SINGLE MARKET FOR INTELLECTUAL PROPERTY RIGHTS: OPPORTUNITIES AND CHALLENGES

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The creation of a single market for intellectual property rights is essential

- for the full realization of the Single Market in the EU
- and to reach key objectives of the EU 2020 agenda.

- In particular, it is necessary to maximize the opportunities offered by the electronic commerce and the digital sector in general, in the perspective of an open and competitive market.

- In a context where geographical borders have no relevance, the protection of the interests involved must be guaranteed on a supranational scale. Thus it is crucial to pass the differences in legislation among Member States which may hinder cross-border trade, in a Europe without internal frontiers, through a single market for intellectual property rights.

- In the era of globalisation and in a fierce international competition, the role of EU legislation is crucial to face the related challenges, while the national legislators should coordinate the new rules with each own legal and cultural tradition.
As stated by the Commission in the Communication of 24 May 2011, the sector is wide and includes, among other things, industrial property rights, such as patents, trademarks, designs and geographical indications, copyright and rights related to copyright.

A major drive for a unitary discipline is linked to the TRIPs Agreement (Trade Related Aspects of Intellectual Property Rights), where the unifying effort is summarized in the old formula “intellectual property”.

Although it is necessary to rule the overall matter coherently - also in a perspective that takes into account the competition law - it is also essential to look into the associated features of the intellectual property rights.

So each right poses specific problems because of the characteristics of the “good” to be protected and of the interests involved in the various sectors.
Interests involved

- In general, it is central to consider the holders of property rights, their competitors and consumers.

- The safeguard of intellectual properties, recognized by the Charter of Fundamental Rights of the EU, is vital to reward creative and inventive efforts, but it is also necessary to consider the protection of human rights, since "the intellectual property rights must serve the public good", as stated in Art. 7 of the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPs).

- So, as confirmed by the European Economic and Social Committee, “the future harmonized IPR policy must also accommodate the general interest and the rights of consumers, as well as the effective participation of all parts of society in deliberations and in the process of shaping a global, balanced strategy”.
In particular: the patent system in Europe

- With reference to paragraph 3.1 of the Communication from the Commission, it is crucial to consider that in the field of unitary patent protection one of the main problems is to protect small and medium enterprises by simplifying procedures and by reducing costs.

- The machine translation program has a central role, especially to ensure equal rights to all citizens, independently of the Member State of residence.

- Regarding a uniform system of the dispute resolution, some doubts rise for the following reasons:
  
  - the system introduced by article 267 TFEU already provides, through cooperation between the Court of Justice (which has still delivered a negative opinion on the subject) and the national courts, the correct application and the uniform interpretation of EU law;
  
  - a different system does not seem justifiable respect to that provided for the Community Trade Mark;
  
  - it is basic to take into account the interfering points of the property rights vs the competition law.
Modernisation of the trade mark system in Europe

- The success of the trade mark system in Europe is underlined by the Commission in paragraph 3.2 of the Communication, as is reflected, *inter alia*, in new record figures for Community trade mark applications filed in 2010 (more than 98,000).

- National trade mark registration in EU Member States has been harmonised for almost 20 years and the Community trade mark was established 15 years ago. The “the Directive to approximate the laws of the Member States relating to trade marks” (Directive 89/104/EEC, replaced by Directive 2008/95/EC) and the “Regulation on the Community trade mark” (Regulation 40/94 republished with all its amendments codified as Council Regulation 207/2009) were introduced as two complementary instruments to remove obstacles to the free movement of goods and services and to the competition within the internal market. As provided in the recitals to the Regulation, in fact, the Community law relating to trade marks does not replace the laws of the Member States in the same field and National trade marks continue to be functional for undertakings which are not interested to be protected at Community level.

- This gives reasons to the existence of the so-called *parallel provisions*, related respectively to National and to Community trade mark, generally interpreted in the same way by the Court of Justice.
The success of the trade mark system is not doubted by the existence of some aspects still to be defined and not by the review to modernise the system both at EU and at National levels by making it more effective, efficient and consistent as a whole, in the Internet era.

In particular, the most important objectives mentioned by the Commission are to simplify and speed up the registration procedure, taking into account the requirements of the electronic age, as well as increase legal certainty, such as by redefining what may constitute a trade mark and to clarify the scope of trade mark rights throughout the EU territory (Communication from the Commission, paragraph 3.2).

So, the modernization could give an answer to some specific problems arisen, for example regarding
- non-conventional trademarks;
- the protection guaranteed to a Community trade mark with a reputation only in one Member State.

In any case, it is crucial to underline that any amendment to the Regulation on the Community trade mark should be consistent with the single market concept and preserve the unitary character of this successful IP title.
A comprehensive framework for copyright

- As proposed by the Commission in the paragraph 3.3 of the Communication - Creation of a comprehensive framework for copyright in the digital single market – the feasibility of creating a “unitary” title on the basis of Article 118 TFEU should be also verified in the copyright field, in consideration of the potential impact for the single market, the right holders and the consumers.

- It has to be highlighted, in particular, the need to fine-tune the balance of the interests between
  - the creative intellectuals
  - the intermediaries in the circulation of intellectual works
  - and the users, by distinguishing commercial users and consumers.

- Due to the new reproductive technologies and digital broadcasting, in some sectors (eg music and audiovisual creations) the protection of authors is even more complex.

- By contrast, in other areas (eg software), the develop of new technologies made by the copyright holders could create a restriction of the “work” in the public use.
Copyright in the digital single market

- **The software protection poses important problems.** Undoubtedly they can not be resolved without considering the specific application for which it is intended.

- For instance, **in terms of duration of the exclusive property rights**, the software protection guaranteed in the toys industry can not be comparable to that in the medical device industry. *As clarified by the Directive 2007/47/EC, in fact, the software is a medical device itself when it is specifically intended to be used for one or more of the medical purposes set out in the definition of device.*

- The rules governing the protection of copyright must take into account the new opportunities and new problems of the digital age. **The challenge is to ensure a right balance between the various interests involved.**

- So, **it is crucial to protect adequately also the consumers**, who are, as confirmed by the Commission, an essential part in “the virtuous IPR circle”. 
Copyright in the digital single market

- Rightly, in paragraph 3.3 of Communication, the Commission wants to avoid that Europe remains “a patchwork of national online markets” and wants to enable European citizens to electronically buy works or services protected by copyright in a Member State across a digital single market.

- The online distribution of audiovisual works has a very important role, as confirmed in the recent Green Paper of the Commission of 13 July 2011, which is also based on the Communication from the Commission of 24 May 2011.

- Digital technologies and the internet are rapidly changing the way in which contents are produced and distributed to consumers, through services that were dreamlike few time before, such as “on demand” or “cloud based”.

- The most appropriate way to allow millions of EU citizens to use and share published knowledge and entertainment easily and legally, is related to the develop of copyright licensing services combined with web applications and tools in order to
  - overcome the complexity of copyright licensing processes
  - and adopt actions to promote cross-border and pan-European licenses.
Copyright in the digital single market

- Non-commercial use of intellectual work must be preserved to not hinder the expansion of the culture by imposing excessive prices to consumers (Communication, paragraph 3.3.1). As underlined by the European Economic and Social Committee, “if prices are reasonable and affordable, private pirate copies will lose most of their appeal”.

- As highlighted by the Commission, clearer rules on copyright licensing and distribution of revenues will ultimately create a level playing field for all actors: right holders, collecting societies, service providers and consumers.

- In order to meet the above mentioned requirements the solution should be the creation of a European Copyright Code in which collect the all EU copyright directives by an updating and organizing process.

- This comprehensive codification could be an opportunity to implement the current harmonisation. For example, rules on authorship and first ownership in the EU have been partially harmonised, as underlined by the Commission in its report on the question of authorship of cinematographic or audiovisual works in the Community (COM 2002 691 def.).
An optional “unitary” copyright title?

- In particular, in the field of online exploitation of audiovisual works, it needs to harmonize the rules relating to an adequate remuneration of authors and artists, without making too complex the development of platforms for online distribution in case of multiple rights. Greater transparency and a more fair distribution in this direction would bring benefits to consumers.

- There is no doubt, therefore, about the opportunity to harmonize important issues, but the Commission will also examine the feasibility of creating an optional “unitary” copyright title on the basis of Article 118 TFEU and its potential impact for the single market, right holders and consumers.

- If in the field of trade mark, as seen before, the success of a unitary title is proved, it has to be valued whether, in light of the differences between the intellectual property rights involved, the system could be also appropriate in relation to the copyright.

- Differently from the complete harmonization in the field, to achieve the above mentioned objectives, an optional “unitary” copyright title does not seem appropriate.
An optional “unitary” copyright title?

- According to the Recital 19 of the Directive 48/2004, “copyright exists from the creation of the work” and “does not require formal registration”.

- Even if a registration and deposit system is sometimes encouraged to facilitate a systematic functioning of the cultural industry and market efficiency (eg. Art. 103, paragraph 5, of the Italian copyright law), **the protection must not depend on constitutive formalities or publication or distribution marks**.

- In general, special features of copyright avoid to create a recording system such as in the field of trade mark. In this sense, **an optional unitary copyright title appears difficult to realize**.

- Moreover, while an entrepreneur might be interested in registering a trade mark or in obtaining a patent at national level, **it is not the same in the field of copyright, especially in view of the digital single market**.
An optional “unitary” copyright title?

- The copyright laws of Member States already ensure the immediate protection of resources originated in other EU Countries in their Schutzland, regardless of the intervention of the Community legislator.

- According to Article 18 of the TFEU, the national protection must be applied for any European copyright holder, regardless of place of realization of the cultural product (ECJ, October 20, 1993, Phil Collins).

- Therefore it appears appropriate to look at the European copyright in a unique perspective, including both national and Community rules. Several elements have been harmonized, thanks to the directives and also to the “communitarisation” of International Treaties, such as the TRIPs Agreement which was implemented through directives.

- The European Court of Justice, thus, can already interpret the provisions contained in those International Treaties (ECJ, December 7, 2006, SGAE), according to the principles of uniform and autonomous interpretation in the EU.
Conclusions

- Rather than assume an optional “unitary” copyright title, ex art. 118 TFEU, as done in the case of trademarks for which the effectiveness of the protection depends on the administrative procedures of registration, it seems appropriate to completely harmonize the discipline of the copyright by giving, in some respects, less range of discretion to national legislators.

- It seems crucial, in other words, to eliminate those differences of discipline that may hinder the development of the single European market. The protection of copyright could be regulated by a EU Code encompassing a comprehensive codification of the copyright directives in order to harmonise and to consolidate the entitlements provided by copyright and related rights.

- This harmonization would protect not only the holders of property rights, but also the European consumers, which would avoid finding different standards in the use of copyright material.

- The creation of European digital libraries is key for the preservation and the dissemination of Europe's rich cultural and intellectual heritage.
Conclusions

- **To ensure adequate protection of authors' rights** it could be allowed, for example, the mere consultation of texts or, as in a traditional library, after an apposite authentication, partial copies.

- Film heritage institutions, in line with their mission of preservation, restoration and provision of cultural and educational access to works, have a strong interest in digitizing their archives, by making them available in digital format.

- **To reach these objectives and ensure legal certainty, the current exceptions and limitations to copyright should become mandatory and their application harmonised among Member States.** The Green Paper on “Copyright in the knowledge economy” opened the discussion on the non mandatory exceptions of Article 5(2)(c) (reproduction for preservation in libraries) and of Article 5(3)(n) (*in situ* consultation for researchers) of Directive 2001/29/EC on copyright in the information society.

- **The creation of a EU Copyright Code** (*Communication from the Commission, paragraph 3.3.1*) is an important opportunity to examine if the current exceptions and limitations to copyright granted under the 2001/29/EC Directive need to be updated and harmonised.
Conclusions

- Last but not least, it is also important to consider the rights of persons with disabilities. The European Disability Strategy 2010-2020 refers to accessibility problems of people with disability experience. In particular it is mentioned that many television broadcasters still provide few subtitles and audio-described programmes.

- At present, only a very small percentage of publications are available in accessible formats such as Braille, large print or audio. The Commission recently brokered a MoU (signed in September 2010) to facilitate the cross-border exchange of works in special formats and make them accessible to persons with a visual impairment. It is important, but not sufficient.

- According to the UN Convention on the Rights of Persons with Disabilities (UNCRPD), State Parties shall take appropriate steps to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier. Although all Member States have implemented copyright exceptions into their national legislation, the approach is not harmonised so the cross-border transfer of the already limited supply of material is hampered by the territorial limitation of exceptions under national legislation. The harmonization has a key role also to overcome these problems.