

First reactions to the Communications Authority proposal

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The Communications Authority proposal to have a leading role in the protection of copyright on electronic communication networks (as explained in its Resolution 668/10/CONS commented in the previous post) has provoked opposite reactions from copyright owners on one side and supporters of major ISPs on the other side.

The Italian federation for the protection against audiovisual piracy, which represents the interests of copyright owners, welcomes the initiative of the Communication Authority as one that aims at promoting measures to facilitate the legal offer of accessible content to the users and that provides enforcement actions for the rapid removal of content posted in violation of copyright, in obedience to privacy and freedom of expression. According to the federation, the approach does not affect the final user: while it is not much invasive, it has a high deterrent value of the unlawful conduct because the user is not logged off, but it is put in a condition not to violate the law.

On the other side, associations representing ISPs and promoting the freedom of expression are very critical towards the proposal of the Communications Authority. They bring good arguments on the table with respect to the lack of a sound legal basis, at national and EU level, empowering the Authority to issue orders that are able to significantly modify positions and interest that are protected by the Constitution.

The major flaw reported by these associations concern the fact that the proposed 5-step procedure for the removal of contents does not adequately guarantee the right of defense of the subject who posted the content suspected to be copyright infringing.

In fact, once ISP has received a notification from a copyright holder that an unauthorized content has been posted on the ISP's properties, the ISP has only 48 hours to remove such content in order to prevent an intervention of the Authority. Such timeframe is very short, and it does not allow a thorough assessment by the ISP of the reasons put forward by the copyright holder and a consultation with the person who posted the content, to verify if there are counterarguments.

Additionally, the proposed system imposes to ISPs and to the Communications Authority a role that it is not proper to them, i.e. judging copyright violations. Indeed, while in the case of offensive and reprehensible contents it is rather easy to assess, by way of a brief analysis, when the content is contrary to the laws, in case of copyright violations such analysis requires a deeper investigations, such as, for example, whether the subject who posted the content was co-author of the person claiming that his copyright has been infringed, or whether that subject has a fair use defense in his pocket. The proper venue to discuss such issues should be the court, not the private offices of the ISP or the offices of an administrative agency.

It appears actually that even the Communications Authority itself is not so certain to be able to adopt a decision to impose the removal of contents that are suspected to be copyright infringing. In a recent interview, a commissioner of the Communications Authority has expressed the view that the judicial authority is the best placed authority to judge about the violation of copyright, while it is a complicated task for the Communications Authority to vest the same role.