

4. Access to the Internet as a Human Right

4. Does your legislation/constitution/case-law define access to the Internet as a specific [or human] right?

Presently the access to the Internet is not defined as a specific right in the Italian legislation. Nonetheless, the discussions on this topic are quite lively and the relevant background refers to constitutional principles, in particular to art. 21 of the Constitution¹ where the fundamental right to freedom of expression is stated solemnly.

The principles stemming from said article have been the core of a number of decisions of the Constitutional Court, in parallel to the development of mass media. Art. 21 has been examined in particular with reference to legislation on TV broadcasting, in a first phase until 1975, to justify the public broadcasting service monopoly, then to admit private broadcasters, initially at local and regional level and subsequently to accept and regulate the activity of national commercial TV networks.

The key provision in this article is par. 1, “*All persons have the right to express freely their ideas by word, in writing and by all other means of communication.*” This is interpreted by the Constitutional Court as conferring on all persons the fundamental right to express and communicate their own ideas in all ways and by any technology useful for this purpose. At the same time this provision aims at ensuring that all persons are in the position to receive information by the different means available. In fact, the availability of information sources representative of the many opinions and positions in the society (pluralism) is considered by the Constitutional Court itself as a fundamental condition for democracy. In art. 21 are therefore provided an active position (right to inform) and a passive position (right to be informed).

As the Constitutional Court specifies in its **Decision 15 June 1972, n. 105**², the general public interest in the free flow of information enshrined in art. 21 can be effectively realized only provided that multiple information sources, as well as free access to these sources, are available to all persons, without unjustified legal hindrances, not even temporary, to the dissemination of news and ideas.

¹ Art. 21 Constitution of the Italian Republic

All persons have the right to express freely their ideas by word, in writing and by all other means of communication.

The press may not be subjected to authorisation or censorship.

Seizure is permitted only by a reasoned warrant, issued by the judicial authority, in the case of offences for which the law governing the press gives express authorisation, or in the case of violation of its provisions concerning the disclosure of the identity of the persons liable for the publication.

In such cases, when there is absolute urgency and when immediate intervention of the judicial authority is not possible, periodical publications may be seized by police officers, who must promptly, and in any case within twenty-four hours, report the matter to the judicial authority. If the latter does not confirm the seizure order within the following twenty-four hours, the seizure is understood to be withdrawn and null and void.

The law may establish, by means of provisions of a general nature, that the financial sources of the periodical press must be disclosed.

Printed publications, public performances and events contrary to public morality are forbidden. The law establishes appropriate means for the prevention and repression of all violations.

² <http://www.cortecostituzionale.it/actionPronuncia.do>

On the other hand, there are authoritative legal opinions³ according to which most of the new media and forms of communication find their fundamental statute in the framework of the present art. 21 of the Constitution and must comply with the relevant principles as established by the Constitutional Court. According to this opinions, even though the decision of the Constitutional Court mentioned above (as well others that confirm those assumptions) was issued long time before the Internet has become the widespread mass media we know today, the basic principles stated therein are so broad and comprehensive that they are deemed to be applicable to it. Consequently new media and forms of communication are subject to all the principles therein (be they explicit or implied). Pluralism is possibly the most important, jointly with the obligation of Universal Service. This latter is increasingly considered as a public duty, although no Law does define Internet access as Universal Service yet. The independent Authority for Communications (Agcom) is entitled to set standards for ensuring the conditions to achieve these purposes, even in the absence of new legislation.

A major Law professor Stefano Rodotà (former President of the Italian Authority for Privacy) has proposed that a new provision is added to art. 21, in order to insert in the of the Italian Constitution a general right for all persons to have access to the Internet, on equal conditions and through technologically adequate means.

4.1. Are there any specific restrictions or limitations on this right [Europe: it is not necessary to refer to ECHR but any national decisions or rulings on ECHR should be mentioned]?

No decision is available on this subject.

5. Orphan Works

5.1 Are there extant legislative provisions allowing access/use in relation to orphan works? What kinds of work are involved? Performances?

Presently, no specific law provision concerns orphan works in Italy.

5.2 On what conditions? Is there a remuneration right or right to compensation? Is there a court or administrative procedure to be satisfied prior to use?

5.3 Are there proposals for the introduction of, or changes to, orphan works provisions?

Orphan works are a subject of debate inside interested circles, such as libraries, archives and Intellectual Property Study centres such as Nexa of the Politecnico in Turin (<http://nexa.polito.it>).

Any proposal for the introduction of specific provisions on orphan works is expected to follow the possible initiatives of the European Commission after its Communication of 19.10.2009 COM(2009)532 final, on Copyright in the Knowledge Economy.

³ Paolo Caretti "Diritto dell'Informazione e della Comunicazione" Bologna, Mulino, 2009, page 230.

6. Graduated Response Laws or Agreements

6.1 Within the specific context of p2p filesharing of audio-visual works and sound recordings, does your national law contain laws (or proposed laws) providing for a graduated response “solution”? On what conditions? Three strikes, etc.?

No graduated response is provided for in Italian Law as far as p2p filesharing of audio-visual works and sound recordings is concerned.

Presently the only direct provisions on the liability of Internet service provider derive from the European directive on e-commerce and are contained in articles 14-17 of legislative decree 70/2003.

A reference to service providers' liability is contained also in art. 68-bis of the Copyright Law concerning the mandatory exception for so called “technical copies”, that has been inserted in the Italian system in 2003, as follows:

Without prejudice to the provisions concerning the liability of the intermediary service providers set out in the law regulating the electronic commerce [emphasis added], temporary acts of reproduction which have no independent economic significance, which are transient or incidental and integral and essential part of technological process and whose sole purpose is to enable the transmission in a network between third parties by intervention of an intermediary or the lawful use of a work or other subject matters shall be exempted from the reproduction right.

This reference is meant to confirm that, also “technical copies” must comply with the conditions required by e-commerce legislation for the liability exemption of service providers.

As to the enforcement of copyright in the Internet, we should add some information on recent steps by the **Independent Authority for Communications (hereafter “Agcom”** or Authority; www.agcom.it) about Copyright in electronic communication networks.

The Agcom considers itself as the Authority competent to supervise the proper functioning of systems for the dissemination of copyright content in the Internet. The source of its powers in the field of copyright is identified in art. 182-bis of the Copyright Law, according to which, the Authority is entrusted to supervise premises where the use in public by air or by cable takes place and the broadcasting activity is carried on by any means. Such supervision is carried on pursuant to the rules that govern the Agcom activity and powers.

This attribution was strengthened by legislative decree 15 March 2010, n. 44, amending the “Testo Unico sui Servizi di Media Audiovisivi e Radiofonici” (hereafter Consolidation Act on Audiovisual Media and Radio Services)⁴. Art. 32-bis, par. 2 lett. b) forbids service providers to broadcast, re-broadcast or make available to users in any manner, without exceptions for any type of service, “programs” whose intellectual property rights are owned by third parties, without the consent of the relevant rightowners. The Agcom is appointed by the same article to approve the regulations necessary to effectively enforce limits and prohibitions established in the said Consolidation Act for the copyright protection.

⁴ The consolidated text of Legislative Decree n. 177/2005 on audiovisual and radio media services is in www.medialaw.it/radiotv/2005177.htm

This broad competence is considered to include also all public communications through electronic networks.

After a thorough analysis of the results of its survey on copyright on electronic communications networks in 2010, on December 22, 2010 the Agcom issued a Resolution⁵. It has been submitted to public consultation, in view of issuing regulations to provide a legal solution to P2P and in general to Internet Piracy. It recalls also that copyright protection and enforcement must be balanced by the compliance with the principles governing freedom of expression and the right to privacy.

The document is summarized at the end of this section of the questionnaire but it should be stressed that only after the term of 60 days allowed for the consultation of the interested parties and the hearings that the Agcom can deem useful to held, it will be decided:

- a) which actual provisions will be introduced on the basis of Agcom' regulatory powers;
- b) which actions and incentives to private parties will be put in place;
- c) which amendments to the Copyright Law are considered necessary or opportune.

If some measures are published before the Dublin study days, we will send you an update.

6.2 Do such proposals include an educational aspect – enhancing awareness of intellectual property protection, as well as measures to (1) make Internet access more secure in order to prevent illegal activity; (2) – favour availability of legal services?

6.3 Is there a court procedure and/ or administrative agency that oversees the proceedings or authorises interruption or termination of internet access?

6.4 Is it possible to assess the effectiveness of the implementation of these measures, both as a matter of stemming piracy, and with respect to the development of legal services ?

6.5 Is there any case-law on the possible (own initiative) use of blocking or filtering technology by an ISP, as distinct from situations where an ISP is required by a court or administrative agency to terminate subscribers access (i.e. injunctive relief)?

6.6 Are there private agreements among copyright owners and internet service providers that function similarly to “3-strikes” laws?

The Agcom's Resolution contains the actions that the Authority is going to pursue in support of copyright compliance and copyright enforcement in the Internet. These actions include the introduction of best practices, the encouragement of standard agreements between right-owners and service providers and possible proposals for amendments of the Copyright Law (still to be specified), to cope with technological developments. The comprehensive aim of all the envisaged actions is to facilitate and increase the access to legal contents in the Internet.

Among the proposed actions there are the following:

- 1) promotion of diversified legal offers of audiovisual and sound content and of new business models;
- 2) removal of the barriers to the development of legal offers of copyright content by means of the enlargement of the access to premium content, the interoperability of distribution platforms and the shortening of “windows” for the publication of contents through different distribution channels;

⁵ Delibera 668/10/CONS “Consultazione pubblica su lineamenti di provvedimento concernente l'esercizio delle competenze dell'Autorità nell'attività di tutela del diritto d'autore sulle reti di comunicazione elettronica”.

- 3) information campaigns and education initiatives increasing the awareness of the public, in particular the young, about the risks deriving from piracy;
- 4) encouragement and standardization of extended collective licenses for file sharing services, providing positive solutions in terms of efficiency, transaction costs and easy payment by the users;
- 5) increased security of payment methods (including m-payment).

The planned actions are described in detail the Resolution.

Specifically, the power of the Agcom in respect of service providers refers to art. 14.3, art. 15.2 and art. 16.3 of legislative decree 70/2003 implementing the e-commerce Directive. Said articles state that, without prejudice to the tasks and prerogatives of the judicial authority, in case of mere conduit, caching and hosting, the supervising administrative authority (i.e. Agcom) can order the service provider to stop or prevent the infringements realized through its service. This does not involve a general obligation of vigilance by the service provider, but selective acts in execution of such order.

One of the actions described in the consultation paper is the Adoption of best practices already in place abroad, such as notice and take down procedures applied in the US. The Agcom proposes to introduce a specific procedure that should be articulated as follows:

- 1) The procedure is initiated upon request of the right owner/s of illegal content to the service provider.
- 2) The interested party can complain to the Agcom in case the allegedly illegal content is not removed within 48 hours.
- 3) Agcom is competent for the hearing of the parties involved in the controversy.
- 4) After hearing the arguments of the parties about the legitimacy of the content usage, the Agcom can decide and order immediate removal of the illegal content.
- 5) The Agcom shall monitor the subsequent compliance with its order (stay-down) and punish the provider in case of repeated non-compliance.

This procedure is intended to be more efficient and rapid than the criminal prosecution, not least because no evaluation of the intent and awareness of the uploader or content provider is needed; it is exclusively needed to prove that the usage was unauthorized.

The procedure for the selective removal shall be applied when a provider, based in Italy, hosts both legal content and copyright infringing content.

When the provider's activity concerns only infringing contents or the provider's servers are outside Italian territory, the Authority envisages two solutions: a) drafting and updating of a list of illegal sites to be made available to service providers; b) in most serious cases, after hearing the parties, blocking the domain name and IP address of the infringing site.

A technical panel among all interested parties should be created in order to support and facilitate the application of the measures, when adopted.

Among measures to combat on-line piracy, the paper deems it necessary to promote the legality awareness and education, as well as the appreciation of the value of creativity through information campaigns. Proper copyright information should also be included in all hosting and access contracts.

As to illegal file sharing, the Authority considers that the most proper solution might be the promotion of agreements between right owners organization and access providers; the Agcom explicitly refers to examples of extended collective licenses already in place in some Nordic Countries.

These arrangements would allow users to subscribe “licensed accounts” paying a small surcharge on the price of their connection. Such licensed accounts should cover the authorization to share protected contents among final users, with the exclusion of all commercial usages or purposes. The revenues so generated should be paid to collective administration organizations that would be in charge of distribution.

It should become mandatory for providers to offer to their subscribers the option for tariff schemes that include the “license” for file sharing. The conditions and content of these schemes should be negotiated by collecting organization and providers, with the collaboration of consumers’ association.

Such agreements between collecting societies and providers shall contain opt-out provisions for right owners, so complying with exclusive rights granted to right-owners by international treaties. In the Resolution it is also recognized that the system should be implemented through mandatory legal rules.

Finally, the Authority intends to take charge of a system for dispute resolution, on the basis of the suggestion of recital n. 46 of European Directive 2001/29/EC and of the European Commission’s Recommendation 2005/737/EC of May 18, 2005 on collective cross-border management of copyright and related rights for legitimate online music services.

7. Private Agreements and UGC

7.1 Are there private agreements among copyright owners and hosts of UGC content sites regarding the filtering of content posted to the sites? Are there inter-industry statements of “best practices” regarding filtering? Have government authorities in your country undertaken initiatives to encourage the adoption of such accords?

7.2 How is the filtering to be accomplished?

7.3 Have there been any cases concerning such agreements or “best practices”?

7.4 Outside the existence of such accords, have courts themselves imposed remedies requiring measures such as "take down, stay down"?

The agreements on user generated content present very specific features, that mirror the variety of business models of these services and the different approaches to copyright on the side of ISP.

After refusing any liability as content provider, Google has changed its position in 2010 and signed an agreement with SIAE and with many independent record producers in Italy, while at the same time increasing its advertisement offer in Italy. No preventive content filtering obligation is contained in such agreements. However, the procedure for notice and take down of illegal content is regulated in the agreements. As effect of this procedure Google is

engaged to remove from its video services all files containing the specific illegal content through the application of its filtering technology based on fingerprinting.

Other providers still refuse to subscribe obligations for the usages of copyright works in their UGC services, considering themselves in the position of mere hosting providers.

New developments could be expected following the publication of the Agcom Regulations, issued on the basis of art. 22-bis of the above mentioned Consolidation Law, following the guidelines laid down by the Legislative Decree no. 44/2010, implementing the European directive on audiovisual media services (Directive 2010/13/UE which repealing Directive 89/552/EEC, as amended by Directives 97/36/EC and already 2007/65/EC).

In December 2010 the Agcom has enacted the regulations implementing Directive 2009/13/EC, in compliance with the above mentioned Decree 44/2010 consolidating d.lgs. 177/2005 on audiovisual media and radio services. The two regulations concern online services that allow users to access, with or without charge, a program at any time they wish (video on demand - Annex A of Resolution 607/10/CONS⁶) and online services offering linear programming, based on a predetermined time scheduling (Web-TV, IPTV and mobile TV, etc. - Annex A of Resolution 606/10/CONS).

The main features considered by Agcom to define the scope of the two regulations refer to the actual possibility that the two types of audiovisual media operate in competition with other broadcasting services.

Some requirements must characterize the newly regulated audiovisual services. Linear programming TV services are subject to the Agcom's regulation if they present a program schedule longer than 24 hours per week and generate annual revenues exceeding € 100,000 arising from advertising, teleshopping, sponsorship, contracts with public and private entities, as well as from public subsidies and pay television. These services must require a license issued by Agcom and apply for inscription in the Register of Communications Operators (ROC).

After thirty days, the audiovisual media service provider may begin to transmit without receiving the Agcom reply, in application of the principle of tacit consent (as provided by art. 20, Law No 241/90, instituting the Agcom), except in those cases when the Authority requests further documentation.

The same requirements apply to on demand services. However, instead of the mentioned license, they must only file a simple declaration when they start their transmission activity.

There is some debate on whether UGC services are excluded or not from the scope of the regulations on on-demand services. The opinion presently prevailing is that they are exempted provided that their actual activity does not imply any kind of selection of published

⁶ Art. 1, paragraph 1, lett. d, Annex A of Resolution 606/10/CONS "Regulation on the provision of on-demand audiovisual media services pursuant Article. 22-bis of the audiovisual media and radio services .".

content and is, moreover, without any economic purpose⁷. According to the indications of Agcom, even indexing and classification of UGC constitutes “editorial selection”. The discussions on the Regulations are still open but, at a first glance, video services such as YouTube could fall in the scope of the Regulation on on-demand services, because of their indexing functionalities and their evident commercial approach.

However, both linear and on demand services must comply with rules concerning copyright rules, the obligation of correction in case of inaccurate statements and the protection of minors provided by the Consolidation Law on audiovisual media and radio services, already applied to broadcasting services.

⁷ “Regulation on the provision of linear audiovisual media and radio services in other means of electronic communications pursuant to art. 21, comma 1-bis of the Consolidated Law of audiovisual media and radio services”