

Advisory Committee on Enforcement

Fourteenth Session

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INITIATIVES TO PREVENT PAID ADVERTISING ON COPYRIGHT-INFRINGEMENT WEBSITES

Contributions prepared by Italy and the European Commission

1. At the thirteenth session of the Advisory Committee on Enforcement (ACE), held from September 3 to 5, 2018, the Committee agreed to consider, at its fourteenth session, among other topics, the “exchange of information on national experiences relating to institutional arrangements concerning IP enforcement policies and regimes, including mechanism to resolve IP disputes in a balanced, holistic and effective manner”. Within this framework, this document introduces the contributions of one Member States (Italy) and one non-state Member (the European Union) on institutional arrangements designed to undermine the business model of copyright-infringing websites in accordance with the “follow-the-money” approach. A key element of such a strategy is to seek to prevent the operators of such websites from deriving revenues from the placement of paid legitimate advertising on their illegal sites.

2. In its contribution, the Italian Communications Regulatory Authority (AGCOM) explains its role in preventing infringements of copyright in the online environment. AGCOM exercises an administrative jurisdiction under which copyright holders or their representatives may lodge complaints requesting the termination of infringements committed through online services. Where the complaint relates to a website hosted in Italy, AGCOM may order the hosting provider to remove the infringed work from the website. Where the website is hosted abroad, AGCOM may order access providers in Italy to disable access to the infringing website by blocking domain name resolution or a specific Internet protocol address. AGCOM has initiated proceedings in 1,021 cases, resulting in 887 website blocking orders, granted on a finding of massive copyright infringements. AGCOM recognizes the importance of advertising to the business model of piracy and calls for strong collaboration among rights holders, Internet

Service Providers (ISPs) and other intermediaries to prevent the flow of money to pirate sites from advertising.

3. In its contribution, the European Commission explains that in October 2016, as part of its “follow-the-money” strategy against copyright piracy, it established a stakeholders’ dialogue among right holders, advertisers and advertising intermediaries, which reached agreement on a set of guiding principles for a Memorandum of Understanding on Online Advertising and IP Rights (the MoU). On June 25, 2018, the MoU was signed by 14 companies and 14 associations, including right holders, advertising agencies and technical intermediaries. The objective of the MoU is to minimize the placement of advertising on websites and mobile applications that infringe IP rights on a commercial scale, with the aim of reducing the revenues gained by those websites and applications. Initial indications are that the MoU has led to a reduction in advertisements on pirate websites. However, an external study has been commissioned to evaluate the effectiveness of the MoU. The results will be published in the second half of 2019.

4. The contributions are in the following order:

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THE ROLE OF THE COMMUNICATIONS REGULATORY AUTHORITY OF ITALY IN ADDRESSING ONLINE ADVERTISEMENTS ON WEBSITES THAT INFRINGE INTELLECTUAL PROPERTY RIGHTS

*Contribution prepared by Mr. Giorgio Greppi, Deputy Director, Digital Rights Unit, Audiovisual Content Directorate, Communications Regulatory Authority (AGCOM), Rome, Italy**

ABSTRACT

The Italian Communications Regulatory Authority (AGCOM) is in charge of online copyright enforcement. Since the beginning of its operations, 1,576 complaints have been filed by right holders, 49 per cent of which concerned audiovisual content on dedicated websites. This contribution explains the different competences AGCOM has and illustrates the practical consequences of its activities by way of concrete figures. The final section includes observations that AGCOM has been able to make in its copyright enforcement work on the frequent use of advertising content on pirate websites relating to different brands, including popular trademarks. Two issues deserve particular attention in this respect, namely: (i) brand safety with regard to advertised products; and (ii) the need for increased awareness of the so-called “follow the money” strategy to stop brands from sponsoring pirate websites. In both cases, right holders and intermediaries should be directly involved either in the prevention of the appearance of advertising content on infringing websites or in the enforcement of the underlying intellectual property rights. Indeed, as long as the business models of infringing websites that rely on revenue from online advertisements remain intact, any strategy formulated to tackle online piracy will be ineffective.

I. THE COMPETENCES OF THE COMMUNICATIONS REGULATORY AUTHORITY (AGCOM) IN RELATION TO ONLINE COPYRIGHT INFRINGEMENTS

1. The Italian Communications Regulatory Authority (AGCOM)¹ is an independent public body established by Law No. 249 of July 31, 1997. With regulatory supervisory functions in the telecommunications, press, audiovisual and publishing sectors, it is a convergent authority. Through Regulation 680/13/CONS of December 12, 2013 (Regulation)², AGCOM used its delegated powers and laid down detailed procedures to settle administrative online copyright enforcement issues and undertake educational and awareness-raising activities to prevent illegal conduct.

2. The Regulation is composed of five chapters. The first chapter provides definitions (partly re-iterating those under Italy’s Copyright Law No. 633 of April 22, 1941) and outlines the aim and scope of AGCOM’s action on the ground. Explicitly excluded from AGCOM’s sphere of operation are cases related to peer-to-peer file-sharing activities or other activities that directly involve end users.

* The views expressed in this document are those of the author and not necessarily those of the Secretariat or of the Member States of WIPO.

¹ *Autorità per le Garanzie nelle Comunicazioni.*

² The text of the Regulation, including the recent amendments discussed below, is available in Italian at: <https://www.agcom.it/documents/10179/12343059/Allegato+18-10-2018+1539880733010>.

3. The second chapter concerns measures that AGCOM may put forward to boost the development and protection of legal offerings of digital works. AGCOM promotes user education and encourages the lawful use of online content as well as the development of innovative and competitive commercial offerings.
4. The third and fourth chapters of the Regulation cover enforcement proceedings in cases of online copyright infringement or infringement performed by audiovisual or radio media services respectively.
5. Only right holders or their representatives may file a complaint and initiate proceedings. All other interested parties (e.g., Internet service providers, uploaders and web page / website owners) subsequently become involved in the respective proceedings by exercising their right of defense and submitting the relevant documentation.
6. In assessing a case of actual copyright infringement in the online environment, AGCOM may adopt a variety of measures, depending on the location of the server hosting the website and the content:
 - if the server is located in Italy, AGCOM's home jurisdiction, the Authority may order the hosting provider to remove the infringing work from the respective website; and
 - if the server is located abroad, since it is not possible to order the selective removal of illegal content (this would imply deep packet inspections that are not permissible under European Union (EU) law), AGCOM may order access providers established in Italy to disable access to the infringing website by blocking the domain name server (DNS) resolution or the Internet protocol address.
7. Regular proceedings are completed within 35 working days but are fast-tracked whenever infringements occur on a massive scale (e.g., large number of works, websites wholly dedicated to piracy) and / or seriously harm right holders (e.g., very recent works). In these cases, AGCOM issues an order within 12 working days.
8. The Regulation also sets some indicators in order to define the severity and scale of infringement. Some of these elements originate from national and EU case law and from Italy's Criminal Code. Others concern the nature of the works or the behavior and character of the websites.
9. The main factors to be taken into consideration are:
 - AGCOM precedents and case law;
 - the amount of digital works offered on the respective website;
 - the release window of a work (this criterion is strictly related to the value chains of audiovisual works and, if the first release window (theatrical) is short and valuable, action must be fast-tracked);
 - the economic value of the infringed rights and the extent of damage sustained by right holders;
 - the promotion or encouragement of consumption of illegal content;
 - the presence of misleading claims as to the lawfulness of the services offered;
 - the provision of technical information on means of illegally accessing digital works;
 - the profit made through the respective website; and

- the entity filing a complaint (for instance, if a complaint is filed by a collective management organization or an industry association).

10. Moreover, Article 2 of the 2017 European Act (a national law adopted yearly to implement EU legislation) introduced new provisions on copyright-related issues³. The new provisions have a direct bearing on AGCOM's competence in the area of online copyright protection and address the most controversial issues that had arisen in the application of the Regulation. More specifically, the main amendments have introduced two more types of fast-track proceedings.

11. First, the amendments have increased the clarity in the handling of websites that had been blocked in the past but frequently re-appeared with different DNS names (so-called "alias websites"). When AGCOM has already issued an order, a right holder may initiate fast-track proceedings by notifying AGCOM that the infringement has recurred. Within three days, if the recurrence of the infringement is confirmed, the newly reported website(s) are included in the list of infringing websites in respect of which access providers must take action.

12. In establishing recurrent infringement, AGCOM takes into account elements such as the similarity of the domain name, matching Internet protocol address, references on the website to the same social network profiles / groups, the identity of the domain name registrant and the layout and graphics of the website.

13. Second, an applicant may seek interim measures based on a risk of imminent, serious and irreparable harm likely to arise from the illegal consumption of audiovisual works online (as for example during their release in cinemas). In such cases, AGCOM needs to take measures within three days of receipt of the application. If a precautionary order is issued, the hosting or access providers must comply with the order within two days. The addressee of the precautionary order may lodge an appeal within five days of receipt of the order, which does not have any suspensive effect on the order. If the order is not appealed, the order remains in force and becomes final.

14. In both cases, AGCOM now has the authority to take precautionary measures and update the list of DNS names used by infringing websites in the framework of an interim proceeding, which is much more effective and highly appreciated by right holders.

II. FACTS AND FIGURES ON AGCOM'S ACTIVITY

15. In the five years since the Regulation entered into force, AGCOM has received 1,576 complaints and the tide of complaints seems to be rising. Most of the complaints concern infringements in the online environment, while only few have been filed for infringements on audiovisual or radio media services. Complaints refer primarily to audiovisual (films, television series, live football games) and musical works and, to a smaller degree, to images and editorial works such as newspapers and journals. Of all complaints, 49 per cent concerned audiovisual content on dedicated websites.

16. The technical means of infringement vary and are constantly changing. Together with traditional file-sharing websites, such as torrent and stream-ripping platforms, a shift has been detected from download technologies that require the user to have some technical skills to more user-friendly offers such as streaming networks.

³ Law 167 of November 20, 2017, available at: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2017-11-20;167>.

17. The affected audiovisual works are available on the Internet mainly as content for streaming (about 60 per cent), while musical works are illegally accessible through direct viewing (streaming) or download.

18. Formal proceedings have been initiated following 1,021 complaints. Audiovisual and musical works are the two types of works with the largest number of proceedings, and therefore fast-track proceedings have been brought primarily in relation to these types of works for massive infringement.

19. The substantial amount of voluntarily removed illegal content is an interesting indicator of the effectiveness of the Regulation: about 34 per cent of proceedings are closed without a final order by AGCOM, which is permitted under the Regulation. Nearly 100 per cent of the proceedings implicating Italian servers have been terminated as a result of voluntary removals.

20. However, despite these good results, 887 website DNS blocking orders have been adopted under the Regulation, owing to massive copyright infringements. All concerned sites were hosted on servers located abroad and the major hosting provider or caching reverse proxy companies included Cloudflare Inc., Ecatel, Private Layer Inc. and Ovh SAS. Furthermore, 61 per cent of the servers were located in the United States of America, 3.4 per cent in Canada, 6.8 per cent in the Netherlands and 2.4 per cent in Singapore, while the remainder were spread over several countries.

21. Interestingly, it can be inferred from the economic value of the content provided through infringing websites (considering the potential cost of purchasing the respective rights) that infringements are economically motivated and not due to any assertion of freedom of expression or any confusion by individual users.

22. A useful indicator of these sites' real purpose is derived from an analysis of services used to gain online anonymization. Indeed, 58.3 per cent of the blocked sites were covered by specialized companies that did not reveal the identity of the registrant, such as Whoisguard Inc, Whois Privacy Protection Service and Contact Privacy Inc.

III. OBSERVATIONS IN RELATION TO LEGITIMATE ADVERTISING ON PIRATE WEBSITES

23. The economic objective of an illicit website's activity is also borne out by the plethora of advertisements on the pages in question. The advertising content varies, depending on the circumstances. However, during its activities, AGCOM noted the presence of a variety of brands on target illicit websites. Examples include leading car producers, payment and betting platforms, and even some pharmaceuticals.

24. Remarkably, these findings seem to contravene the golden rule of brand safety, which implies that there is a risk of a reputational damage if a brand is associated with illegal content or channels. Indeed, the combination of a brand and the environment where this brand is advertised can have unexpected effects on the recipients of such advertisements, such as hilarity, when the result is grotesque or inappropriate, and even indignation and anger, when controversial and sensitive issues are involved. This can have unforeseen effects on the appreciation and success of the respective product.

25. As the right holder has little control over the digital advertising market environment, which only entails interactions between website publishers and specialized intermediaries, ensuring brand safety is a serious concern for all right holders who wish to advertise their branded products and services on the Internet.

26. Having said that, advertising content on illicit websites has implications not only for brand safety policy, but also for the so-called “follow-the-money” strategy and approach. As illicit websites operate for profit, it must be recognized that as long as their operators are able to gain financial benefits from these activities, an anti-piracy strategy will have but limited effect. Action must therefore be taken to curtail their monetary streams and break the advertising circle that is central to the business model of such websites.

27. Action to that end must be twofold. On the one hand, awareness must be raised, not only among individual users (consumers), who are always the preferred target of such activities, but also among professionals in the industries concerned. In this respect, specific communication campaigns and educational initiatives (especially for young students) must be conducted on copyright and trademark protection in order to build awareness of the opportunities and threats in the digital environment.

28. On the other hand, both right holders and intermediaries should be directly involved either in the prevention of the appearance of advertising content on infringing websites or in the enforcement of the underlying intellectual property rights. While Internet access providers are already involved, in order to prevent the services in question from performing infringing activities, strong collaboration is required from search engines, payment intermediaries, alternative DNS providers, naming authorities and advertising agencies. To this end, the WIPO Building Respect for Intellectual Property Database pilot project, an initiative to create a global centralized database of copyright-infringing websites⁴, is undoubtedly a useful tool and an effective solution to enhance international cooperation and raise awareness while helping market players to avoid digital threats.

[End of contribution]

⁴ See WIPO (2019), *The Building Respect for Intellectual Property Database Project* (document WIPO/ACE/14/9), available at: https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=439052.

STAKEHOLDERS' COOPERATION UNDER THE MEMORANDUM OF UNDERSTANDING ON ONLINE ADVERTISING AND INTELLECTUAL PROPERTY RIGHTS – AN UPDATE FROM THE EUROPEAN COMMISSION

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ABSTRACT

Internet websites and mobile applications that provide access to content, goods or services infringing intellectual property rights (IPRs) on a commercial scale use the sale of advertising space as one of their revenue sources. In the complex environment of online advertising, the misplacement of advertising is an issue, with brands themselves often being unaware of where their advertisements end up. To address this challenge the European Commission facilitated the conclusion of a voluntary agreement between representatives of the advertising sector. The signatories of the Memorandum of Understanding on Online Advertising and Intellectual Property Rights committed to cooperate in order to limit misplacement of advertising online. This initiative is part of the European Commission's "follow the money" approach to IPR enforcement, which consists of designing policy measures that identify and disrupt the money trail for commercial-scale IPR-infringing activities.

I. "FOLLOW THE MONEY" APPROACH TO INTELLECTUAL PROPERTY ENFORCEMENT

1. In 2014, the European Commission introduced the so-called "follow the money" approach to the enforcement of intellectual property rights (IPRs). The European Commission confirmed this approach when presenting new measures to reduce counterfeiting and piracy in November 2017¹.
2. The "follow the money" approach consists of designing policy measures that identify and disrupt the money trail for commercial-scale IPR-infringing activities, rather than penalizing the citizen for infringing copyright, trademarks, etc. The objective of this approach is to eliminate rogue commercial players operating to the detriment of legitimate actors in the creative and innovative sectors.
3. In practice, the "follow the money" approach translates into voluntary agreements between industry players. Thus far, the European Commission has encouraged the industry representatives to launch cooperation under two memoranda of understanding – on the sale of counterfeit goods via the Internet² and on online advertising and IPRs (details outlined below). Two further European Union (EU)-wide stakeholders' dialogues aim to bring together actors from the transport and shipping industries and providers of online payment services.

* The views expressed in this document are those of the authors and not necessarily those of the Secretariat or of the Member States of WIPO.

¹ See for more information https://ec.europa.eu/growth/industry/intellectual-property_en.

² Harrie Temmink and Natalia Zebrowska (2018), *Stepping up Industry Efforts to Reduce Intellectual Property Infringements – An Update from the European Commission*, pp. 13-18 of document WIPO/ACE/13/7, available at: https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=412285.

4. Another strand of work involving the European Commission, industry and other partners seeks to protect supply chains against threats of counterfeiting and other IPR infringements³.
5. All of the above initiatives complement the solid legislative framework set out within the EU, in particular the 2004 Directive on the Enforcement of Intellectual Property Rights (IPRED)⁴.

II. COUNTERFEITING AND PIRACY AS CHALLENGES FOR ONLINE ADVERTISING

6. The world of online advertising is hugely complex and is governed by algorithms, real-time bidding, ad impressions, performance display ad allocation and an array of other perplexing factors. In this complex environment, the misplacement of advertisement on risky or IP-infringing websites and mobile applications is an issue, with brands themselves often being unaware of where their advertisements end up.
7. Recent studies⁵ confirm that this is an important problem, since the websites and mobile applications that provide access to IP-infringing content, goods or services on a commercial scale use the sale of advertising space as one of their revenue sources.
8. In addition, the presence of advertising for household brands or the availability of well-known payment services on IP-infringing websites and mobile applications can confuse consumers, who may mistakenly believe that they are accessing legal content.

III. STAKEHOLDERS' DIALOGUE AND MEMORANDUM OF UNDERSTANDING

9. On October 21, 2016, under the auspices of the European Commission, representatives of the advertising industry, right holders and advertisers, as well as intermediaries and technology providers, reached an informal agreement on a set of guiding principles⁶ for the establishment of a Memorandum of Understanding on Online Advertising and Intellectual Property Rights (MoU).
10. This milestone allowed further cooperation among the potential signatories of the future voluntary agreement, who represent parties involved in placing, buying, selling and/or facilitating advertising, including advertisers, advertising agencies, trading desks, advertising platforms, advertising networks, advertising exchanges for publishers, sales houses, publishers and IP owners, as well as associations of the above groups.
11. Since the adoption of the guiding principles, the potential signatories have worked closely together to agree on specific commitments that could be rolled out to improve the existing situation. These discussions were concluded on June 25, 2018, when the final text of the MoU was signed by 14 companies and 14 associations⁷.

³ Jean Bergevin (2013), *Preventive Actions Developed by the European Commission to Complement Ongoing Enforcement Measures with a View to Reducing the Size of the Market for Pirated or Counterfeit Goods* (document WIPO/ACE/9/20), available at: http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=261436.

⁴ See for more information https://ec.europa.eu/growth/industry/intellectual-property/enforcement_en.

⁵ European Observatory on Infringements of Intellectual Property Rights (2016), *Digital Advertising on Suspected Infringing Websites*, available at: https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/publications/Digital+Advertising+on+Suspected+Infringing+Websites.pdf.

⁶ Available at: <http://ec.europa.eu/DocsRoom/documents/19462>.

⁷ The text of the MoU is available at: <https://ec.europa.eu/docsroom/documents/30226>. The signatories are Adform, Amobee, Associação Portuguesa de Anunciantes (APAN), Associazione Italiana Commercio Estero (Aice), comScore, Hrvatsko udruženje društava za tržišno komuniciranje - Croatian Association of Communications

12. The overall objective of the MoU is to minimize the placement of advertising on websites and mobile applications that infringe IPRs on a commercial scale, and thus minimize the revenue that such websites or mobile applications gain from online advertising.

13. The MoU contains specific commitments for advertisers, advertising intermediaries and associations. The main commitments of these signatories encourage two types of action:

- collective efforts aimed at limiting the placement of advertising on websites and mobile applications which have been found by judicial, administrative or other enforcement authorities to infringe copyright or to disseminate counterfeit goods on a commercial scale; and
- individual efforts aimed at limiting the placement of advertising on websites and mobile applications in relation to which the advertisers have reasonably available evidence that those websites and applications are infringing copyright or disseminate counterfeit products on a commercial scale based on signatories' own individual policies and assessment criteria.

14. Since the signing of the MoU, the stakeholders involved in the initiative have been meeting with the European Commission on a regular basis to discuss the implementation of the MoU commitments and exchange best practices.

15. The first year of the work under the MoU is set as an assessment period, after which an overview report will be prepared to evaluate the functioning of the MoU and describe the results achieved to the wider public. At that point, the MoU will be also open to accession for new potential signatories.

IV. MEASURING THE PROGRESS ACHIEVED

16. To ensure that the voluntary cooperation under the MoU brings tangible results, the signatories agreed to measure its effectiveness by reporting on their efforts to apply their commitments and by monitoring the impact of the MoU on the online advertising market.

17. Efforts of the signatories will be monitored based on their feedback. To that end, the advertisers and advertising intermediaries agreed to report annually on the concrete means they have in place to comply with the commitments set out in the MoU, as well as on the estimated effectiveness of such means. Associations involved in the MoU cooperation committed to actively seek feedback on issues covered by the MoU from their members and to report annually on that feedback.

18. To measure the impact of the MoU on the online advertising market, the signatories committed to collect and discuss information analyzing the online advertising market, such as documents and reports prepared by public or private bodies, including academia, which is relevant to the work under the MoU.

Agencies (HURA), DoubleVerify, European Association of Communications Agencies (EACA), European Gaming and Betting Association (EGBA), Google, GroupM, Integral Ad Science (IAS), Internet Advertising Bureau Europe (IAB Europe), Internet Advertising Bureau Italy, Związek Pracodawców Branży Internetowej IAB Poland, Internet Advertising Bureau Slovakia, Internet Advertising Bureau UK (IAB UK), ISBA, OpenX, Publicis Groupe, Sovrn, SpotX, Sports rights owners coalition (SROC), Trustworthy Accountability Group (TAG), Uniunea Agentiilor de Publicitate din Romania (UAPR), Romanian Association of Communications Agencies, Utenti Pubblicità Associati (UPA), whiteBULLET, World Federation of Advertisers (WFA).

19. An external study was also commissioned to feed into this process, with a view to monitoring and classifying advertising on IP-infringing websites that are accessible from a group of selected EU member states. The results of this study will be published, together with the overview report on the functioning of the MoU, in the second half of 2019.

20. This monitoring process is stimulated by the European Commission and evaluated with the help of the European Observatory on Infringements of Intellectual Property Rights of the European Union Intellectual Property Office.

V. CONCLUDING REMARKS

21. Our experience in working with stakeholders in the framework of the two memoranda of understanding mentioned above shows that when used alongside legislation, voluntary cooperation can usefully contribute to curbing online counterfeiting and piracy. It can provide the flexibility to quickly adapt to technological developments and deliver efficient solutions. Close cooperation with industry representatives on the implementation of such voluntary initiatives allows the policymaker and legislator to have a better understanding of the challenges that the market players are facing.

22. The “follow the money” approach not only strengthens cooperation between industry representatives through the establishment of a sectorial code of conduct, but also helps identify best practices and disseminate them across the market, to the benefit of a wider range of actors.

23. From the initial months of cooperation through the MoU mechanism, it is already clear that there has been some progress. The stakeholders are becoming more aware of the scale of the problem that the MoU tackles, and, as a consequence, are implementing (or improving) internal processes, which in turn stimulates due diligence in the distribution of online advertising. The European Commission will therefore encourage the signatories to take a positive decision on continuation of the work under the MoU after the assessment period.

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