

## On-demand streaming raises compensation issues

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### Scope

There are two types of streaming: live and on-demand. Live streaming is the real-time broadcasting of live events over the Internet. On-demand streaming, which is the focus of this update, is the transmission of audiovisual content – previously stored on a server – at a time and place chosen by the user (ie, on request).

### Communication to the public

Pursuant to the Copyright Law,<sup>(1)</sup> any use of copyrighted materials – including use through the Internet – requires the consent of the relevant right holder.

In particular, the author has the exclusive right to:

- I the economic use of the work in any form or manner;
- I communicate the work to the public by wire or wireless means; and
- I make the work available in such a way that members of the public may access it when and where they choose – this undoubtedly refers to the on-demand streaming of content.

Licences to use copyrighted materials over the Internet in Italy are administered by the Italian Society of Authors and Publishers (SIAE) and are mandatory for websites dealing with the live or on-demand streaming of works (eg, videos, music, radio, television and podcasts).

In addition, the Copyright Law provides that phonogram producers have the exclusive right to make their work available in such a way that members of the public may access it on demand. Moreover, music performers and producers are entitled to receive remuneration for the use with gainful intent of the phonograms in the following ways:

- in cinematography;
- in radio or television broadcasts (including satellite transmissions);
- at public dance parties;

- on public premises; and
- in any other public use.

This right will be exercised by the producer, who will share the remuneration with the performing artists concerned.

Unlike the SIAE, Italian collecting societies of phonogram producers (the Società *Consortile Fonografici* (SCF) and others) are entitled to negotiate standard and basic umbrella agreements only in case of public transmission of the relevant work (ie, in public places or places accessible to the public, such as pubs, bars and restaurants); they cannot issue licences for on-demand use. These societies deal with licences on a case-by-case basis for the addition of music to a website, but with the express exclusion of on-demand streaming and downloading services. As a result, royalties are due to applicable collecting societies only in case of communication to the public.

The definition of 'public' in relation to the right of communication under the Copyright Law (Article 15) excludes performances within the normal circle of the family, community, a school or a retirement home, provided that it has not been carried out with gainful intent (then deemed a public performance).

The concept of the 'public' has also been interpreted by the European Court of Justice (ECJ) in a number of decisions, among which – as far as Italian law is concerned – the decision in *SCF v Marco Del Corso* (Case C-135/10 of March 15 2012) perhaps sheds the most light. In this case the ECJ identified the following requirements to assess the definition of 'communication to the public':

- The role of the user – an operator makes a communication to the public within the meaning of Section 3 of EU Directive 2001/29/EC when "it intervenes, in full knowledge of the consequences of its action, to give access to a broadcast containing the protected work to its customers. Without its intervention the customers cannot enjoy the works broadcast, even though they are physically within the broadcast's catchment area".
- The definition of 'public' – the term 'public' within the meaning of Section 3(1) of the directive refers to an indeterminate number of potential listeners and implies a fairly large number of persons. The court also referred to the definition of 'communication to the public' provided in the World Intellectual Property Organisation glossary (which, even if not mandatory, is helpful for the purpose of interpretation): "making a work...perceptible in any appropriate manner to persons in general, that is, not restricted to specific individuals belonging to a private group". Furthermore, "a fairly large number of people" includes a *de minimis* threshold, since groups that are too small are excluded.<sup>(2)</sup>
- The profit-making nature – it will be assessed whether the communication of a work can produce effects on the financial results of an activity. For instance, the broadcast of a work by a hotel to its customers is performed with the aim to gain benefit, since supplying that service has an influence on the hotel's standing and therefore on the price of rooms.

In determining whether the on-demand point-to-point streaming transmission engages the exclusive right to communicate to the public – in order to decide whether such activity triggers a tariff – it can be difficult to maintain that there was no intention to transmit the same work again, even though each streaming is initiated at the request of an individual member of the public.

### **Private copy and cloud services**

As a general rule, the right holder's exclusive right of reproduction concerns copying the work in all or in part, either directly or indirectly, temporarily or permanently, by any means or in any form (eg, copying

by hand, printing, lithography, engraving, photography, phonography and cinematography). However, under the Copyright Law, natural persons have the right to reproduce phonograms and videograms exclusively for private use and for ends that are neither directly nor indirectly commercial (Article 71-sexies) – the so-called 'private copy exemption'.

'Private copy' means that the copy is intended for private use and not for commercial purposes (ie, not for communication or distribution to the public or for public performances), and that the copy cannot be given to third parties. However, the private copy exemption does not apply to works or other protected materials that are:

- made available to the public in such a way that anyone may access them on demand;
- protected by technological measures;
- or accessed on a contractual basis (Article 71-sexies, Paragraph 3).

Consequently, in case of on-demand streaming users can be prevented from accessing a private copy by technological protection measures or on a contractual basis.

There has been debate in Italy regarding the private copy exemption for remote recorder services. Article 71-septies provides that when private copies are made through "remote recording systems", fair compensation is due to the authors – in this case, a percentage of the price paid to the operator that provides the remote recording system. Rights holders have been opposed to the inclusion of such services under the private copy exception, since such inclusion would result in a lower "fair compensation" than royalty payments. Furthermore, the European Commission (in Letter 29900 DG Markt/D1/DB/D (2009)) has asked the Italian government to cancel this provision, because it is incompatible with Section 2 (reproduction right) and Section 3 (right of communication to the public) of EU Directive 2001/29/EC.

As a result, it has not yet been determined which provisions providers of cloud services engaging in remote recording platforms are required to comply with (private copy levy or other mechanisms). The streaming of copyrighted materials in the context of cloud services can thus currently be considered a grey area. In such a confusing situation, it seems that cloud services providers have adopted a 'wait and see' approach as to whether relevant collecting societies will issue instructions and guidelines. It has been reported that Apple and Amazon have recently entered into agreements with SIAE in connection with, respectively, the iCloud and Amazon Cloud services in Italy – namely, regarding the possibility for registered users to make private copies on several devices and to scan their music files in order to stream them on demand.

## Endnotes

(1) Law 633/1941, as last amended by Legislative Decree 68 of April 9 2003 implementing EU Directive 2001/29/EC.

(2) A recent decision of the Supreme Court of Canada (*Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada* (2012 SCC 35)) also dealt with the meaning of 'communication to the public' in connection with streaming files from the Internet triggered by individual users (namely, online music services).