

AGCOM: fight piracy with greater availability of content

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Summary

On December 17 2010 the Communications Authority (AGCOM) issued a draft paper on the protection of copyright on electronic communication networks, attachment B to Resolution 668/10/CONS, published in the Official Journal on January 3 2011. The public consultation on the paper closed on March 4 2011, but the debate about many of the issues that it raises seems certain to continue, pending AGCOM's decision in light of the contributions from interested parties and of the hearings that AGCOM will hold in this regard.

The draft paper addresses certain key issues for the media and entertainment sector, including:

- the need to promote the availability of legal, non-infringing digital content;
- the opportunity to inform and educate internet users about infringements that are committed on internet platforms;
- the procedure that copyright owners should follow in order to report infringement and obtain the removal of allegedly infringing content; and
- the measures that AGCOM may apply to protect copyright in media works.

Improving availability of content

In AGCOM's opinion, the most appropriate measure for fighting internet piracy (eg, illegal downloads and file sharing using peer-to-peer networks) is the promotion and provision of a wide range of legally available media content. This should be implemented by providing in-depth, up-to-date catalogue of affordable audiovisual content online.

However, the development of more widely available legitimate content is stifled by the procedures for buying and selling the rights in premium content. Distribution rights in such content are transferred by means of exclusive clauses along the entire distribution chain - this includes video-on-demand, pay-per-view, pay-television and free-to-air programming. Moreover, operators and technology providers frequently create 'walled gardens' (ie, systems that allow access to information services in which the operator is the sole content provider). These allow media stakeholders to maintain monopolistic positions and to control the availability of certain content, thereby blocking the interoperability of transmission platforms. AGCOM has identified a need to create the market conditions for user access to a wider choice of content, including premium

content, on all platforms, thereby facilitating competition between operators in supplying content to end users.

Another critical factor relates specifically to audiovisual content. Contractual provisions on distribution windows for video-on-demand or other distribution channels can act as a barrier to the availability of content on digital platforms. The delay between cinema release and availability through home video and new digital distribution channels (eg, video on demand and internet protocol television) is seen as encouraging the diffusion of pirated content.

AGCOM's view is that the framework of distribution windows should be revised with a view to reducing the delay between the release of audiovisual content through traditional channels and its availability through legitimate digital technology.

The protection of copyright owners' right to adequate remuneration could be secured by differentiating the offer on the basis of product quality. For example, AGCOM suggests making a standard version of a film available online as soon as possible, but reserving a high-definition version for the home video market.

Copyright protection

The draft paper mentions the notice and takedown procedure, which is based on the US Digital Millennium Copyright Act and is already applied on a voluntary basis by most web operators. It describes a procedure for the selective removal of copyright content, to be applied where not all of a website's content is infringing. This allows a website that hosts infringing content to continue to provide its services, notwithstanding such removal. The procedure is as follows:

- The copyright holder (or its licensee) must initially send a notification of copyright infringement to the website operator or the media service provider, together with a takedown request.
- The website operator must remove the material within 48 hours of receiving the request. It may also contact the uploader of the content in order to allow the latter to issue a counter-notice if appropriate.
- If the website operator does not remove the infringing content, the copyright holder may complain to AGCOM.
- AGCOM has five days in which to enter into discussions with the parties, identify the alleged copyright infringement and decide whether the material should be permanently removed. If AGCOM confirms an infringement of copyright, it will order the website operator or media service provider to remove the infringing content without delay. If the operator or provider fails to do so, AGCOM will reiterate its warning that non-compliance will result in penalties.⁽¹⁾

If a website's sole purpose is to share illegal, copyright-infringing content, or if its servers are located outside Italy, the draft paper provides for a total removal procedure.

Having received a notice from the parties concerned, and after seeking appropriate views, AGCOM would be able to draft a list of illegal websites to be made available to internet service providers, or block use of a website name or IP address.

User-generated content and interactivity

In debating AGCOM's draft paper, interested parties should consider that users are often content creators. As the European Commission stressed in an analysis of creative content,⁽²⁾ user-created content and interactive services are having an increasing social, cultural and economic impact on



content industries. Consumers expect more freedom and flexibility to express themselves on new media platforms.

They also want to be clearly informed of whether their activities are compatible with third-party copyright and on what conditions they may derive commercial revenues from their own creations.

Comment

The key issues in developing the range of legitimately available content – particularly access to premium content and the system of distribution windows - should be reviewed to find sustainable solutions.

The measures for copyright protection should be assessed with regard to other fundamental rights, such as freedom of expression and the right of access to the Internet,⁽³⁾ as well as with respect to user's data protection.

As at European level, the debate within the Italian media industry should concentrate on the search for new business models, the promotion of innovative and flexible solutions and the possible need to review existing legislation.

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