*Copyright related aspects of the broadband distribution of content**

**di
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An initial and important critical aspect relating to the distribution of content in a broadband environment is the absence at this point in time of mechanisms governing access to and negotiations for works and rights within the context of multi-platform and multi-territory distribution.
As recently pointed out by the Commission in the Communication on Single Market for Intellectual Property, in line with the general philosophy expressed by the Authority in the long but beneficial work that it is preparing on the protection of copyright on electronic communication networks, "attractive and affordable legal offers of digital content to consumers must be developed in parallel to any measures to further strengthen IPR enforcement".
By contrast, currently "licensing transactions are impaired by high costs, complexity and legal uncertainty for creators, users and consumers".
This calls for a rethink on the mechanisms for the circulation of rights ("Europe must become a world leader in innovative licensing solutions") and a greater level of harmonisation (there is talk of a "European Copyright Code", which also through revisiting the information society directive would clarify the group of rights involved in online circulation and the rules governing exceptions and limitations) or even a sort of single European right (regarding which, however, I would be somewhat puzzled).
According to what the Commission has proposed in relation to music rights, the objective could be attained through a close synergy between law and technology. In fact, technology can provide a more suitable instrument for speeding up transactions and increasing the amount of information available (in particular, on the ownership of the rights in the works that one wishes to use).
From a legal standpoint the "European framework for online copyright licensing" would seem to be based on two pillars: collective management and the granting of multi-territory licenses.
On a technological level express reference is made to an "automated and integrated standard-based rights management infrastructure" operating as a rights management tool (databases, transactions and distribution of royalties) .
It has been also discussed about mechanism to facilitate negotiation of licenses such as collective management bodies who negotiate a license (standard, including as regards pricing, in relation to the various uses requested) with interested parties with automatic extension of the effects thereof also to those who did not expressly participate in the negotiations, save for the right of the latter to opt out once they become aware of the negotiation of their rights by the collective management body.
The system of collective licenses could be the means through which one could then offer users subscriptions with license (where members can download everything they want) and subscriptions without license.
The point is quite discussed. It is a solution not unknown in Eu and Italian law (as it is the case of licenses for cable retransmission rights - except the ones granted by broadcasters, who are entitled to negotiate directly – according to Directive

93/83/EEC and article 110-bis and 180-bis of the Italian Copyright Law) but the opting out mechanism rises many problems about freedom of contract by right holders, depriving right holders from the right to exclude and reduce that right to the status of a mere compensation (one of the big issues of the future of copyright), creating conflict with the principle (in the Berne Convention) that no formalities are required to cerate a copyright and to the fact that this mechanism could be inefficient because the owners of the most precious content (and hence most appealing for users), like the majors, would surely exercise their right to opt out and would individually negotiate (on more advantageous economic terms).
Furthermore, the fixed cost of a subscription with license would be an expense for the user that may well not be warranted having regard to the effective access to the protected content and could deprive the user of the economic resources to devote to other online purchases of protected works.
Another problematic aspect in the online circulation of content derives from the articulated structure of rights involved in audiovisual works allied to the various rules on managing those rights that differentiate them. Given that online exploitation requires the acquisition of further rights compared to those involved in the very first use of the work through broadcasting (satellite or terrestrial) or simultaneous redistribution by cable, i.e. the right of reproduction (necessary, for example, for storage on the servers of the suppliers of libraries on demand) and the right of making available (accessing them from a place and at a time individually chosen by the user, according to the wording of Directive 2001/29/EC).
A crucial aspect, as mentioned before, is the territorial scope of the licenses for online exploitation.
As is known, in the matter of intellectual property rights the principle of territoriality applies. In this regard one can cite article 5 of the Berne Convention concerning specifically copyright, article 54 of Law No. 218/1995 under which rights in intangible assets are governed by the law of the country of use and now article 8 of Regulation (EC) No. 864/2007 of 11 July 2007 providing that the applicable law shall be that of the country for which protection is claimed.
The problem of the extraterritoriality of the exploitation (the fact that work broadcast by satellite can be be seen in all of the satellite's footprint) has been resolved by adopting the principle of the country of origin. It was considered that the relevant exploitation of the work occurred at the time of emitting the signal (input of the work into the flux of the signal of the terrestrial segment).
The concept of country of origin is also beginning to take hold for online transmissions.
An important aspect of the circulation and availability of audiovisual content, as aready outlined, is so-called "broadcasting windows". This is a mostly legal aspect of the market because the parties are totally free to negotiate it as they see fit (although within the legal framework of article 9 of the Copyright Law envisaging the multiplicity and independence of the rights that comprise copyright and hence their possible ways of exploitation).
The Authority too has highlighted that a restructuring of the broadcasting/exploitation windows is necessary, for example, to facilitate faster growth in the on demand market for audiovisual content.
ANICA (at the time of consultations on AGCOM Resolution 668/10/CONS) has pointed out that release windows still serve to better value content and that "it is

necessary to avoid the legal offer - offer contemporaneous with theatrical release equation because the current market would not reward such a distribution strategy". It argues that "a different modulation of the windows would not guarantee the cinematographic industry a proper return on investment".
From its hand, the Commission (in the Green Paper on the online distribution of audiovisual works) did cite the case of the Faith Akin movie "The Edge of Heaven", whose theatrical release was accompanied by an on demand offer, available online just for the 15 days following the release of the film at about the same price as a theatre ticket, and this actually increased sales of tickets at the box office.
Last but not least, I would like to spend just few words about the protection against copyright violation on line. Given all the possible solutions to get contents in a legal way, and to develop a rich market for European works, what happens in case something "goes out without permission". Who will care about and how ? Are service provider involved in the story or not ? The issue is quite complicated but may be not too much.
We have to consider laws and principles. From the first side we have some rules that clearly states that access and service providers do not have a general control duty on what happens in the web. This is what is written in article 17 of the D.lgs 70/2003 according to the e-commerce Directive.
They can be involved in the issue when (i) they have clear knowledge of an illegal use of their service (the majority of Italian courts seems to converge toward an approach which avoid every strict liability (responsabilità oggettiva) over the ISP see Fapav/Telecom PFA Film Yahoo, Trib. Roma. Even if we have also the Supreme Court on Pirate bay and the Court of Milan on google/Vividown) ;
(ii) when an authority (a Court or an administrative authority) tells them that something wrong is happening. In this case the service provider (as a third intermediary) can be asked by the authority involved to protect copyrighted works from violation. This is what is provided for in articles 156 of the Italian Copyright Law. But how ? And here is the principle. The European Court of Justice recently (SABAM Scarlet, C-70/10 and C- 360/10) stated that IPR protection is not an untouchable right and it has to be balanced with other values such as the freedom of undertaking.
An Italian Court has recently (in PFA Film Vs. Yahoo!) said that the Italian - as well European - copyright law, striking a balance between opposite values (i.e. one is the protection of copyright), has deemed crucial to promote the free circulation of services in the information society.
So again, an ISP can not be asked, after a violation of copyright has taken place, to have a general control duty for the future and to carry heavy obligation and cost to manage control on any possible copyright violation in the present and in the future.

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Footnotes:
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[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committe of Regions, "A Single Market for Intellectual property Rights Boostering creativity and innovation

to provide economic growth, high quality, jobs and first class products and service in Europe, COM (2011) 287 final, 24.5.2011.
See also the Green Paper on the online distribution of audivisual works in the European Union: opportunities and challenges towards a digital single market, COM (2011) 427 del 13.7.2011).