
Kluwer Copyright Blog

Draft regulation for the protection of copyright on electronic communications networks

Francesco Spreafico · Thursday, August 4th, 2011

On July 6, 2011 the Italian Communications Authority (AGCOM) approved the “Draft regulation regarding copyright protection on the electronic communications networks”, currently subject to a 60-day public consultation.

As mentioned in my previous posts, AGCOM’s proposal of new rules for the protection of copyright in Internet and audiovisual media services was heavily criticized because of its ambiguities and the doubt that it could pass muster of constitutionality. Unfortunately, it appears that the draft regulation just approved by AGCOM does not completely solve the problems that have been raised in these months.

It is true that the AGCOM has made an effort to try to clarify and simplify the procedure for requesting the removal of a copyright-infringing content setting forth (i) a first round before the ISP or the provider of audiovisual media services (notice and take-down procedure), where the copyright holder and the uploader of the incriminated content confront themselves (with a notice and a countre-notice) and the provider is requested to evaluate the respective arguments and decide whether to remove the content or to keep it (or, if already removed, whether to restore it) and (ii) a second (eventual) round before the AGCOM itself where the authority, after a summary proceeding, decides about the removal of the content.

It is also true that the draft regulation better specifies which information the copyright holder must provide in order to trigger the obligation to remove contents (e.g., it indicates that the URLs where the copyright-infringing content is located must be provided to the ISP).

However, it appears that a compromise taking into account the needs of all interested parties is still far to be reached. Some examples may help to clarify the point.

The draft regulation briefly lists the criteria for the evaluation by the AGCOM of fair use defenses. The provision does not take into account that there is a copious case law on the matter and that courts would be the appropriate place where to decide whether a fair use defense applies or not, also because in that environment due process and right of defense are fully guaranteed.

Also, the AGCOM indicates the specific forms (attached to the regulation) that the copyright holder and the uploader **MUST** use for the notice and the counter-notice, and for their complaints to the authority. According to the instructions accompanying such forms, supporting arguments

MUST be expressed in maximum 50 characters. This appears to be a non-sense and an extreme limitation to the right of defense.

Furthermore, the draft regulation just focuses on inhibiting ISPs and providers of audiovisual media services from displaying alleged copyright-infringing contents and it does not provide for a control over the individuals. I am afraid that this approach, that de facto does not consider the actual authors of the infringements, could in some ways give the perception of impunity to infringers.

Thus, there is still a lot to discuss before concluding that the regulation proposed by AGCOM is the right solution for copyright protection on electronic communications networks and AGCOM may not have enough expertise to deal with the variety of cases that could be brought to its attention.

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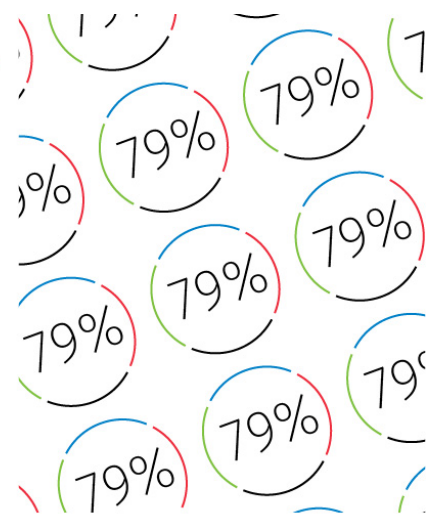
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