



September 13, 2011

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Re: Consultazione pubblica sullo schema di regolamento in materia di tutela del diritto d'autore sulle reti di comunicazione elettronica

(Public consultation on the draft Regulation Scheme On Copyright Protection Over Electronic Communication Networks, Resolution No. 398/11/CONS, July 6, 2011)

Comments from the International Intellectual Property Alliance (IIPA)

The IIPA greatly appreciates the important efforts of the Government of Italy (GOI) and Italy's Communications Regulatory Authority (AGCOM) to address the growing problem of Internet piracy. Unfortunately the draft regulations published on July 6, 2011 contain multiple problems that will undermine their effectiveness and frustrate their purpose. Proposed notice and takedown provisions are too limited in scope and largely inefficient. And perhaps most importantly, the provisions related to the blocking of foreign pirate websites provides only a stripped-down version of AGCOM's early aspirations, unlikely to produce the kind of robust, flexible and timely response required in order to respond to a piracy problem of constantly changing shape and form. We offer these comments which we hope will help AGCOM and the GOI to fashion a more useful set of regulations that is likely to have a greater impact in addressing a rampant internet piracy problem that afflicts Italian and American creators alike.

I. Website blocking

The original AGCOM proposal provided administrative authority to AGCOM itself to issue orders to prevent access in Italy to foreign infringing websites. Italian law already provides the ability to obtain injunctions against foreign sites, and rights holders have done so with respect to Pirate Bay and BTjunkie. But the process is lengthy and therefore unlikely to be sufficiently utilized to make it effective. Under the original AGCOM proposal, orders to prevent access to foreign infringing sites would be available through a quick and cost-effective administrative mechanism. Establishing an expeditious and fair administrative procedure in the

AGCOM regulations is a top priority for rights holders and their authorized distributors and partners in Italy. Instead, however, the draft regulations take a step in the opposite direction: they provide severely limited means to address infringing websites hosted outside of Italy, adding two notification steps and 15 days to the procedures required before the already lengthy review process of the Authority (addressed in section III below) can even begin, and they make no accommodation for the Authority to address repeat foreign infringers.

II. Limited in scope.

Because the proposal lacks provisions specifying the type of online services subject to the framework, it is unclear whether remedies available under the regulations will be applicable to the full range of sites that foster Italy's enormous piracy rate. As currently drafted, the remedies may only apply to the operators of sites that host infringing content. Consequently, operators of sites that index links to infringing content hosted elsewhere or links to peer-to-peer (P2P) files may not be required to comply with takedown requests from rights holders or subsequent AGCOM orders, including the blocking orders mentioned above. Given the central role linking sites play in facilitating piracy, they should not be immune from the proposed remedies. AGCOM should either add provisions that clearly articulate the types of online services subject to the framework or amend the definition of "content" in Article 1 to include links to infringing content.

The draft regulations specifically exclude P2P file-sharing networks from their scope. Art 2.4. We understand that this provision is intended only to clarify that the AGCOM remedies cannot be brought to bear on intermediary application providers. However, this should be clarified. The current draft is vague, and could be interpreted in a manner that would prevent application of the remedies even to sites that induce infringement by knowingly indexing links to content the site operator knows to be infringing.

III. Problems in the contemplated notice and takedown procedures

1. Lengthy delays.

Rights holders frequently only have one to two months—or even a shorter period of time—to recoup their considerable investment in a copyrighted work before consumer interest begins to wane. The availability of expedited notice and takedown remedies is therefore critical to preventing unfair competition and supporting the development and growth of online business models and innovations for authorized distribution. Unfortunately, AGCOM's proposal fails to realize this objective. Under the draft regulations, hosts or uploaders of infringing content can leave infringing material online for up to 49 days with impunity (four days of direct notice, plus 30 days of Head office review, plus a 15-day extension for Head office review), at which point the Board may finally be called upon to issue an order for removal that is subject to a penalty. At a minimum, the entire procedure allows infringing material to remain online for a total of 64 days before hosts or uploaders must comply with a removal order issued by the Board. Given that Article 9 lacks a prescribed timeframe in which AGCOM must respond to a notice or report from a rights holder, the total time that a site operator can leave infringing material online with impunity will likely greatly exceed 64 days.

- Rights holders must wait four days after notice is sent to a host or uploader before they may refer the case to the Authority. Art. 6.4. In the original AGCOM proposal, this was a shorter period of 48 hours.
- Article 8.3 is unclear and could create further delays to the deferral of cases to the Authority: “The deferring of the matter to the Authority cannot be started when the procedure before the site operator or the radio or audiovisual media service operator referred to in Section I of this Chapter it is not concluded within its terms”
- The review by the Head office may take up to 10 days to complete, followed by another 20 days for the respondent to comply – much too long for pirated material to remain widely available online. Arts. 11.1., 11.5. Further, if the respondent does not “spontaneously comply,” he is given an additional 15 days for further inquiry, extending the total length of the procedure before the Authority to 45 days. Arts. 11.4, 11.5.
- Finally, review by the Board could add an additional 15 days, making the total length of time from first notice to final determination potentially 64 days before the respondent faces actual consequences. Art. 12.3.

2. **Lack of transparency toward right holders.**

Certainty and transparency are important to all parties. In cases of third party uploaders, the AGCOM draft regulations do not obligate site operators to report any rebuttals to the rights holder – “The party to which the opposition is submitted, *where possible*, informs the reporting party referred to in article 6, who has the right to present its rebuttal.” Art. 7.2.

3. **Potentially overbroad exceptions.**

The criteria by which the Authority may consider a use to be covered by exceptions to copyright are far too broad. For example, the criterion listed under Art. 10.1(d) is highly subjective: “the occasional circulation, quantity and quality of the content being circulated with respect to the entire work which does not compromise the economical use of the work.” Other criteria are wholly irrelevant. For example, Article 10.1(c) refers to “the absence of commercial and financial purposes.” While this may be a legitimate criterion in determining whether a particular *personal* use is infringing, it is irrelevant with respect to the acts addressed by this regulation—that is, the unauthorized making available, distribution or communication to the public of protected materials. The issue of whether such an act is undertaken for commercial or financial purposes is irrelevant with regard to a determination of whether infringement has occurred, and whether to take down such content or otherwise make it inaccessible.

4. **Unclear treatment of repeat infringers.**

Article 13.3 mentions, but does not cite specific procedures or consequences with respect to repeat infringers. This language applies only to repeat infringers located in Italy, severely reducing this effort’s potential effectiveness.

5. Potential Loopholes.

Several major loopholes threaten to undermine the proposal's objective of providing some quick and effective relief from piracy. For instance, in providing procedures by which rights holders may request that content be removed from a site, Article 6.1 fails to account for scenarios in which a site is operated anonymously. In such situations, the provider should take down the infringing content immediately if the request meets the AGCOM form.

In addition, Article 6 presupposes that websites will provide mechanisms for submitting notices of infringement. Because takedown requests to AGCOM can only be submitted "[a]fter four days from the submission of the request referred to in paragraph 1," it is unclear whether rights holders will have any recourse against a site that provides no means for submitting takedown requests as sites knowingly trafficking in pirated materials will be apt to do.

Article 8.3 creates another possible loophole insofar as it prevents AGCOM from evaluating takedown requests in the event that a party to the issue refers the matter to the Judicial Authority. Given the backlog of cases in Italian courts, it is quite possible that third party uploaders will simply request judicial review in an effort to stymie a takedown request, knowing that a court is unlikely to review the matter for several years.

IV. Issues concerning the "Technical Table."

Articles 3 and 4 create a council termed the "Technical Table," with the authority to facilitate the "achievement of agreements between manufacturers, distributors, radio and audiovisual service providers, information society service providers." Article 5 identifies a number of objectives for the Technical Table. The IIPA supports the involvement of the State in ensuring that parties operate responsibly with respect to the handling of intellectual property, to ensure that intellectual property rights protection exists not just in law but in practice. However, we are concerned that aspects of the provisions could be understood as giving the Technical Table authority to compel rights holders into mandated best practices agreements. While stimulating the legal market is a laudable objective, we do not believe that it would be appropriate for AGCOM to compel rights holders to adopt particular business practices, and we hope that this can be clarified prior to the adoption of a final regulation. Collaborated discussions of distribution practices and other related business issues could raise competition concerns. Furthermore, independent rights holders and small- to medium-sized companies especially must have access to all tools and mechanisms for copyright protection, and mandated best practices of any kind (especially those with high cost) can irrevocably damage their business models and negatively impact the distribution infrastructure in Italy.

Respectfully submitted,

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