



JONES DAY
COMMENTARY

NEW ITALIAN RULES FOR ONLINE COPYRIGHT ENFORCEMENT

In December 2013, the Italian Communications Authority (“AGCOM” or “Authority”) approved a new regulation providing rules for the protection of copyrights from violations that may occur online or through audiovisual media (“Regulation”). The Regulation will come into force on March 31, 2014 and will bring a number of significant developments for copyright enforcement.

The approval of the text by AGCOM was much awaited and was preceded by a public consultation. The consultation has not avoided a debate (still ongoing) on the implications that such rules may have on the freedom of the internet, notwithstanding the statement by the Authority that the new rules are aimed at opposing massive violations and were not intended to affect individual users. Of course, on the other hand, industry associations (mainly SIAE for authors and ANICA for cinematographic companies) have welcomed the availability of a new instrument for combating digital piracy and the opportunity to educate consumers as to legitimate purchase of contents.

In this *Commentary*, we will not address the legitimacy of AGCOM in issuing a piece of legislation that actually self-attributes the power and sets the procedure for protection in the copyright field, which heretofore has been the province of the legislator and the enforcement by specialized courts. We will focus instead on the practical aspects and the implications for authors and users that the entry into force of the Regulation may have within the Italian legal framework.

The Regulation, apart from setting general rules for promoting the development of digital works, including the establishment of an *ad hoc* committee, provides rules targeted to: (i) online violations (Sections from 5 to 9); and (ii) violations on audiovisual media (Sections from 10 to 14).

ONLINE VIOLATIONS

Preliminarily, it is worth noting that the new procedure will not be applicable to peer-to-peer networks and is mainly targeted to internet service providers supplying mere conduit and hosting services.

In practice, the Regulation provides an alternative to ordinary court proceedings for the holder of the right that believes that its copyrighted work has been illegally made available through a website.

The procedure cannot be started *ex officio* by the Authority, but a specific request must be sent by the author of the copyrighted work to the AGCOM through a form made available by the latter on its website. This procedure is not available if an ordinary proceeding before a civil court is already pending.

Unless the claim by the right holder is deemed not admissible, the Authority gives notice to the ISPs, to the uploader, and to the webpage/website managers of the commencement of the procedure, with details of the works allegedly infringed and of the right to file defensive briefs with the Authority.

The addressees of the notice by AGCOM may immediately comply with the order of the Authority. In such a case, AGCOM will stop the proceeding and will inform both the holder of the right and the addressees of its order that the proceeding has been dismissed.

If the addressees of the notice should decide not to comply, they have a five-day term for sending the Authority a defensive brief. After the expiration of the five days, the Authority may decide to extend the terms to open an investigation or to assess claims of particular complexity. Otherwise, the claim of the right holder is sent to the AGCOM decision committee, along with the proposal for the decision. The case may be dismissed or, if the violation is ascertained, the Authority decision committee may: (i) order the hosting provider to perform a selective removal of the infringing content, if the server is located in the Italian territory and the content can be easily tracked; or (ii) if there should be a massive violation, order the service provider to disable access to the infringing works. This measure will also be adopted against the *mere conduit* provider if the server should be located abroad. The above-described procedure should end in a very short 35-day period from the date in which the author of the copyrighted work has addressed its request to AGCOM.

An even swifter procedure is available when—on the basis of a preliminary and high-level cognition of the facts—the Authority believes that the facts result in a serious violation of economic exploitation rights of a digital work or, in any case, in a massive violation. In such a case, the Authority may proceed with shorter terms than the ones mentioned above, with a proceeding that leads to an order by the Authority within 12 days from the date in which the complaint has been received. In order to assess the existence of serious violation, the Authority takes into account the high number of copyrighted works illegally made available or the high value of the same.

This very fast track certainly may be welcome by the owners of the copyrights exploited online, but it needs to be carefully used and applied by AGCOM in order to avoid excessive and unjustified restrictions of distribution rights.

In the case of noncompliance with the orders of the Authority, fines up to €258,000 may be applied.

VIOLATIONS ON AUDIOVISUAL MEDIA

Further provisions are set forth for violations on audiovisual media. The procedure can be promoted against broadcasting of copyrighted works made by either pay-TV channels or by linear broadcasting.

Similar to online alleged infringements, the procedure will start with a complaint filed by the author of the copyrighted work. Again, the intervention of AGCOM cannot be invoked if an ordinary proceeding before a civil court is already pending, therefore qualifying the AGCOM action as an alternative method for dispute resolution. Unless the complaint is deemed not acceptable by the Authority, the proceeding is started. A notice of the new procedure is sent to the media provider, granting a five-day term for defensive briefs. After expiration of such term and save for the need of extending the terms for a deeper analysis or investigation, the complaint of the right holder is sent to the AGCOM decision committee, along with the proposal for the decision. This proposal may involve a dismissal of the procedure or the

delivery of a warning notice to the media provider, ordering the stoppage of the broadcasting activity for freely accessible channels or the removal of the infringing program from the catalogue of the programs that may be acquired, in case of pay-TV channels. The decision by the AGCOM committee is adopted within 35 days from the date in which the complaint is actually received, and, in case noncompliance with the orders of the Authority, fines up to €258,000 can be applied.

GENERAL REMARKS

The two procedures are similar, save for the fast track that may be applied against online violations. In general, we believe the Regulation is a valid attempt to grant a more effective protection of rights to copyright holders, even if it remains to be seen how it will be actually applied by the Authority, which has no specific competence in IP matters and positions itself as an alternative to the specialized courts that were recently created just for the purposes of having skilled judges to handle complex IP cases. Also, the remedies applicable against AGCOM decisions raise similar doubts, given that these can be appealed before the Rome offices of the Administrative Court of Lazio, which usually focuses on different matters and cannot be deemed fully qualified to decide the merits of a case in violation of copyright.

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