

# EU DIRECTIVES IN THE FIELD OF COPYRIGHT AND RELATED RIGHTS

Ana-Maria MARINESCU\*

## Abstract

*The aim of this article is to underline the evolution and the importance of the European Directives in the field of copyright and related rights, their contribution to the development of the law and the national implementation, namely their transposition into Romanian Law no. 8/1996 on copyright and related rights. For this purpose, the article will analyze the historical evolution of the European Directives in the field of copyright and related rights and their most important dispositions. Given the wide range of subject matter with which it is concerned, the European Directives in the field of copyright and related rights address to enforcement, protection of databases, protection of computer programs, resale right, satellite and cable, term of protection, rental and lending rights, copyright and related rights in the information society, orphan works and management of copyright and related rights. Taking into account the wide range of subjects that European Directives in the field of copyright and related rights address, it is important to observe the permanent interest of the European legislator on the harmonization of the law on copyright and related rights. In this way, the result was the adoption of 7 directives in a 10-year interval between 1991 and 2001, and of 4 directives, including the one for the modification of the Directive on the term of protection, also in a 10-year interval between 2004 and 2014. Despite the extensive process of harmonization, copyright law in the Member States of the European Union is still largely linked to geographical boundaries of sovereign states.*

**Keywords:** *directive, copyright and related rights, enforcement, protection of databases, protection of computer programs, resale right, satellite and cable, term of protection, rental and lending rights, copyright and related rights in the information society, orphan works, management of copyright and related rights, evolution, harmonization, national implementation.*

## 1. Introduction

At the present 11 Directives in the field of copyright and related rights are in place in the European Union<sup>1</sup>:

a). Council Directive 91/250/CEE from the 14th of May 1991 on legal protection of computer programs, published in the Official Journal of European Communities no. L 122 from the 17th of May 1991, replaced by the Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, published in the Official Journal of the European Union no. L 111/16 from the 5 of May 2009;

b). Council Directive 92/100/CEE from the 19th of November 1992 on the rental and lending right and other rights related to copyright in the field of the intellectual property, published in the Official Journal of EC no. L 346 from the 24th of November 1992;

c). Council Directive 93/83/CEE from the 27th of September 1993 on the harmonization of certain provisions regarding copyright and neighboring rights applicable to the broadcasting of programs via satellite and cable retransmission, published in the Official Journal of EC no. L 248 from the 6th of October 1993;

d). Council Directive 93/98/CEE from the 29th of October 1993 on the harmonization of the duration

for the protection of copyright and certain neighboring rights, published in the Official Journal of EC no. L 290 from the 24th of November 1993;

e). European Parliament Directive and that of the Council 96/9/CE from the 11th of March 1996 on the legal protection of databases, published in the Official Journal of European Communities no. L 077 from the 27th of March 1996;

f). European Parliament Directive and that of the Council 2001/29/CE from the 22nd of May 2001 on the harmonization of certain issues of copyright and neighboring rights in the information society, published in the Official Journal of European Communities no. L 006 from the 10th of January 2002;

g). European Parliament Directive and that of the Council 2001/84/CE from the 27th of September 2001 on resale right for the benefit of the author of original works of art, published in the Official Journal of European Communities no. L 272 from the 13th of October 2001;

h). European Parliament Directive and that of the Council 2004/48/CE from the 29th of April 2004 on insuring the observance of intellectual property rights, published in the Official Journal of European Communities no. L 157 from the 30th of April 2004;

i). Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain

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\* Director General PERGAM, PhD Candidate, Faculty of Law, "Nicolae Titulescu" University of Bucharest (e-mail: [amm\\_marinescu@yahoo.com](mailto:amm_marinescu@yahoo.com)).

<sup>1</sup> Ciprian-Raul Romișan, Paul-George Buta, *Drept român și comunitar al proprietății intelectuale: Dreptul de autor și drepturile conexe* (București: Ed. ASDPI, 2006), 141-318.

[http://ec.europa.eu/internal\\_market/copyright/acquis/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/acquis/index_en.htm).

<http://www.orda.ro/default.aspx?pagina=212>

related rights, published in the Official Journal of the European Union no. L 372/12 from 27 December 2006, amended by the Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, published in the Official Journal of the European Union no. L 265/1 from 11 October 2011;

j). Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, published in the Official Journal of the European Union no. L 299/5 from 27 October 2012;

k). Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, published in the Official Journal of the European Union no. L 84/72 from 20 March 2014.

Having in mind the wide range of subjects concerning copyright and related rights described by the Directives, it is important to analyze their historical evolution, their main dispositions, the level of harmonization and their national implementation into the Law no. 8/1996 on copyright and related rights<sup>2</sup>.

The research of the EU Directives in the field of copyright and related it is an important part of the general research on copyright and related rights, being a part of the legislation structure in the field, together with the international framework.

The international vocation<sup>3</sup> of copyright and related rights is underline by international conventions and treaties like: Berne Convention for the Protection of Literary and Artistic Works (1886), Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), WIPO<sup>4</sup> Performances and Phonograms Treaty (1996), WIPO Copyright Treaty (1996), and Trade Related Aspects on Intellectual Property Rights (TRIPS - 1994). All above mentioned international conventions and treaties are adopted and transposed into our national legislation.

Copyright and related rights has to be protected also outside the national frontiers, on the territory of other states<sup>5</sup>, and, of course, has to be protected on a

harmonize level inside the European Union. The instrument chosen by the European legislator in order to fulfill this aim is the directive, defined as binding the Member State only for the result, leaving the Member States the competence to choose the forms and the ways for fulfilling the objective<sup>6</sup>. As it was underlined in the doctrine<sup>7</sup>, this is the main difference between directive and regulations. The regulations are compulsory, having as the law a general influence, unlike the directive which binds only as regards the result.

The Romanian literature in the field, limits to presents the European Directives in the field<sup>8</sup>, as a collection of laws, or tackles in a comprehensive manner to some subjects of the Directives<sup>9</sup>.

## 2. Content

As I mentioned before, at the present 11 Directives in the field of copyright and related rights are in place in the European Union.

The first Directive, on computer programs, was adopted in 1991. The **Directive on the legal protection of computer programs (91/250/EEC)** was a real European "first" for copyright law, the first copyright measure to be adopted. The objective of the Directive was to harmonize Member States' legislation regarding the protection of computer programs in order to create a legal environment which will afford a degree of security against unauthorized reproduction of such programs<sup>10</sup>. In the sense of the Directive, the object of protection is the 'computer programs', which shall include their preparatory design material<sup>11</sup>. So, the protection in accordance with this Directive shall apply to the expression in any form of a computer program, with the exception of ideas and principles which underlie any element of a computer program, including those which underlie its interfaces that are not protected by copyright<sup>12</sup>. The only criteria that will be applied to determine the eligibility for protection of a computer program is if it is original in the sense that it is the author's own intellectual creation<sup>13</sup>.

Another important disposition of the Directive regards the authorship of the computer programs created by an employee in the execution of his duties or following the instructions given by his employer. In

<sup>2</sup> Published in the Official Journal of Romania no. 60 from 26 March 1996, subsequently amended and completed by Law no. 285/2004 on the modification and completion of Law no. 8/1996 (published in the Official Journal of Romania no. 587/30.06.2004), GEO no. 123/2005 on the modification and completion of Law no. 8/1996 (published in the Official Journal of Romania no. 843/19.09.2005) and Law no. 329/2006 (published in the Official Journal of Romania no. 657/31.07.2006).

<sup>3</sup> Viorel Roș, Dragoș Bogdan, Octavia Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, (București: All Beck, 2005), 24.

<sup>4</sup> World Intellectual Property Organization.

<sup>5</sup> *Idem*.

<sup>6</sup> Ion P. Filipescu, Augustin Fuerea, *Drept instituțional comunitar european*, ediția a V-a (București: Actami, 2000), 38.

<sup>7</sup> *Idem*.

<sup>8</sup> Romițan, Buta, *Drept roman și comunitar al proprietății intelectuale*, 141-318.

<sup>9</sup> Roș, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 419, 423-429, 448-452, 490-492.

Ciprian Raul Romițan, Mariana Liliana Savu, *Drepturile artiștilor interpreți sau executanți*, (București: Universul Juridic, 2008), 47-50.

<sup>10</sup> [http://ec.europa.eu/internal\\_market/copyright/prot-comp-progs/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/prot-comp-progs/index_en.htm)

<sup>11</sup> Art. 1 (1).

<sup>12</sup> Art. 1 (2).

<sup>13</sup> Art. 1 (3).

this case, the employer exclusively shall be entitled to exercise all the economic rights in the program so created, unless otherwise is provided by contract<sup>14</sup>.

Directive 91/250/EEC has been repealed and replaced by Directive 2009/24/EC and has been transposed totally into the Romanian legislation.

The second Directive adopted in the field of copyright and related rights was the **Rental Right Directive** in 1992 which harmonized the rights of commercial rental and lending. In this case, the most important fact of the Directive is that harmonizes certain related rights of fixation, reproduction, broadcasting and communication to the public and distribution at levels in excess of the minimum norms of the Rome Convention<sup>15</sup>. The related rights beneficiaries are the performers, phonogram producers, film producers and broadcasters.

Directive 92/100/EEC has been repealed and replaced by Directive 2006/115/EC and had been transposed into Romanian Law no. 8/1996 on copyright and related rights.

In 1993, two more Directives were adopted.

The **Satellite and Cable Directive** was described in the special literature as a direct response to the deployment of new technologies of transmission of broadcast programs, by satellite and cable that greatly facilitated the broadcasting of television programs across national borders<sup>16</sup>, envisioned in this way the establishment of an internal market for broadcasting services.

Also, one of the most important characteristics of the Directive is that introduce a scheme of mandatory collective rights management with regard to acts of satellite and broadcasting. In this way, according to article 9 (1) of the Directive “Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society”. Thereupon, “Where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and the collecting society which is deemed to be mandated to manage his rights as the rightholders who have mandated that collecting society and he shall be able to claim those rights within a period, to be fixed by the Member State

concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter”<sup>17</sup>.

Law no. 8/1996 on copyright and related rights transposes the above mentioned dispositions of the Directive<sup>18</sup>, cable retransmission right being a case of compulsory collective management<sup>19</sup> together with the private copy remuneration<sup>20</sup>.

In 1993, also the **Term Directive** was adopted, which harmonized the term of protection of copyright and related rights of 70 years *post mortem auctoris*, and set the duration of related rights at 50 years.

The Directive has been repealed and replaced by Directive 2006/116/EC on the term of protection of copyright and certain related rights. According to article 1 of this Directive “The rights of an author of a literary or artistic work within the meaning of Article 2 of the Berne Convention<sup>21</sup> shall run for the life of the author and for 70 years after his death, irrespective of the date when the work is lawfully made available to the public” and according to article 3 the duration of related rights is:

“(1) The rights of performers shall expire 50 years after the date of the performance. However, if a fixation of the performance is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.

(2) The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram has been lawfully published within this period, the said rights shall expire 50 years from the date of the first lawful publication. If no lawful publication has taken place within the period mentioned in the first sentence, and if the phonogram has been lawfully communicated to the public within this period, the said rights shall expire 50 years from the date of the first lawful communication to the public.

(3) The rights of producers of the first fixation of a film shall expire 50 years after the fixation is made. However, if the film is lawfully published or lawfully communicated to the public during this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier. The term ‘film’ shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.

(4) The rights of broadcasting organisations shall expire 50 years after the first transmission of a broadcast, whether this broadcast is transmitted by wire or over the air, including by cable or satellite.”

<sup>14</sup> Art. 2 (3).

<sup>15</sup> Estelle Derclaye, *Research Handbook on the Future of EU Copyright* (UK: Edward Elgar, 2009), 15.

<sup>16</sup> *Idem*.

<sup>17</sup> Art. 9 (2).

<sup>18</sup> Art. 121.

<sup>19</sup> Art.123<sup>1</sup> (1) g).

<sup>20</sup> Art.123<sup>1</sup> (1) a).

<sup>21</sup> Art. 2 Protected Works: 1. “Literary and artistic works”; 2. Possible requirement of fixation; 3. Derivative works; 4. Official texts; 5. Collections; 6. Obligation to protect; beneficiaries of protection; 7. Works of applied art and industrial designs; 8. News.

Three years later, in 1996, the **Database Directive** was adopted. The Directive created a new exclusive “*sui generis*” right for database producers, valid for 15 years, to protect their investment of time, money and effort, irrespective of whether the database is in itself innovative (“non-original” databases). The Directive harmonized also copyright law applicable to the structure and arrangement of the contents of databases (“original” databases). The Directive’s provisions apply to both analogue and digital databases<sup>22</sup>.

As it was mentioned in the doctrine<sup>23</sup>, Law no. 8/1996 on copyright and related rights regulates the databases as object of copyright as derivate works, but transposing the Database Directive, envisages a *sui-generis* right of the makers of databases, and not a right for copyright. Therefore, the Law talks about the makers of databases and not of creators/authors<sup>24</sup>. However, this *sui-generis* right on databases is not excluding the possibility of protection of the databases or their content through copyright and other rights (art. 122<sup>4</sup>). This is reason why the databases are still enumerated by the Law no. 8/1996 as object of protection as derivate works.

In the light of the *sui-generis* right, the maker of a database has the exclusive economic right to authorize and prohibit the extraction<sup>25</sup> and/or re-utilization of the entire or of a substantial part of the database, evaluated qualitatively or quantitatively<sup>26</sup>.

In 2001, was adopted the **Directive of copyright and related rights in the informational society**. The final text is a result of over three years of thorough discussion and an example of co-decision making where the European Parliament, the Council and the Commission have all had a decisive input<sup>27</sup>.

As it was mentioned in the press release of the Directive<sup>28</sup>, its aim was to stimulate creativity and innovation by ensuring that all material protected by copyright including books, films, music are adequately protected by copyright. It provides a secure environment for cross-border trade in copyright protected goods and services, and will facilitate the development of electronic commerce in the field of new and multimedia products and services (both on-line and off-line via e.g. CDs).

The Directive harmonizes the rights of reproduction, distribution, communication to the public, the legal protection of anti-copying devices and rights management systems. Particular novel features of the Directive include a mandatory exception for technical copies on the net for network operators in certain circumstances, an exhaustive, optional list of exceptions to copyright which includes private copying, the introduction of the concept of fair compensation for rightholders and finally a mechanism to secure the benefit for users for certain exceptions where anti-copying devices are in place.

Adoption and implementation of the Directive enabled the Community and its Member states to ratify the 1996 WIPO Treaties - the so-called Internet Treaties<sup>29</sup>.

Implementing this Directive, Law no. 8/1996 on copyright and related rights regulates in Chapter VI, articles 33-38, the Limitations on the Exercise of Copyright. These limits are strictly provided by the law, they cannot be extended by analogy<sup>30</sup>, as in case of the exceptions on copyright and related rights.

Also, the limits and the exceptions has to be enclosed to the so-called 3 steps test<sup>31</sup>: that such uses conform to proper practice, are not at variance with the normal exploitation of the work and are not prejudicial to the author or to the owners of the exploitation rights<sup>32</sup>.

Analyzing the legal norms, the doctrine<sup>33</sup> underlined the following categories of limitations for public use:

1. The reproduction with the scope of quotations (art. 33 (1) b)-d);
2. The reproduction of visual works placed in public places (art. 33 (1) f);
3. Information on actuality problems;
4. temporary acts of reproduction that are transient or incidental forming an integral and essential part of a technical process and the sole purpose of which is to enable transfer, in a network between third parties, by an intermediary or the lawful use of another protected object and that should have no separate economic value on their own, are excepted from the reproduction right<sup>34</sup>;

<sup>22</sup> [http://ec.europa.eu/internal\\_market/copyright/prot-databases/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/prot-databases/index_en.htm)

<sup>23</sup> Roş, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 180.

<sup>24</sup> Art. 122<sup>1</sup>-122<sup>4</sup>.

<sup>25</sup> Art. 122<sup>2</sup> (2) a): extraction shall mean the permanent or temporary transfer of all or a substantial part, evaluated qualitatively or quantitatively, of the contents of a database to another medium by any means or in any form.

<sup>26</sup> Art. 122<sup>2</sup> (2) b): re-utilization shall mean any form of making available to the public all or a substantial part of the contents of a quantitative or qualitative apprised database by the distribution of copies, by renting, or other forms, including by making available to the public of the contents of the database so that anyone may access it in a place and time individually chosen by them. The first sale, on domestic market, of a copy of a database by the rightholder of *sui generis* right or with his consent shall exhaust the right to control resale of that copy.

<sup>27</sup> [http://ec.europa.eu/internal\\_market/copyright/copyright-info/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/copyright-info/index_en.htm)

<sup>28</sup> [http://europa.eu/rapid/press-release\\_IP-01-528\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-01-528_en.htm?locale=en)

<sup>29</sup> WIPO Performances and Phonograms Treaty and WIPO Copyright Treaty.

<sup>30</sup> Roş, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 302.

A. Lucas, *Droit d’auteur et numérique*, (Paris : Litec, 1998), 170-172.

<sup>31</sup> Art. 9 (2) Berne Convention and art. 5 parag. 5 Directive of copyright and related rights in the informational society.

<sup>32</sup> See for more details on the conditions of the 3 steps test Roş, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 304-305.

<sup>33</sup> Roş, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 311-322.

<sup>34</sup> Art. 33 (3).

5. The alteration of a work shall be permissible without the author's consent and without payment of remuneration in the following cases<sup>35</sup>:

(a) If the alteration is made privately and is neither intended for nor made available to the public;

(b) If the result of the alteration is a parody or caricature, provided that the said result does not cause confusion with the original work and the author thereof;

(c) If the alteration is made necessary by the purpose of the use permitted by the author;

(d) If the alteration is a short review of the works by didactic purpose, mentioning the author.

6. For the purpose of testing the operation of their products at the time of manufacture or sale, trading companies engaged in the production or sale of sound or audiovisual recordings, equipment for the reproduction or communication to the public thereof and also equipment for receiving radio and television broadcasts may reproduce and present extracts from works, provided that such acts are performed only to the extent required for testing<sup>36</sup>.

One of the most important limit regulated by the Directive and the one that had been controversial at the level of the Member States till recently is the private copy.

Article 34 (1) Law 8/1996 on copyright and related rights define the private copy: the reproduction of a work, without the author's consent for personal use or for use by a normal family circle, provided that the work has already been disclosed to the public, while the reproduction does not contravene to the normal use of the work or prejudice the author or the owner of the utilization rights.

In order to compensate the prejudice broth to the copyright and related rights holders, the Romanian legislator established a levy system for the private copy remuneration<sup>37</sup>: For the media on which sound or audiovisual recordings can be made or on which reproductions of the works graphically expressed can be made, as well as for apparatus dedicated for copying, in the situation provided for in paragraph (1), a compensatory remuneration established by negotiation, according to the provisions of this law, shall be paid.

The private copy exception doesn't apply to computer programs<sup>38</sup>, for which is permitted only a copy for archive or safety, in the manner in which this is necessary for using the computer program<sup>39</sup>.

On the one hand, the Directive generated a series of documents and consultations very important in the information society economy, like:

1. The Green Paper on copyright in the knowledge economy (16.07.2008)<sup>40</sup>. With this Green Paper, the Commission plans to have a structured

debate on the long-term future of copyright policy in the knowledge intensive areas. In particular, the Green Paper is an attempt to structure the copyright debate as it relates to scientific publishing, the digital preservation of Europe's cultural heritage, orphan works, consumer access to protected works and the special needs for the disabled to participate in the information society. The Green Paper points to future challenges in the fields of scientific and scholarly publishing, search engines and special derogations for libraries, researchers and disabled people. The Green paper focuses not only on the dissemination of knowledge for research, science and education but also on the current legal framework in the area of copyright and the possibilities it can currently offer to a variety of users (social institutions, museums, search engines, disabled people, teaching establishments).

2. The public consultation on "Content Online" (October 2009) with the need to create a genuine Single Market for creative content on the internet, focused on three area of actions:

- Make sure creativity is rewarded so that creators, rightholders, and Europe's cultural diversity can thrive in the digital world;

- Give consumers' clearly-priced, legal means of accessing a wide range of content through digital networks anywhere, anytime;

- Promote a level playing field for new business models and innovative solutions for the distribution of creative content across the EU.

In the press released of the public consultations<sup>41</sup>, is noted that in Europe, the cultural and creative sector (which comprises published content such as books, newspapers and magazines, musical works and sound recordings, films, video on demand and video games) generates a turnover of more than € 650 billion annually and contributes to 2.6% of the EU's GDP, employing more than 3% of the EU work force. European policymakers therefore have the responsibility to protect copyright, especially in an evolving economic and technological environment.

As part of the ongoing discussions on the priorities for a European Digital Agenda, and adding to similar debates currently taking place at national level, the Commission now wishes to focus the debate on practical solutions for encouraging new business models, promoting industry initiatives and innovative solutions, as well as on the possible need to harmonize, update or review the applicable rulebook of the EU's single market.

3. Communication on Copyright in the Knowledge Economy (19.10.2009) aiming to tackle

<sup>35</sup> Art. 35.

<sup>36</sup> Art. 37 (1).

<sup>37</sup> Art. 34 (2).

<sup>38</sup> Art. 81.

<sup>39</sup> Art. 77.

<sup>40</sup> [http://europa.eu/rapid/press-release\\_IP-08\\_1156\\_en.htm?locale=fr](http://europa.eu/rapid/press-release_IP-08_1156_en.htm?locale=fr)

<sup>41</sup> *Idem*.

the important cultural and legal challenges of mass-scale digitisation and dissemination of books, in particular of European library collections.

On the other hand, the private copy system and levies was one of the most controversial subject in the field of copyright and related rights. A mediation process took place at the level of EU in the period 02.04.2012-31.01.2013, date when the mediator António Vitorino presented its recommendations<sup>42</sup>.

The core elements of the recommendations refer to:

- The private copy remunerations between Member States have to be collected at the level of the State where the final consumer reside (this principle results from the European Court of Justice case C-462/09 - *Stichtung de Thuiskopie vs. Opus Supplies Deutschland GmbH*)<sup>43</sup>.

- The general possibility to establish remunerations for devices and equipment depends on the place where the product is capable to make copies, this is way the scope is that the product to be remunerated only one time in the European Union.

- Non-application of private copying levies to professional users.

- Shift the liability to pay levies from the manufacturer's or importer's level to the retailer's level while at the same time simplifying the levy tariff system;

- Oblige manufacturers and importers to inform collecting societies about their transactions concerning goods subject to a levy.

- Place more emphasis on operator levies compared to hardware-based levies in the field of reprography.

- The levies should be visible for the final consumer.

- Ensure more coherence with regard to the process of setting levies by defining 'harm' uniformly as the value consumers attach to additional copies in question (lost profit).

- Ensure more coherence with regard to the process of setting levies by providing a procedural framework that would reduce complexity, guarantee objectiveness and ensure the observance of strict time-limits, for example:

- In the case of a new product being introduced on the market, the decision as to the applicability of levies should be taken within 1 month following its introduction. The provisional level of tariffs applicable should be determined not later than within 3 months

following its introduction.

- The ultimate level of the applicable levy should, to the extent possible, not be superior to the one imposed temporarily. If nevertheless this were the case, the resulting difference should be payable gradually and could be split into several instalments.

- The final tariff applicable to a given product should be agreed or set within 6 months period from its introduction on the market.

In the view of the Recommendations and in light of the Directive of copyright and related rights in the informational society, it is necessary that the Romanian legislation to be harmonized at this level, by amending and completing the dispositions of Law no. 8/1996 regarding the private copy system.

In 2001, after barely surviving its perilous journey between the Commission, the European Parliament and the Council (and back again), the **Resale Right Directive** was finally adopted<sup>44</sup>.

The resale right – as an inalienable right, which cannot be waived, even in advance - was provided, for the benefit of the author of an original work of art, to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author<sup>45</sup>. The right shall apply to all acts of resale involving as sellers, buyers or intermediaries art market professionals, such as salesrooms, art galleries and, in general, any dealers in works of art<sup>46</sup>.

The European Court of Justice Decision in the case C-518/08 (*VEGAP vs. ADAGP*) stated that art. 6 (1) Resale Right Directive<sup>47</sup> must be interpreted in the sense that is not opposing to a national disposition which reserve the benefit of the resale right only to the legal inheritors of the author, excluding the testamentary legatees<sup>48</sup>.

For stating this Decision, the Court took into account on the one hand, the fact that the Directive is intended to assure a certain level of remuneration of authors and this purpose is not compromised by the devolution of the resale right to some legal subjects by excluding others after the death of the artist. On the other hand, although the EU legislator had in mind that legatees to benefit of the resale right after the death of the author, didn't considered that is advisable to interfere in the field of the inheritance national laws, leaving to each state the competence to define the categories of legatees. Results that in the light of the Directive the Member States have the liberty to establish

<sup>42</sup> Ana-Maria Marinescu, "Analiza Recomandărilor lui Antonio Vitorino rezultate din medierea privind copia privată și remunerațiile în reprografie", *Revista Română de Dreptul Proprietății Intelectuale* nr. 3 (2013): 46-49.

<sup>43</sup> See for details on the case Ana-Maria Marinescu, "Gestiunea colectivă a dreptului de autor și a drepturilor conexe. Jurisprudență română și europeană în domeniu", *Revista Română de Dreptul Proprietății Intelectuale* nr. 4 (2014): 107-110.

<sup>44</sup> Derclaye, *Research Handbook on the Future of EU Copyright*, 16.

<sup>45</sup> Art. 1 (1).

<sup>46</sup> Art. 1 (2).

<sup>47</sup> Article 6 Persons entitled to receive royalties

1. The royalty provided for under Article 1 shall be payable to the author of the work and, subject to Article 8(2), after his death to those entitled under him/her.

2. Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1.

<sup>48</sup> Marinescu, "Gestiunea colectivă a dreptului de autor și a drepturilor conexe. Jurisprudență română și europeană în domeniu": 126-128.

the categories of persons which can benefit of the resale right after the death of author.

According to article 21 of Law no. 8/1996, as stated also in the doctrine<sup>49</sup>, the resale right applies only to an original work of graphic or plastic art or of a photographic work. Also, as stated in the doctrine<sup>50</sup>, having in mind the frugifer nature of the resale right, it least all the life of the author and is the subject of being inherited for 70 years after the death of author, according to article 25 of Law no. 8/1996<sup>51</sup>.

The **Directive on the enforcement of intellectual property rights** such as copyright and related rights, trademarks, designs or patents was adopted in April 2004.

The Directive requires all Member States to apply effective, dissuasive and proportionate remedies and penalties against those engaged in counterfeiting and piracy and so creates a level playing field for right holders in the EU. It means that all Member States will have a similar set of measures, procedures and remedies available for rightholders to defend their intellectual property rights (be they copyright or related rights, trademarks, patents, designs, etc.) if they are infringed. The similar set of measures refers to: measures for preserving evidence<sup>52</sup>, right of information<sup>53</sup>, provisional and precautionary measures<sup>54</sup>, corrective measures<sup>55</sup>, injunctions<sup>56</sup>, alternative measures<sup>57</sup>, damages<sup>58</sup>, legal costs<sup>59</sup> and publication of judicial decisions<sup>60</sup>.

**Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights** extended the term of protection for performers and sound recordings to 70 years. In this way the Directive narrows the gap between the copyright term of protection for authors (currently life plus 70 years after the authors' death) and the term of protection for performers (currently 50 years after the performance). Consequential the performers will receive remunerations over a longer period of time.

The Directive also strengthens the position of performers with a number of accompanying measures<sup>61</sup>:

- A 20% fund for session musicians, paid by the record companies. This remuneration ensures that performers who are forced to sell their rights against a one-off flat fee obtain additional payments during the extended term. The fund would apply to all recordings which benefit from the term extension.

- A 'use it or lose it' clause, which means the record company will have to cede control over its copyright to performers if it does not market the sound recording containing the performance. If a record company does not market a recording despite the performers' request, the performers will get their rights back and can market the recording themselves.

- A 'clean slate' provision, which means that producers are not entitled to make any deductions from the contractual royalties due to featured performers during the extended term.

According to art. 2 of the Directive Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 November 2013.

In Romania, the Directive was transposed through Law no. 53/2015 for the modification and completion of Law no. 8/1996. The Law no. 53/2015 was adopted after the term prescribed for the implementation of the Directive, Romania being for a short time in the pre-infringement procedure.

**Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works** sets out common rules on the digitisation and online display of so-called orphan works. Orphan works are works like books, newspaper and magazine articles and films that are still protected by copyright but whose authors or other rightholders are not known or cannot be located or contacted to obtain copyright permissions<sup>62</sup>. Orphan works are part of the collections held by European libraries that might remain untouched without common rules to make their digitisation and online display legally possible.

<sup>49</sup> Roş, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 284.

<sup>50</sup> Roş, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 285-286.

<sup>51</sup> Art. 25.—(1) The economic rights provided for in Articles 13 and 21 shall last for the author's lifetime, and after his death shall be transferred by inheritance, according to civil legislation, for a period of 70 years, regardless of the date on which the work was legally disclosed to the public. If there are no heirs, the exercise of these rights shall devolve upon the collective administration organization mandated by the author during his lifetime or, failing a mandate, to the collective administration organization with the largest membership in the area of creation concerned.

(2) The person who, after the copyright protection has expired, legally discloses for the first time a previously unpublished work to the public shall enjoy protection equivalent to that of the author's economic rights. The duration of the protection of those rights shall be 25 years, starting at the time of the first legal disclosure to the public.

<sup>52</sup> Art. 7.

<sup>53</sup> Art. 8.

<sup>54</sup> Art. 9.

<sup>55</sup> Art. 10.

<sup>56</sup> Art. 11.

<sup>57</sup> Art. 12.

<sup>58</sup> Art. 13.

<sup>59</sup> Art. 14.

<sup>60</sup> Art. 15.

<sup>61</sup> [http://ec.europa.eu/internal\\_market/copyright/term-protection/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/term-protection/index_en.htm)

<sup>62</sup> Art. 2.

For the purposes of establishing whether a work or phonogram is an orphan work, the libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations shall ensure that a diligent search<sup>63</sup> is carried out in good faith in respect of each work or other protected subject-matter, by consulting the appropriate sources for the category of works and other protected subject-matter in question. The diligent search shall be carried out prior to the use of the work or phonogram.

The Directive establish also the mutual recognition of orphan work status<sup>64</sup>, in this way a work or phonogram which is considered an orphan work in a Member State shall be considered an orphan work in all Member States. By consequence, Member States shall ensure that a rightholder in a work or phonogram considered to be an orphan work has, at any time, the possibility of putting an end to the orphan work status in so far as his rights are concerned<sup>65</sup>.

The permitted uses of orphan works are set out in article 6 of the Directive, for this Member States shall provide for an exception or limitation to the right of reproduction and the right of making available to the public provided for respectively in Articles 2 and 3 of Directive 2001/29/EC to ensure that the libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations are permitted to use orphan works contained in their collections in the following ways:

(a) by making the orphan work available to the public, within the meaning of Article 3 of Directive 2001/29/EC;

(b) by acts of reproduction, within the meaning of Article 2 of Directive 2001/29/EC, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration the libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations shall use an orphan work only in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection. The organisations may generate revenues in the course of such uses, for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public.

Member States shall bring into force the laws, regulations and administrative provisions necessary to

comply with this Directive by 29 October 2014. By present, in Romania the collective management organisations submitted to the Romanian Copyright Office (ORDA) proposals for transposing the Directive, but the Directive wasn't implemented yet.

The last of the Directives adopted by the European Union is the **Directive on collective management of copyright and related rights**.

Chronologically the predecessors of the Directive were the Recommendation 2005/737/EC regarding the trans-border management of copyright and related rights for the on-line music services, adopted by the European Commission at 18.10.2005, the public hearings on governance of collective management in the European Union (Brussels, 23.04.2010) and the proposal of the Directive (11.07.2012)<sup>66</sup>.

The Directive 2014/26/EU on collective rights management and multi-territorial licensing of rights in musical works for online uses aims at ensuring that rights holders have a say in the management of their rights and envisages a better functioning of the collective management organizations in the EU. The Commission will work closely with the Member States in order to achieve a correct transposition of the provisions of the Directive into national law by the transposition date of 10 April 2016. *De lege ferenda*, the transposition of the Directive 2014/26/EU on collective rights management and multi-territorial licensing of rights in musical works for online uses into Romanian Law on copyright and related rights requires a minimum set of provisions taking into consideration the fact that Romania implemented already the principles of the Recommendation 2005/737/EC<sup>67</sup>.

The main dispositions of the Directive refer to:

- Definitions<sup>68</sup> – more than 14 definitions are set by the Directive, some of them can be implemented also into the Law no. 8/1996, for example the definition of user;
- General principles<sup>69</sup> like the fact that collective management organizations act in the best interests of the rightholders whose rights they represent and that they do not impose on them any obligations which are not objectively necessary for the protection of their rights and interests or for the effective management of their rights.
- Membership rules of collective management organisations<sup>70</sup> including the electronic ways to communicate with the members;
- Rights of rightholders who are not members of the

<sup>63</sup> Art. 3.

<sup>64</sup> Art. 4.

<sup>65</sup> Art. 5.

<sup>66</sup> Ana-Maria Marinescu, Gheorghe Romițan, Alina Havza, "Analiza Propunerii de Directivă privind gestiunea colectivă", *Revista Română de Dreptul Proprietății Intelectuale* nr. 3 (2012): 238.

<sup>67</sup> Ana-Maria Marinescu, "Analiza Directivei 2014/26/UE a Parlamentului European și a Consiliului privind gestiunea colectivă a drepturilor de autor și a drepturilor conexe", *Revista Română de Dreptul Proprietății Intelectuale* nr. 3 (2014): 112-121.

<sup>68</sup> Art. 3.

<sup>69</sup> Art. 4.

<sup>70</sup> Art. 6.

collective management organisation<sup>71</sup>, which in my opinion had to be set down also in the Statue of the collective management organisations;

- General assembly of members of the collective management organisation<sup>72</sup>, including the possibility of the members to vote through a representative or for voting by electronically means;

- Supervisory function<sup>73</sup> which, in my opinion, is not set very clearly, because interfere with the functions of the Censors Commission establish by the Romanian laws. If this function will be done by external auditors, it will be very expensive for some of the collective management organisations in Romania;

- Collection and use of rights revenue<sup>74</sup>, deductions<sup>75</sup> and distribution of amounts due to rightholders<sup>76</sup>. In my opinion, the weak spot of the Directive is the distribution of amounts due to rightholders. The provisions regarding this point of the Directive were better set in the proposal of the Directive than the Directive itself.

- Management of rights on behalf of other collective management organisations<sup>77</sup>;

- Relations with users: Licensing<sup>78</sup> and Users' obligations<sup>79</sup>;

- Transparency and reporting divided in 5 parts<sup>80</sup>:

- a) Information provided to rightholders on the management of their rights;

- b) Information provided to other collective management organisations on the management of rights under representation agreements;

- c) Information provided to rightholders, other collective management organisations and users on request;

- d) Disclosure of information to the public;

- e) Annual transparency report.

Most of the transparency measures mentioned before are already set down in Law no. 8/1996<sup>81</sup> and in some cases, for example the annual transparency report, it is provided by the Law no. 8/1996 in the form of the annual report. So, in my opinion, the transposition of these provisions have to very well compared in order not to excessive load the obligations of the collective management organisations.

- Enforcement measures divided in 3 parts:

- a) Complaints procedures<sup>82</sup> set by the collective management organisations for dealing with complaints, particularly in relation to authorisation to manage rights

and termination or withdrawal of rights, membership terms, and the collection of amounts due to rightholders, deductions and distributions.

- b) Alternative dispute resolution procedures<sup>83</sup> between collective management organisations, members of collective management organisations, rightholders or users regarding the provisions of national law. In my opinion, this disposition address to a very wide range of subjects, and *de lege ferenda* could be implemented only as regards, on the one hand, collective management organisations and, on the other hand, collective management organisations and users.

- c) Dispute resolution<sup>84</sup>.

In the present, in Romania, we are in the stage of the First Compliance Table. For this, the collective management organisations communicated to the Romanian Copyright Office their proposals of implementing the Directive.

### 3. Conclusions

The European Directives adopted till 2004 refer to a wide range of subjects according to the needs of economic and technical evolution of the society. In my opinion, the most ambitious of them is the Directive of copyright and related rights in the informational society. Also, as I mentioned previously, it was the Directive that generate most of the controversial.

After 2004, we can observe a period extremely relaxed for the European Union for adopting new Directives, therefor were adopted only Directives that repealed and replaced older Directives.

After 2011, we can observe a new wave of EU Directives one more important than the other, culminating with the adoption of the Directive on the collective management of copyright and related rights, which in my opinion is the first supra-national act on the management of copyright and related rights, because till it adaptation some of the Directives were referring to the collective management of rights<sup>85</sup>.

The new generation of Directives (term of protection, orphan works and collective management), demonstrate again the interest of EU on finding legal solutions to problems that we can find in practice, but also a way to preserve a field that is bringing so much money to the EU and international economy. If we think that the phonograms of Beatles or Elvis were

<sup>71</sup> Art. 7.

<sup>72</sup> Art. 8.

<sup>73</sup> Art. 10.

<sup>74</sup> Art. 11.

<sup>75</sup> Art. 12.

<sup>76</sup> Art. 13.

<sup>77</sup> Art. 14-15.

<sup>78</sup> Art. 16.

<sup>79</sup> Art. 17.

<sup>80</sup> Art. 18-22.

<sup>81</sup> Art. 134<sup>1</sup> – 135.

<sup>82</sup> Art. 33.

<sup>83</sup> Art. 34.

<sup>84</sup> Art. 35.

<sup>85</sup> Roş, Bogdan, Spineanu-Matei, *Dreptul de autor și drepturile conexe - Tratat*, 490-492.

approaching the term of 50 years of protection, we will understand we it was a need to extended the term of protection for performers and sound recordings to 70 years. If we think that UE are functioning more than 250 collective management societies, that are managing annually revenues for more than 6 milliards EURO, and the remunerations resulted from music using represent approximately 80% from the revenues collected by the collective management societies<sup>86</sup>, we will understand we it was a need to adopt a Directive on collective management of copyright and related rights.

Analyzing the Directive on collective management of copyright and related rights, I can affirm that its impact on the collective management activity for sure cannot be measured now: maybe it will ultra-regulate the activity of the collective management societies, or maybe it will modernize the Law no. 8/1996 on copyright and related rights which is already exceeded by the practical situations. It will

take years to quantify the impact of the Directive, at least as regards its benefits, but is sure that the way in which the collective management activity is done is not neutral<sup>87</sup> for the EU and that the role of the collective management is growing in the universe of the digital era<sup>88</sup>.

*In Romania the level of harmonization is pretty high, except the fact that the Directive on orphan works wasn't implemented till now and it will be implemented after the term prescribed for transposition. If the Directive on the term of protection and the Directive on the orphan works, were transposed in the national legislation after the term stipulated in the Directives, hopefully this will not happen and the scenario will not repeat in the case of the Directive on the collective management of rights. For this, of course, there is a need also for some political will.*

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<sup>86</sup> Marinescu, Romițan, Havza, "Analiza Propunerii de Directivă privind gestiunea colectivă", 238.

<sup>87</sup> André Lucas, Henri-Jacques Lucas, *Traite de la propriété littéraire et artistique*, 3 édition, (Paris : Lexis Nexis, 2006), 559.

<sup>88</sup> Mihaly Ficsor, *Gestiunea colectivă a drepturilor de autor și a drepturilor conexe*, (București: Universul Juridic, 2010), 165.