC of the Council 14/05/1991 (OJ L122/42 17/05/1991)
6. Directive 92/100/EEC of the Council 19/11/1992 (OJ L 346/61 27/11/1992)
7. Directive 93/98/EEC of the Council 29/10/1993 (OJ L290/9 24/11/1993)
8. Directive 93/83/EEC of the Council 27/09/1993 (OJ L 248/15 06/10/1993)
9. COM (95) 382 final. Brussels, 19/07/1995

As a result of the 1995 Green Book, the Directive on Databases was published in 1996; in 1998 the Directive on legal protection of conditioned access services (radio broadcasting, television and information society services) was approved and, also since 1997, work is being carried out on the Proposal for a Directive on the harmonisation of determined aspects of copyright and neighbouring rights in the information society[10] which, once approved, will lead to a new reform in the intellectual property legislation of member States.

The Proposed Directive on the harmonisation of determined aspects of copyright and neighbouring rights in the information society is, in addition, the result of events now taking place internationally in the area of intellectual property.

Indeed, we cannot omit a reference to the TRIP's Agreement of 1995, among the resolutions adopted by the World Trade Organisation. Such Agrrement has notably influenced either the Community law as well as the WIPO Treaties, and was a part of the Final Acta of the Agreement which set up the WTO.

Neither can we forget the WIPO Diplomatic Conference held in December 1996, which led to the adoption of two new Treaties in the area of intellectual property: the WIPO Treaty on copyright and the WIPO Treaty on the interpretation and execution and phonograms, which aims are to revise and update the Bern Convention of 1886, revised in 1971, as well as the Rome Convention of 1961.

Both Treaties were unanimously approved by more than 100 countries, and are pending ratification by European Union member States, for which they represent a requirement prior to adoption of the Proposed Directive on copyright in the Information Society which we shall analyse later, and which will be acknowledged by the European Union itself, as a subject under international public law, for subsequent ratification by its member States, once the new regulation adopted by the Convention has been incorporated by harmonisation of legislation required by Directives.

As a matter of fact, the role played by the European Union in this regard is replacing legislative power in the different member States, which merely adapt the "law" laid down by Brussels to their internal systems, but it is evident that the major changes brought about by the Information Society will require common policies.

10. The first draft produced by the Commission is dated December 1997 (COM (97) 628 FINAL 10/12/1997)

2. Amended proposal for a directive on the harmonisation of certain aspects of copyright and neighbouring rights in the information society.

The text on which this discussion is based is the version of the Amended Proposal for Directive dated 21 May 1999, following incorporation therein of a considerable number of amendments proposed by Parliament at its session held on 10 February 1999.

The title of the Proposal for a Directive is incorrect as it is, in fact, a directive on copyright in general, as long as its provisions are applicable to both analogue and digital applications; it is not restricted to either categories of works or to areas of exploitation (on-line, off-line) or to exploitation rights or faculties.

Article one describes the content of the Directive: "This Directive refers to the legal protection of copyright and neighbouring rights within the framework of the domestic market, particularly in relation to the information society".

The salient points of the Directive are:

- The basic principles on which the copyright system is based must not be Amended; due to the fact that, only the environment in which exploitation of the works is carried out will vary.

- Maintenance of the degree of protection of copyright that has traditionally existed in Europe, i.e. copyright must continue to be deemed an exclusive right.

- The quest for a balance between all sectors involved (authors, industry, consumers) with special attention being paid to general interest. Copyright is envisaged from a three-fold perspective: cultural, economic and social. Here, it will be necessary to find the balance between copyright and rights of people, while warranting a fair remuneration to the former in order to encourage and develop artistic creation, and warranting to the latter access to culture and, therefore, its availability and dissemination.

- Uniform regulation of the exceptions and limits to exclusive rights, ending with legislative differences depending on territories.

The two aims pursued by the proposed Directive are to harmonise the rights affected thereby and to guarantee a uniform protection of technological means, for both technical identification and for protection softwares.

Elimination is thus made of issues such as broadcasting rights, the law applicable and its enforcement, collective management of rights and moral rights; and this is because the Commission, albeit aware of the importance of these points in the Information Society, has not yet been able to delimit the scope of its intervention, i.e. to ascertain whether harmonisation measures are necessary or mere recommendations or clarification on problems that may arise.

Among the rights affected by the Amended Proposal for the Directive are the reproduction rights, distribution rights and public communication rights.

Reproduction rights are essential for both authors and copyright owners, inasmuch as they usually become necessary when a work is first exploited, and represent the first step towards the exercise of other faculties of a patrimonial nature.

The technological revolution we are witnessing, which some authors have called the 4th revolution after the printing press, cinema and computer programmes, could jeopardise reproduction rights, inasmuch as the new forms of exercising this right are not protected at the present time either by national legislation or by international conventions, with the exception, perhaps, of the Bern Convention, which addresses a broad concept of reproduction in its article 9.

Acts of reproduction permitted by new technologies enable top quality copies to be obtained rapidly, but the problem does not only lie in the proliferation of user copies but also in temporary or ephemeral reproductions made of works when they are transmitted in the network, caché copies or viewing a web page on the screen, to give a few more common examples. It is evident that all these acts of reproduction are not covered by present legislation in Community States and, therefore, the concept of reproduction must be revised and harmonised in order to encompass its new forms and, above all, to ensure effective and adequate protection for authors and copyright owners.

This new reality of reproduction rights has led to a broader concept being considered, which is shown in article 2 of the Amended Proposal for Directive, to wit: "direct or indirect, temporary or permanent reproduction of all or a part of the works of authors or related material, by any means or in any form".

Innovation lies in the inclusion of indirect[11] and temporary[12]

11. temporary copy: those that merely store information for a very short time (those made by servers)

12. indirect copy: those remote from the place of the original work and the place where the copy is made, linked by a communications network (cordless data transmission or the recording of a broadcast).

reproduction, and also in future possibilities admitted by the expression "by any means and in any form".

This means a reinforcement of the position of authors and copyright owners or neighbouring, who are empowered to authorise such reproduction of their works and/or their supports.

Given the hazard entailed in such a exorbitant faculty, for some, reproduction rights may be restricted and even excluded in certain cases, those shown in article 5 and which we will discuss later on, in order to maintain the balance between the different interests that concur in the Information Society.

Public communication rights: in this case, Community harmonisation is addressed at the regulation of on-line transmissions, i.e. the exploitation of works and related material through networks and, in particular, tailor-made transmission (the placing of material at the disposal of user, which would otherwise entail multiple and varied copyright).

Discussions of varied hues took place among members of the EU when defining interactive transmissions and determining the copyright to be applied, ranging from an attempt to subsume these into reproduction rights, to consider them as part of distribution rights, to include them in public communication rights or to create a new category within exploitation faculties.

Finally, the Commission opted for a broader concept of public communication which would include on-line transmissions, regardless therefore of whether they are addressed at one single person or at a group, which is more characteristic of the public communication rights under the different legal systems in member States.

Accordingly, by virtue of article 3.1, it is understood that the concept of public communication includes: "placing their works at the disposal of the public so that any person may access these from wherever and whenever they so wish". That is, the concept of public that traditionally distinguished the distribution of communications is eliminated and is replaced by effective enjoyment of the work merely because of its accessibility.

Distribution rights are the least affected by the new situation created by the Information Society, as they refers to tangible objects: the original and copies of the work. The fact that the support used may be a book or a CD-ROM does not imply any change whatsoever in the concept of distribution.

Nevertheless, Community harmonisation is intended to harmonise the principle of exhaustion of the right at Community level, which was set forth in Directives on computer programmes, Databases and the harmonisation of rental Rights. Accordingly, it was opted to apply the principle of exhaustion of the right at Community and not international level, with the aim of offsetting the considerable economic losses that would ensue for member States by accepting an exhaustion of rights that had no counterpart in the legislation of third nations outside Community jurisdiction. Here, it is important to recall that the 1996 WIPO Treaty reserved this decision on exhaustion to the legislation of each signatory State.

Obviously, the principle of exhaustion of the right will not be applied to on-line transmissions.

Exclusive exploitation faculties acknowledged to authors and other owners of associated rights are subject to determined limits and exceptions, which are set forth in article 5.

Among these, the only one with a mandatory character is that referring to "transitional and accessory acts of reproduction, when forming an indispensable part of a technological process, including those that enable the performance of transmissions systems, the sole purpose of which consists in facilitating the use of a work or any other creation, and which per se have no independent economic significance" (caché copies and browser copies).

Paragraph 2 of article 5.2 restricts reproduction and distribution rights, and paragraph 3 refers to the limits of the three rights regulated by the Amended Proposal for Directive.

Although these restrictions are optional for member States, depending on their different cultures and jurisprudence, they are exhaustive, i.e. no other limits than those enumerated in that article can be admitted.

Article 5.2 includes the following:

- supports that use reprographic techniques subject to a fair compensation payable to authors.
- private reproductions on analogue supports of audio-visual, sound and visual material with no profit-making aim.
- private reproductions on digital supports of sound, visual and audio-visual material, with no profit-making aim, although this may be left to the decision of the authors themselves who may decide not to permit a private copy of their works and, as the case may be, subject to an fair economic compensation.
- reproductions made by non-profit-making institutions for the purpose of conservation or files, but not distribution.
- ephemeral recordings made by broadcasting institutions using their own means and for their own broadcasts.

Article 5.3 ends with a list of optional exceptions:

- educational purposes or scientific research.
- for the benefit of the handicapped.
- information on current affairs.
- quotes for critique or review.
- public safety applications or as evidence in administrative or judicial proceedings.

Lastly, the Amended Proposal for Directive we are discussing addresses the scope of exceptions, the three steps test, the drafting of which is extremely reminiscent of the American Fair Use doctrine and which is also included in the WIPO Treaty and the Bern Convention[13], whereby the preceding exceptions must fulfil three requirements: (1) not cause unjustified damage to the legitimate interests of copyright owners; (2) not be contrary to normal exploitation of the work; and (3) be applied only in cases determined by the legislator, i.e. they cannot be applied by analogy to exceptions regarding the exploitation rights of authors.

As for the second package of harmonising measures set forth in the Amended Proposal for Directive, these include identification and protection methods for technical media, a regulation which is absolutely necessary because the new forms of exploiting works make these more vulnerable to infringement and increase the risks to which copyright owners are exposed when disseminating their works.

New protection methods such as passwords, as an access control, or anti-copy systems (Serial Copyright Management System) and identification systems such as watermarks and other forms of tattoo on the works, have become indispensable for the control and follow-up of their exploitation.

Accordingly, article 6 of the proposal sets forth the obligation for member States to provide the necessary legal protection for these technological means, in order to prevent mechanisms that would permit their evasion or disablement, nuancing that it must known or reasonably presumable that forbidden activities entail evasion, and also prohibiting preparatory activities and even mechanisms with limited aims independently of evasion.

With regard to technical means of identifying works, member States must establish measures for protection against those persons who, without being authorised and being aware or assuming that they are facilitating the infringement of copyright or neighbouring, eliminate, suppress and/or alter information for the electronic management of rights or the distribution, import, dissemination, communication or publication of the works protected, in which information for electronic data management has been suppressed or altered.

Lastly, article 8 of the Proposal regulates the creation of appropriate ways for appeal and effective and proportionate sanctions to discourage new infringements.

To conclude this comment on the Amended Proposal for Directive, suffice to say that it is expected to be approved at the end of this year or the beginning of 2001, bearing in mind the urgency of providing a regulation for the harmonisation of copyright and associated rights, which will sponsor and adequately protect creation in the Information Society and which, in addition, is a necessary requirement prior to ratification by both the EU and signatory States of the 1996 WIPO Treaty on copyright and associated rights.

13. Article 9.2

3. The directive on e-commerce.

The second Community proposal that refers to copyright in the technological environment is the Directive on Electronic Commerce[14], which was put forward when submitting this talk, approved on 4 May at the Lisbon summit by the Council and the Parliament by teh codecission procedure.

The Directive on E-Commerce establishes rules for harmonisation to ensure that both businessmen and citizens will be able to able to provide and receive Information Society services within the Community, regardless of the frontiers separating member States.

In this way, application of the Community principle of freedom of circulation of goods and services will be guaranteed in electronic transactions, and a minimum rule will be established for indispensable protection which will ensure its growth and dissemination.

Data provided by the EU estimates that the world e-commerce market will represent 1.4 trillion dollars in the year 2003. At the present time, it is believed that, in Europe alone, e-commerce is generating 17 billion euros and it is expected that this will reach 340 trillion by the year 2003.

The Directive covers both business to business (B2B) services, i.e., between companies, and direct services to end consumers (B2C), and includes a regulation on information service providers, business communications in the network, termination and validity of electronic contracts, the liability of network intermediaries, alternative dispute resolutions, judicial appeals and co-operation between the authorities.

With regard to Service Providers, it is interesting to note that the Directive takes into account the actual location of their business activity at a stable establishment and for an undetermined duration, as a determining factor for application of the regulation to one member State or another, regardless of where the technical and technological means used for the service are located. It is thus intended to avoid the creation of electronic or technological havens, in the same way as tax havens, which were beginning to abound.

The regulations of the member State where the service provider is established will be applicable.

Member States shall not impose restrictions on either the circulation of services originating in another member State or on access to the business of the Information Society service provider and, accordingly, these shall not be subordinated to any requirement for prior authorisation.

Nevertheless, this will not release member States from their duty to control and to obtain general information that may be necessary to ascertain determined identification of Information Service Providers, such as: name, establishment address, particulars of the person to be contacted, registration details, as the case may be, and others.

Regarding business communications, these are also regulated in order to achieve transparency and ensure trust and fair trading with consumers and to protect consumers against the phenomenon known as spamming, so that this type of unsolicited commercial communications will be identified as such.

The Directive forbids member States to place any type of restriction or prohibition on the use of electronic contracts, with the exception of contracts that require the mediation of a Notary, which must be registered with a public authority in order to be valid, those subject to family law and those subject to probate.

In order to protect consumers, a definition is given of the information to be furnished by Information Service Providers when entering into an electronic contract, and this is eminently technical information, along with codes of ethics to be observed by Service Providers.

This obligation to provide information can only be avoided when both parties are businessmen and this is resolved between them.

However, the most crucial aspect in the regulation of on-line contracts are the rules that determine when they are to be entered into, when the addressee of a service must express his or her consent using technological methods, i.e. pressing a key on the computer keyboard.

The Directive sets forth that contracts shall become binding when the addressee of the service:

1. has received notification via e-mail from the Service Provider acknowledging receipt of his or her acceptance; and

2. has confirmed receipt of such acknowledgement of receipt.

3. acknowledgement of receipt and confirmation thereof shall be deemed as made at the time they are accessed by the parties.

4. and both documents shall be transmitted as soon as possible.

14. Amended Proposal for Directive. Document 598PCO586 in http://www.europa.eu.int/comm./internal_market/en/media/eleccom/2K-442htm.

Another aspect regulated by the Directive is the liability of Service Providers acting as intermediaries (who transmit data in a communications network or who provide access thereto). In this case, a release from liability is established for data transmitted when providers play a passive role, as a mere conduit, when their function is automatic and provisional storage (caching) or normal data storage.

This does not signify a total absence of liability, but a principle that would be meaningless were it not for a series of requirements: absence of data manipulation, non-interference in technology, that addressees are not selected by them, that they have not triggered the transmission

Neighbouringly, neither do Service Providers have an obligation to control and monitor all data they transmit.

Lastly, the Directive sponsors and encourages the adoption of codes of ethics through professional associations, it favours out-of-court resolution of complaints, even on-line, because member States have the necessary means to apply the regulation and to defend possible victims, and because of co-operation between member States.

It would be interesting to make one last comment on this Directive, namely: that it does not define the law applicable to contracts entered into nor the jurisdiction in which controversies arising in cases not subject to out-of-court resolution will be processed, and article 3 sets forth that the law of the member State where the Service Provider is established will only be applicable to on-line contracts when so determined by international private law in that State.

Furthermore, article 22.2 excludes application of article 3 to copyright and other rights regulated in the Directive on Databases.

This means that in the event of a contractual breach the rules of the 1980 Rome Convention must be applied with regard to the Law applicable to Contractual Obligations in order to determine the legal system that will regulate the rights and obligations of the parties and, at the same time, judicial competence will be determined by the 1968 Brussels Convention on judicial competence, acknowledgement and execution of court judgements in mercantile and civil cases, which is also being reviewed at the present time and which is expected to see the light in the form of a Regulation by the end of the year.

In cases of copyright infringement that entail extracontractual liability, the rules of international private law in the member State must be applied when determining the legal system applicable.

However, the regulation of e-commerce will not end with this Directive. Agencies or Archives intending to market their works or the works of authors they represent in the network must obey other legal provisions, most of which have also been harmonised at Community level and incorporated into the internal legislation of member States. Here, we refer to rules on distance contracts[15], general conditions for contracting and abusive clauses[16], advertising[17], electronic signature[18] and the protection of private data[19] which, obviously, due to a material lack of time, cannot be discussed now.

All these Directives, along with the special attention present-day problems between trademarks and domain names must be particularly borne in mind by any company that decides to become part of the Information Society.the law applicable and its enforcement, collective management

15. Directive 97/7/EC of the European Parliament and of the Council of 20/05/1997 in relation to consumer protection with regard to distance contracting.

16. Directive 93/13/EEC of the Council of 025/04/1993 on abusives clauses in the contracts with consumers

17. Directive 97/55/EC of the European Parliament and of the Council of 06/10/1997 which amends the Directive 84/450/EEC on misleading advertising so as to include comparative advertising (OJ L 23/10/1997)

18. Directive 99/93/EC of the European Parliament and of the Council of 13/12/1999 (OJ L013 19/01/2000)

19. Directive 97/66/EC of the European Parliament and of the Council of 15/12/1997 related to the private data treatment and to the privacy protection in the field of telecommunications (OJ L24 30/01/1998) and Directive 95/46/EC related to the personal protection with regard to the private data treatment (OJ L281 23/11/1995)

4. Conclusions

To conclude, we can only trust that the Amended Proposal for a Directive will be approved according to the Commission's forecasts and that the Directive on E-commerce will be transposed to the respective legal systems of member States, once it has been and published, as quickly and fairly as possible, in order to truly endorse possibilities for business and progress in line with idea of creation put forward by the Information Society.

In any event, problems arise that have not yet been solved by the avalanche of Community rules, namely:

1. The threat posed by the Information society for moral rights, particularly paternity rights and the integrity of works, which appear to have be forgotten by new legislative trends.

2. The problem of the law applicable and judicial competence when rights are exercised, infringed or are contracted in telematic networks.

3. Collective Management of copyright: what role will be played by collective management societies in the future? How will they adapt to new circumstances or how are they managing to adapt? For some, they may play a leading role, for others, and given that technological progress may enable authors to control their works and their applications from home, they are condemned to vanish or to play a secondary role in the analogue world.