

The new regulation of the Italian Media Authority on copyright enforcement over electronic communication networks

Contents

1. The administrative proceedings: common features
2. The proceeding for the infringements committed over the Internet: peculiar features
3. The proceeding for the infringements committed on media services: peculiar features
4. The critical points of the Regulation

After several draft regulations and related public consultations (the last draft regulation submitted for public consultation was the no. 425/13/CONS dated July 25, 2013, the “**Project**”), on December 12, 2013, the Italian Media Authority (the “**AGCOM**”) finally adopted the new regulation concerning the administrative proceedings (before the same AGCOM) against copyright and neighboring rights infringements over electronic communication networks (the “**Regulation**”).

In the AGCOM's view, the Regulation aims at implementing Sections 14, 15 and 16 of Italian Legislative Decree no. 70/2003 on Electronic Commerce (the “**E-Commerce Act**”) as far as online infringements are concerned, and Section 32-bis of Italian Legislative Decree no. 177/2005 and subsequent modifications – so-called “Consolidated Act on Audiovisual and Radio Media Services” (the “**Media Services Act**”) – as far as infringements through such media services are concerned.

The Regulation will enter into force on March 31, 2014 and establishes and regulates two different administrative proceedings before the AGCOM aimed at ascertaining and repressing copyright and neighboring rights infringements committed through the services of the ISPs (i.e. the Internet Service Providers, contemplated by the E-Commerce Act) and of the audiovisual and radio media service providers (contemplated by the Media Services Act), respectively.

The two administrative proceedings have common and peculiar features.

1. The administrative proceedings: common features

Both proceedings follow a similar procedure:

- (a) **notice of the “legitimate entity”**: the proceedings may be initiated only upon request of the so-called “legitimate entity”, who is defined as the “holder or licensee” of the rights allegedly infringed or the “collecting society” of the same rights or the “union” of the holders or licensees of the afore-said rights. The notice of the “legitimate entity” must be drafted in accordance with the form that the AGCOM will make available on its website; in addition, the notice must contain all the essential information (which are expected to be specified in the afore-said form) and must be supported by the documentation attesting the status of “legitimate entity”¹;
- (b) **preliminary assessment of the notice**: the Media Services Directorate of the AGCOM (the “Directorate”) verifies that the notice complies with all the above-mentioned formal requirements, that it falls within the scope of the Regulation, that it is not plainly groundless (e.g. concerning contents which are in public domain, or under “free use license” – such as the so-called “creative commons” licenses – or other cases of clearly lawful transmission of contents) and that no legal proceedings before the judicial authority is pending on the same matter between the same parties;

¹ As a matter of fact, as far as the infringements committed through media services are concerned, the Regulation does not explicitly require the exhibition of documentation attesting the status of “legitimate entity”. As far as notices concerning massive violations are concerned, the AGCOM will make available a simplified web form.

- (c) **dismissal or preliminary proceeding:** within 7 working days from receipt of the notice, the Directorate (i) shall dismiss the case if the notice does not comply with one or more of the above-mentioned requirements or if the “legitimate entity” has in the meantime initiated a legal proceeding before the judicial authority on the same matter or if the same entity has withdrawn the notice, or (ii) shall send the communication starting the proceeding to the “counter-interested parties” (see below under paragraphs 2 and 3), thereby initiating the preliminary proceeding;
- (d) **counterclaims of the “counter-interested parties”:** within 5 working days from receipt of the communication starting the proceeding, the “counter-interested parties” may submit to the Directorate counterclaims containing any item useful to the establishment of the infringement;
- (e) **decision:** not before 5 working days from the receipt of the communication starting the proceeding by the “counter-interested parties”, the Directorate shall transmit all the documents of the proceeding to the Commission for the Services and Products of the AGCOM (the “**Commission**”), thereby proposing (i) the dismissal of the case or (ii) the adoption of the repressive measures (see below under paragraphs 2 and 3). Within 35 working days from the receipt of the notice by the Directorate, the Commission, after examination of the documents, shall (i) dismiss the case (if it considers that no infringement occurred) or (ii) issue the repressive measures and communicate such measures to the “legitimate entity” and to the “counter-interested parties”. The costs rising deriving from the implementation of the repressive measures are to be borne by the entities to which these measures are addressed;
- (f) **non-compliance:** if the entities to which the repressive measures are addressed do not timely comply with such measures, the AGCOM shall apply an administrative fine from Euro 10.329,14 to Euro 258.228,45. In addition, the AGCOM shall communicate such non-compliance to the judicial police bodies, which shall report it to the Public Prosecutor, so that, if applicable, a criminal proceeding may be initiated.

2. The proceeding for the infringements committed over the Internet: peculiar features

2.1 Purpose

Such proceeding aims at repressing not only the uploading of unlawful contents over the Internet (including the embedding), but also the insertion of links to such contents or torrents of the same.

2.2 The “counter-interested parties”

“Counter-interested parties” of such proceeding are first the ISPs providing access or connection services (“mere conduit”) or non-temporary storage services (“hosting”) for transmission of data and/or contents of third parties (“uploader”) over the Internet. The ISPs providing temporary storage services (“caching”) are excluded from the scope of the Regulation².

If traceable, “counter-interested parties” will be also the “uploader”, the manager of the Internet site where the unlawful contents and/or the relevant links and/or torrents are hosted³, and the manager of the Internet page where the afore-said contents, links and/or torrents are hosted⁴.

² The ISPs providing caching services have been excluded from the scope of the Regulation since their activity is limited to the temporary storage of data and therefore they cannot play any concrete and useful role in the implementation of the orders of permanent removal of the content or of permanent disabling of the access to the site that can be adopted by the AGCOM.

³ This is the entity who manages the Internet site (even with no editorial responsibility of such site) and executed a data hosting agreement with the hoster.

⁴ This is the entity who manages the Internet page, part of an Internet site (even with no editorial responsibility of such page) and executed an agreement with the manager of the afore-said Internet site for managing one of the latter’s Internet page.

2.3 The spontaneous compliance

Each one of the “counter-interested parties” may avoid the adoption of the repressive measures by the AGCOM by spontaneously removing the unlawful contents and/or the relevant links and/or torrents before the Commission adopts the repressive measures. If so, the Directorate (should the file of the proceeding not be transmitted to the Commission yet) or the Commission (should the file be already transmitted to it) shall dismiss the case.

2.4 The abbreviation of the terms of the proceeding

If the Directorate considers that the notice concerns massive infringements or a serious violation of copyright and/or neighboring rights, it may abbreviate the terms of the proceeding (see above under paragraph 1, letters no. (c), (d) and (e)). In particular, the Directorate may abbreviate the terms for the adoption of the repressive measures by the Commission up to 12 working days from receipt of the notice.

2.5 The repressive measures

If the Commission establishes that the alleged infringement occurred, it may adopt the following repressive measures:

- (i) if the server hosting the Internet site where the infringement occurred is located in the Italian territory, an order to the ISP providing the relevant hosting services to remove the unlawful contents, links and/or torrents;
- (ii) if the server hosting the Internet site where the infringement occurred is located within the Italian territory, but the infringement has a massive nature, an order to the above-mentioned ISP to selectively disabling the access to the unlawful contents, links and/or torrents and to automatically redirect users to another Internet page drafted in accordance with the instructions of the Commission;
- (iii) if the server hosting the above-mentioned Internet site is located outside the Italian territory, an order to the ISP providing the relevant mere conduit services to disable the access to the same Internet site and to automatically redirect users to another Internet page drafted in accordance with the afore-said instructions.

The ISP must comply with the measure adopted by the Commission within 3 working days from their communication to it, under penalty of the administrative fine and of the communication of non-compliance to the judicial police bodies described above (see above under paragraph 1, letter (f)).

3. The proceeding for the infringements committed on media services: peculiar features

3.1 Purpose

Such proceeding aims at repressing the “linear” and “non-linear” transmission of audio and/or video contents in violation of copyright or neighboring rights by (audiovisual or radio) media service providers.

3.2 The “counter-interested parties”

“Counter-interested party” of such proceeding is first the media service provider established in the Italian territory which transmitted on a “linear” or “non-linear” mode audio and/or video contents in violation of copyright and/or neighboring rights.

If the afore-said provider is not established in the Italian territory, but nonetheless is subject to Italian jurisdiction (i.e. for using a satellite up-link or satellite capacity appertaining to Italy, pursuant to Section 1-bis, paragraph 4 of the Media Services Act) or such provider is subject to extra-EU jurisdiction, other “counter-interested parties” are, instead, those providers whose services, platform or facility have been used by the afore-said provider to transmit the unlawful contents (and, therefore, the provider of the relevant conditional access services, the provider of the relevant interactive services, the relevant ISP and/or the relevant network or service operator).

3.3 The spontaneous compliance

Differently from the proceeding for the infringements committed over the Internet, the spontaneous compliance appears to have no relevance in such proceeding (except for the compliance with the formal recall described under point (iii) below in respect of the infringements committed by media service providers not established in Italy, but nonetheless subject to Italian jurisdiction or subject to extra-EU jurisdiction).

3.4 The measures

The Commission or the Directorate (depending on the case) may adopt the following measures, if it finds that an infringement occurred:

- (i) in case of “linear” transmission by a media service provider established in Italy, a warning by the Commission against such provider not to transmit audio and/or video contents in violation of copyright and/or neighboring rights within its programming schedule;
- (ii) in case of “non-linear” transmission by a media service provider established in Italy, an order by the Commission against such provider to remove from its catalogue the unlawful audio and/or video contents within 3 working days from the communication of the order;
- (iii) in case of “linear” or “non-linear” transmission by a media service provider not established in Italy, but subject to Italian jurisdiction or subject to extra-EU jurisdiction, a formal recall by the Directorate to the provider of conditional access services and/or to the provider of interactive services and/or to the ISP and/or to the network or service operator (whose services, platform or facility have been used by the afore-said media service provider for committing the infringement) aimed at stopping the relevant infringement.

3.5 The non-compliance

The non-compliance with the measures adopted by the Commission in the cases described above under points no. (i) and (ii) shall bear the consequences specified above under paragraph 1, letter (f).

Conversely, the non-compliance with the measure adopted by the Directorate in the case described above under point no. (iii) shall lead the Commission to adopt a subsequent and additional order, against the same entities to which the afore-said measure was addressed. Pursuant to such Commission’s order, the afore-said entities must undertake all steps necessary to prevent the transmission to the Italian public of the programming schedule or of the catalogues of the media service provider through their services, platform or facility. This Commission’s order must be adopted within 70 working days from the receipt of the notice by the Directorate; in case of non-compliance with such order, the AGCOM shall apply an administrative fine in the range of Euro 150,00 and Euro 150.000,00.

4. The critical points of the Regulation

It is clear that the Regulation offers to holders and other entitled entities a fast and quick procedure (even though we cannot say how really effective it will be) for the protection of their contents over electronic communication networks. However, the Regulation is affected by the same general and systematic doubts as the Project (dated July, 2013 and raised also by the previous drafts), as well as by some new ones.

4.1 The doubtful powers of the AGCOM to adopt repressive measures for the protection of copyright and neighboring rights

The proceedings set forth by the Regulation do not prejudice the competence (established by law) of the judicial authority to enforce copyright and neighboring rights: indeed, a pending judicial proceeding before the judicial authority between the same parties and on the same matter initiated by the “legitimate entity” before or after the submission of the notice to the Directorate leads to the bar to further proceedings or to the dismissal of the case, respectively, before the AGCOM.

This document is delivered for informative purposes only.

It does not constitute a reference for agreements and/or commitments of any nature.

For any further clarifications or research please contact:

Milan

Luca Rinaldi
Tel. +39 02 763741
lrinaldi@gop.it

Rome

Milan

Bologna

Padua

Turin

Abu Dhabi

Brussels

London

New York

www.gop.it

However, should the judicial proceeding be initiated by one or more of the “counter-interested parties” (who may have an interest in initiating such a proceeding, even only for establishing the non-occurrence of the alleged infringement) and not by the “legitimate entity”, then the AGCOM shall not dismiss the case and may (even) adopt repressive measures in relation to the same conduct which is under decision by the judicial authority.

In any case, it is difficult to find the grounds for the (administrative and concurring) powers of the AGCOM to establish and repress copyright and neighboring rights infringements - even if committed over electronic communication networks - on the basis of the existing relevant law provisions. Actually, such powers of AGCOM may exist only if expressly established by law provisions.

But no law provisions expressly grant to AGCOM such powers: which cannot be actually inferred neither from those law provisions generally recognizing to regulatory authorities on public utility services the powers to regulate and control the industries under their authority (Law no. 481/1995, referred to in Section 1 paragraph 6 letter c) of the law instituting the AGCOM), nor from the general powers of surveillance on copyright and neighboring rights infringements granted to the AGCOM by Law no. 633/1941 (the Italia Copyright Law, Section 182-bis), nor from the general regulatory powers over the electronic communications industry granted to the AGCOM by Legislative Decree no. 259/2003 (so-called Code of Electronic Communications, Section 1), nor from the powers to issue injunctions against ISPs granted to the administrative authorities having surveillance duties by the E-Commerce Act (Sections 14, 15 and 16), nor, still, from the regulatory powers to ensure the respect of copyright and neighboring rights by media service providers recognized to the AGCOM by the Media Services Act (Section 32-bis). Perhaps, the sole (administrative and concurring) powers of the AGCOM having some actual legislative basis may be those related to the copyright and neighboring rights infringements committed by media service providers not established in Italy but nonetheless subject to Italian jurisdiction or subject to extra-EU jurisdiction; indeed, Section 1-ter paragraph 8 of the Media Services Act expressly establishes the powers of the AGCOM to adopt repressive measures against such providers.

4.2 The general and precautionary scope of some of the measures set forth by the Regulation

Some of the measures set forth by the Regulation appears to go beyond the purpose of repressing the specific infringement alleged by the “legitimate entity” and of preventing its reiteration for the future (see e.g. the order to disable the access to the Internet site against the ISP or the warning – without any further specification – not to transmit audio and/or video contents in violation of copyright and neighboring rights against the media service provider); as a matter of fact, such measures appear to be aimed at generally preventing any possible future infringement falling within the scope of the Regulation, regardless of its ascertainment on a case-by-case basis before the AGCOM; and also considering that such measures are adopted irrespectively of any negligence or fraud by the provider, it appears that they may actually prevent the exercise of an economic activity (i.e. the provision of services for the transmission of contents over the electronic communication networks) which is not, by itself, aimed at perpetrating infringements and, on the other hand, has to be considered protected by the Constitution like any other activity of the cultural industry.

4.3 No recognition of the self-regulated notice and take-down procedures

The Project, dated July, 2013, correctly required the completion, by the “legitimate entity”, of the self-regulated notice and take-down procedures prior to initiate any administrative proceeding before the AGCOM, thereby filling a clear gap of the EU directive no. 31/2000 and of the E-Commerce Act (implementing such directive); and along the lines of the model set forth by Section 202 of the DMCA (Digital Millennium Copyright Act, supposed source of inspiration for the EU directive no. 31/2000), the afore-said self-regulated procedures have been actually adopted over time also in Europe by a large number of firms in the electronic commerce industry.

Conversely, the new Regulation does not require the completion of any self-regulated notice and take-down procedures prior to submit the infringement notice to the AGCOM (apparently to avoid the extension of the duration of the proceeding before the AGCOM and the consequent risk to spread the infringement). The new Regulation contains only a general statement in relation to the above (i.e. “without prejudice ... to the possible self-regulated notice and take down procedures”), whose meaning and purpose, however, at this point is hard to understand.

INFORMATION PURSUANT TO ARTICLE 13 OF LEGISLATIVE DECREE NO. 196/2003 (Data Protection Code)

The law firm Gianni, Origoni, Grippo, Cappelli and Partners (hereafter “the Firm”) only processes personal data that is freely provided during the course of professional relations or meetings, events, workshops, etc., which are also processed for informative/divulgate purposes. This newsletter is sent exclusively to those subjects who have expressed an interest in receiving information about the Firm’s activities. If it has been sent you by mistake, or should you have decided that you are no longer interested in receiving the above information, you may request that no further information be sent to you by sending an email to: relazioniesteme@gop.it. The personal data processor is the Firm Gianni, Origoni, Grippo, Cappelli & Partners, whose administrative headquarters are located in Rome, at Via delle Quattro Fontane 20.