

EU Digital Copyright Law and the End-User

Giuseppe Mazziotti

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*For my parents,
Lorenzo and Adonella*

Preface

This book draws on the contents of the Ph.D. dissertation I wrote and defended at the European University Institute (EUI) of Florence. At the beginning of my research, I did not expect to write a book on the intersection between copyright law and digital technologies and, in particular, on the implications that digitisation presents for the interests of users of copyrighted works. At that time, I was neither an expert on new technologies nor an avid user who viewed the Internet as a “no copyright land” where anyone should download whatever content for free. Before graduating from the University of Perugia School of Law, I had established myself as a clarinet player who performed mostly chamber music and the symphonic repertoire. I had also worked extensively as a radio speaker, music critic and writer with the Italian public broadcaster RAI-Radio3. In performing all these music-related activities, I developed a considerable interest for copyright issues and, when choosing my dissertation topic, I immediately opted for a work on copyright law that examined the economic rights of music performers under the Italian and the EU legal systems. I was very curious to see how and to what extent the law sought to protect the subtle, particular kind of creativity and originality embodied in musical performances. That was my first step towards writing a book on copyright law. However, my background as a musician and writer naturally made me more sympathetic to the interests of copyright owners than to those of users of protected works. So, my initial research interests were focused on the analysis of copyright *protection* rather than on that of copyright *restrictions*.

My study was consequently stimulated, at the beginning, by a reflection on how the law could preserve the rationale of copyright protection when controlling the unauthorised digital copying and use of copyrighted works seemed to be unfeasible and utopian. At a time when the economic and moral rights of copyright owners were objectively endangered by the advent of the digital society, the spectacular rise of Digital Rights Management (DRM) technologies and other measures of technological protection started modifying the state of the art in the field of digital copyright. It became clear in the relevant literature on the future of copyright that the risk of “digital abandon”, which was widely perceived as imposing a structural change on copyright policy, would soon be replaced by the risk of “digital lock-up”. This stemmed from the technical assumption that DRM systems and similar technologies would provide efficient systems of control and management of digitised information. My analysis has focused on the consequences of the directive that the European Union enacted in May 2001 as a legal tool that sought to adapt copyright law to the digital environment and to harmonise national regulations with the institutional objective of developing pan-European markets in copyright-

related markets. By the enactment of Directive 2001/29/EC, European law-makers harmonised the rights of copyright owners at European Union level and conferred legal protection to technologies such as DRM systems without considering that such digital means sought to transform the public, which has been the traditional addressee of copyrighted works, into a chain of single users, whose legitimate and socially valuable purposes of personal copying, quotation, teaching and research, parody, and so on, should be effectively enabled and preserved notwithstanding the wide adoption of access control and rights management mechanisms. I maintain that the pursuit of objectives of public policy can be achieved only by ensuring a reasonable breadth of the copyright scope even in the digital world. For instance, the objective of protecting the user's private sphere from the increasingly pervasive capabilities of control and monitoring enabled by DRM technologies and "Trusted Computing" platforms requires careful reflection upon the suitability of the private copying exception, which would avoid expanding the enforcement of copyright to the realm of personal uses. Similarly, the policy goal of fostering cumulative creativity in fields where the user is often a potential follow-on creator would require the statutory grant of rights of uses with the consequence of limiting the power of access- and copy-control technology to the benefit of qualified classes of users. Such concerns, as well as many others, do not have a place within today's EU copyright legislation. By testing the legislation enacted in 2001 in the most contested digital settings (*i.e.*, peer-to-peer networks, DRM-based protection of access to and use of digital works), I develop a critical review of the EU copyright system by seeking to emphasise why the legislation enacted a few years ago would need to be reformed and why the important goal of copyright enforcement targeted at end-users should be reconciled with the pursuit of other strategic policies such as the implementation of human rights law, consumer protection law, competition law and privacy protection law in copyright-related scenarios.

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Giuseppe Mazziotti
giuseppe.mazziotti@gmail.com

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The autumn of 2004, which I spent at the School of Law of the University of California at Berkeley, was a turning point in my PhD research. Here, I had the opportunity to meet and learn from Robert Merges, Peter Menell, Molly van Howeling, Howard Shelanski and François Lévêque. I wish to thank them for their brilliant teaching, the very useful discussions I had with them and their comments on my research project. I owe much to Robert Merges for his kindness, continuous encouragement and appreciation of my work. Upon my return to Italy, I had the chance to meet two people who helped me greatly in developing my research ideas with confidence and optimism, at a time when I needed to be confident and optimistic, given my delay in bringing the writing process to its conclusion within the time schedule. These people were Séverine Dusollier and Giovanni Sartor. Without their helpful comments and intellectual support, my work would have missed much and might never have reached a happy end.

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Giuseppe Mazziotti

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List of abbreviations

CD	Compact Disc
Community	European Community
DMCA	Digital Millennium Copyright Act
DPRL	Digital Property Rights Language
DRM	Digital Rights Management
DVD	Digital Video Disc
EC Treaty	Treaty establishing the European Community
EIPR	European Intellectual Property Review
EU	European Union
IIC	International Review of Intellectual Property and Competition Law
IP	Internet Protocol
InfoSoc Directive	Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society
IPRs	Intellectual Property Rights
ISO	International Organisation for Standardization
ISP	Internet Service Provider
LAB	Legal Advisory Board of the European Commission
MPAA	Motion Picture Association of America
MPEG	Motion Picture Experts Group
MP3	MPEG-1 Audio Layer 3 (digital audio encoding standard)
OJ	Official Journal
REL	Rights Expression Language
RIAA	Recording Industry Association of America

RIDA	Revue Internationale du Droit d’Auteur
TC	Trusted Computing
TCG	Trusted Computing Group
TCPA	Trusted Computing Platform Alliance
TPM	Trusted Platform Module
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
U.S.	United States of America
VCR	Video Cassette Recorder
VHS	Vertical Helical Scan (recording and playing standard for VCR)
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation
XML	eXtensible Mark-up Language
XrML	eXtensible Rights Mark-up Language