

AGCOM AND THE ADMINISTRATIVE ENFORCEMENT OF IP RIGHTS

JANUARY 2014

The Issues Concerning the Legitimacy of the Regulations

At the end of a process started in 2010, after three public consultations on an equal number of proposals, on December 12, 2012 AGCOM (i.e. the Italian Communications Authority), adopted regulations that established the powers that it can exercise in case of breaches of copyrights in the Internet. The legal framework that has been created is unprecedented in Western countries, since an independent administrative authority is granted the power to impose, in the course of a shortened proceeding, exceptionally severe injunctions and other restrictive measures, traditionally falling under the competence of the judicial authority, and imposed at the end of proceedings where the right of defense is fully guaranteed.

AGCOM's decision to provide itself with strong coercive powers, which can be exercised in the course of unusually short and informal procedures, coupled with the absence of clear legislative grounds on which AGCOM's (self-)regulatory powers might be based, induces to think that, prior to the entry into force of the regulations (scheduled for March 31, 2014), Italian administrative judges will be called to rule on its legitimacy, which was already questioned by various stakeholders in the course of the three aforesaid public consultations, and has been the object of inquiries by the European Commission and the UN *Rapporteur* on Freedom of Expression and Access to Information.

The Persons Concerned by Enforcement

The regulations set forth two distinct administrative assessment and sanctionary proceedings in case of breach of copyrights and any related rights, with respect to:

- “IT service providers”, and most notably *i)* carriers providing the users with an access to the Internet, ; and *ii)* host providers offering memory spaces to clients for the purpose of hosting Web sites and Web pages (social networks, cyberlockers, videostorage systems, etc.)
- Audiovisual media service providers, including both *i)* linear services, such as those offered by classical radio and television broadcasters, and *ii)* non-linear services, such as *video-on-demand*.

With respect to the administrators of Web sites and Web pages, as well as in the case of uploaders (i.e. natural and legal persons uploading digital contents online), even though involved in the former of the above-mentioned processes, AGCOM is not entitled to directly enforce any measures against them. Moreover, as expressly indicated in the regulations, the provisions here described do not apply in case of file sharing, and more generally, of activities carried out by end users who merely use digital contents through downloading (download of sample files) or streaming (viewing without reproduction) services.

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Proceedings in Case of Breaches on the Internet

The procedure starts with the submission of a claim to AGCOM by the owner of the allegedly breached a copyright or any other related rights in connection with Web pages or sites containing a) protected works or cultural products published without his or her consent; or b) connections, through links, torrents, etc., to spaces on the Internet where the protected works or products are available (Art. 6).

Unless the claim is declared inadmissible (due to the absence of formal requirements,) or it is not possible to commence a proceeding (due to the existence of a proceeding previously established before the jurisdictional authority), or the claim is evidently groundless as to the merits, within 7 days the Media Service Department of AGCOM will start an investigative procedure, and notify the service provider (whenever possible), the uploader, and the Web site or Web page administrator.

In the event that the aforesaid persons spontaneously comply with the claimant's request, the Department will terminate the proceeding. This will be the case also if the claimant starts a proceeding before the judiciary. Otherwise the Department will conduct an investigative procedure, which sets forth a five-day period for any defensive statements. At the end of the investigation the Department will submit the issue to the Authority, requesting either that the procedure be terminated or sanctions imposed (Art. 7).

Should the Authority deem that there is a breach of copyrights or related rights on Web sites hosted by servers located in Italy, it will order that the host provider selectively remove the digital contents concerned, or (in case of massive violations), that access to the Web site be disabled. In case of breaches contained in Web sites hosted by servers located abroad, AGCOM may order that the telephone carriers prevent access to said Web sites by their users (Art. 8).

The recipient of the aforesaid orders must comply within 3 days of the relevant notice. Otherwise AGCOM will impose an administrative pecuniary sanction in an amount ranging between 10,000 and 250,000 Euro. Moreover, pursuant to Art. 182^{ter} l. of Law 633/1941, it will inform the Criminal Police of the offense, in order to enable them to evaluate the possibility of criminally prosecuting the persons concerned in connection with the breach of copyright or any related rights. In case of further or particularly serious breaches, AGCOM can order that the activity concerned be suspended, or revoke any licenses or authorizations. Failure to comply with the orders imposed by AGCOM results in the host provider no longer being exempted from tort liability pursuant to Art. 16 of Legislative Decree 70/2003, which implemented in Italy the rules about “safe harbors” set forth by the e-commerce directive 31/2000/CE.

The aforesaid proceedings can last a maximum period of 35 days as from the date of receipt of the relevant claim by AGCOM. In case of massive breaches, or of serious breaches of economic exploitation rights in connection with copyrighted works, the Department can determine to establish a shortened proceedings. The maximum term allowed for the entire procedure is limited to 12 days, while the period set forth for compliance with the sanctionary measures adopted is reduced to 2 days only (Art. 9).

Proceedings in case of Breaches on Television and in Other On-Demand Services

Also this procedure can be started only upon request of a private party, whenever the owner of a copyright or any related rights on an audiovisual work (the so-called “program”) deems that its linear broadcasting (i.e. on the radio or television) or its inclusion in an on-demand catalog has not been authorized by the same, or in any case is in contrast with the limitations agreed under a broadcasting license agreement (Art. 12).

The structure of the procedure reflects that of the proceedings adopted in case of breaches on the Internet, except for the Department's liberty to opt for a shortened proceeding. Similarly, also the measures that can be adopted by AGCOM may differ in case of ascertainment of a breach, and consist in an injunction preventing any further broadcasting of the program, or an order to remove it from the on-demand catalog (Art. 13).

Said measures can be imposed on media service providers located in Italy. For those located outside Italy, even if operating through a land-satellite connection located in Italy, or having a satellite capability in Italy, or in any case publishing or circulating contents or catalogs for an Italian audience, either directly or indirectly, Art. 14 of the regulations sets forth the same sanctionary powers already conferred on AGCOM under Art. 1-ter of Legislative Decree 177/2005, which in connection with the breach of a copyright and related rights also include the possibility of issuing injunctions, and in case of failure to comply, of pecuniary sanctions for an amount ranging between 150 and 150,000 Euro.

On a First Analysis

Even though valuable in itself, the goal concerned, which consists in prosecuting massive IP breaches on the Internet in a speedy and effective way, is pursued through regulations conferring on AGCOM particularly strong repressive powers. In order to be managed effectively, such powers demand the striking of a careful balance between the ownership rights allegedly breached and those that may be in contrast with them (including, among others, freedom of expression and private entrepreneurship), which are equally paramount. However, such balance requires from the very outset an in-depth knowledge of a highly technical field that so far has been outside the scope of activity of AGCOM.

The short period available for defensive statements to the uploader and/or the administrators of the Web pages or Web sites concerned, coupled with the absence of specific measures against clearly unfounded claims, might result in owners of copyrighted contents purposefully exerting pressure on carriers and host providers, who will presumably tend to comply with the orders issued by the Authority (or even prior to that, the requests made by owners of allegedly breached rights) in order not to incur heavy pecuniary sanctions, and to continue to benefit from the so-called “safe harbor” existing in connection with tort liability, pursuant to Legislative Decree No. 70/2003 (and the directive 31/200/CE).

In order to effectively cope with the trends triggered by the new rules, the various players concerned will need to acquire a greater knowledge of the technicalities involved in the enforcement of IP regulations, most notably in connection with the use on the Internet of works and products protected by copyright and any related rights.

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We remain at your disposal for any clarifications and further information.

Yours faithfully.

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