

Rome
October 13, 2006

Directorate-General Information Society and Media
Audiovisual and Media Policies Unit
European Commission

VIA EMAIL

Re: **Public Consultation on Content Online in the Single Market.**

Portolano Colella Cavallo Studio Legale is an Italian independent Law Firm focusing on media. We work regularly on platforms convergence issues (e.g., cross-platform content, interactive formats, online gambling, internet Television, transactional TV channels, e-commerce, etc.).

Therefore, we intend to give a contribution to the captioned Public Consultation as a player in the media, entertainment, information technology field.

Given our role as legal counsel and not as entrepreneurs/business operators, we deem preferable to answer only on legal issues, without answering to the whole questionnaire.

In particular and preliminarily we want to point out that a clear, uniform legal framework is necessary for the growth of any industry. This is particularly true for the media sector, because of the many criticalities (e.g., criticalities in connection with protection of customers, protection of minors, etc.) which need to be addressed with a proper regulation. This in turn creates the risk of overregulation as well as risks of uncertainty of law, with an obvious negative impact.

2. *Are there other types of content which you feel should be included in the scope of the future Communication? Please indicate the different types of content/services you propose to include.*

As a first "building block", the Communication should clarify what "online digital content" means, what is the extent of this concept and whether (and to what extent) also content and services delivered through platforms different from internet (e.g., Digital Terrestrial Television, satellite, mobile phones) are deemed "online".

In the introduction to the questionnaire, the Commission enumerates the types of creative content and services identified falling within the scope of this public consultation. The list is large and we deem it is a good choice: the future Communication, in fact, should cover any kind of content and services which may be delivered through online media.

Since almost all content and services showed by the Commission can be delivered through internet as well as through other platforms, the point is, again, to understand what are “online media”.

We deem that the Communication should stress the principle of “platform neutrality”: to what extent a movie broadcast through satellite is different from a movie delivered through IPTV (provided that the commercial form of exploitation – e.g., free transmission, pay tv, etc. – is the same)? To what extent playing an interactive game by means of Digital Terrestrial Television is different from playing the same game by internet?

We deem that implementation of platform neutrality principles should be improved. For example, in Italy the conditional access transmission of programs that may be harmful for minors is allowed on Digital Terrestrial Television from 24:00 to 7:00¹ and on satellite and cable from 23:00 to 7:00², determining an unjustified discrimination between platforms and relevant limitations in scheduling programs for multiplatform content providers.

Moreover, the Communication should show the links between online content regulation on one hand and the regulatory framework of the electronic communications and of television services on the other hand, clarifying what is the set of rules applicable in different circumstances. The Communication should also clarify its scope of application, in coordination with the distinction between linear transmission and non-linear transmission drawn by Mediakabel case law³ and by the Commission’s proposal of review of the TV Without Frontiers directive. In this way the Communication would have been increasing legal certainty.

We want also point out that, although product promotions (e.g., prize draws), gambling and other content will have an important role in a pan-European online environment, there is a lack of harmonization in the relevant legislations (e.g., strong limitations to online gambling in certain countries are mirrored by the great freedom granted in UK and an increasingly open market in other countries).

4. *Do you think that adequate protection of public interests (privacy, access to information, etc) is ensured in the online environment? How are user rights taken into account in the country you live / operate in?*

In Italy the Data Protection Code, the Consumer Code, the E-commerce Law (each one implementing EC directives) and other statutes assure an high level of protection to the rights of the user/customer.

¹ Section 11 of Regulation no. 435/01/CONS of the Italian Communication Authority.

² Section 15 of Regulation no. 127/00/CONS of the Italian Communication Authority, as amended.

³ EUROPEAN COURT OF JUSTICE, June 2, 2005, judgement in Case C-89/04, *Mediakabel BV/Commissariaat voor de Media*.

- 5. How important for you is the possibility to access and use all online content on several, different devices? What are the advantages and / or risks of such interoperability between content and devices in the online environment? What is your opinion on the current legal framework in that respect?**

We deem that although the current legal framework regulates interoperability and access rights, the effectiveness of these rules has to be assessed and probably strengthened.

- 15. Are there any problems concerning licensing and / or effective rights clearance in the sector and in the country or countries you operate in? How could these problems be solved?**

In many license agreements the parties do not provide a clear definition of various terms (e.g., Internet, IPTV, xDSL, etc.). Other problems of license agreements are the non univocal use of some platform names, the use of different names/acronyms to mean the same platform, the overlapping of technical concepts (means of transmission) and commercial ones. Hence, certainty of the relevant obligations is at risk.

This however is mainly a contractual issue and providing a regulatory set of descriptions would not be an appropriate solution. The industry should be left work its way through an appropriate set of commonly accepted descriptions.

- 17. Are there any legal or regulatory barriers which hamper the development of creative online content and services, for example fiscal measures, the intellectual property regime, or other controls?**

The creation of new “formats” suffers from a high level of legal uncertainty.

The main European jurisdictions do not offer clear protection for formats and Italian case law has generally denied that formats constitute a copyrighted work or that they are enforceable under other principles of law. There is however a factual market of formats, which relies on mutual trust and on market power of the players.

Some kind of legal certainty, with regard to formats for online works, would limit the number of controversies and allow a greater number of players in the market. In addition, this would benefit the creation of “new” formats tailored to the interactive online industry.

- 18. How does the country you mainly operate in encourage the development of creative online content and services?**

A commission named “*Italia Digitale*” has been appointed to innovate in the Digital Terrestrial Sector. The commission’s focus is extended to every area of digital television and the objective is the creation of a “free” bouquet on the BBC model.

- 33. What actions (policy, support measures, research projects) could be taken at EU level to address the specific issues you raised? Do you have concrete proposals in this respect?**

Coordinate regulation on online content with TV Without Frontiers directive.

Start a process aimed at harmonizing the legislation on gambling, prize draw and premium telephony.

The communication system needs few, clear rules and an effective application of principle "*in dubio pro libertate*." Many member States introduced criminal sanctions for violation of the regulation on audiovisual contents. These policies prevent the effectiveness of the principle "*in dubio pro libertate*", because in cutting edge cases the risk of criminal sanction is a strong deterrent preventing operators from making use of the freedom granted by the said principle in case of dubious interpretation of the rules.

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Sincerely yours,

Portolano Colella Cavallo
Studio Legale