ALAI Comité Exècutif, 15 March 2014

AGCOM regulation

The Italian Communications Authority (Agcom) issued its long debated regulation on the copyright enforcement on electronic communications networks and its implementation procedures pursuant to legislative decree of April 9, 2003, no. 70 on 12 December 2013[1].

Its drafting and enactment have been surrounded by lively criticisms, expressed in the two rounds of consultation carried out by the Authority and specially in the press and in blogs, supporting the arguments against the Regulation presented by technology companies and telcos.

Agcom's circumspect attitude is reflected in art. 18, that states that the Authority reserves the right to revise the regulation provisions on the basis of the experience deriving from its enforcement, as well as in light of technological innovation and market evolution. Such amendments can also be introduced on proposal of the newly instituted Committee described below.

The Regulation is divided into five chapters: I. General principles; II. Measures to foster the development and protection of digital works; III. Procedures for the protection of online copyright pursuant to Legislative Decree of April 9, 2003, no. 70; IV. provisions related to the copyright protection on media services; V. Final provisions. It will entry into force on 31 March 2014, therefore no information is available on its actual working and effects.

The mentioned criticisms concern the merits of the Regulation, as well as the Authority's powers to issue such rules. The main legal sources for the Regulation are:

a) the Copyright Law no. 633 of April 22, 1941 and, as to the competence of the Authority, its article 182-bis.

c) The Consolidated Act on audiovisual and radio media services, approved by Legislative Decree of July 31, 2005, no. 177, as amended by Legislative Decree of March 15, 2010, no. 44. This latter is the decree implementing the Audiovisual Media Services Directive of 2010.

d) The Electronic Communications Code, approved by Legislative Decree of August 1, 2003, no. 259, implementing the directives on the electronic communications framework.

e) The Legislative Decree of April 9, 2003, no. 70, implementing directive 2000/31/CE on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

Some definitions used in the Regulation are taken from the mentioned laws, while others have no specific precedent in Italian laws, such as "website manager" (the provider who, on the Internet, manages a space including digital works or parts thereof or hyperlinks to the same, also uploaded by third parties); "webpage manager" (the provider who, within a website, manages a space where there are digital works or parts thereof or hyperlinks to the same, also uploaded by third parties. The most original new definition is "digital work", meaning a work, or parts thereof, with audio, audiovisual, photographic, videogame, editorial and literary nature, including the software and the computer operating systems protected by Copyright Law and diffused on electronic communication

[1] Delibera (Resolution) N. 680/13/Cons - Regolamento in materia di tutela del diritto d'autore sulle reti di comunicazione elettronica e procedure attuative ai sensi del decreto legislativo 9 aprile 2003, n. 70.

networks; in this definition the Regulation includes also any content protected by neighbouring rights. No hint is made to the *sui generis* right.

The proceedings to be followed by the Authority in order to impose the measures aimed to stop or prevent the copyright violation are regulated in detail.

The Authority intervention is started after receipt of a request from a legitimate person, meaning the rightowner/s, the licensee, the trade association or the collective right management organization alleging that a certain radio or tv broadcaster or a website or an internet service is infringing copyright. There is no obligation for such legitimate party to make a previous attempt of notice and take down directly to the content provider or to the service provider. After receiving the request, two procedures can apply: the first proceeding has a maximum duration of 35 days and aims at the selective removal of the infringing content from the site, catalogue or program; the abbreviated proceeding lasts 12 days and aims at disabling the access to the service in case of massive copyright violation.

In the first stage of the proceedings, the allegedly infringing party is requested to present its counterclaim.

The proceedings stop in the following cases:

- the Authority dismisses the case because it is manifestly groundless or otherwise inadmissible;
- the requesting party decides to sue the infringer in Court;
- the infringing party complies with the request.

At the end of the proceedings, if the alleged violation is deemed to subsist, the Authority can order the following measures:

- the first one is an order given to the service providers (hosting provider, webpage manager or the website manager) to remove the infringing content. Selective removal is applicable in case of violations limited to specific works or protected materials. The same measure apply for linear media.

- Another more extensive measure may be adopted in case of massive violation; in such a case the Authority orders to the mentioned service providers to proceed disabling the access to the web site or the web pages containing copyright infringing content.

- A third measure is foreseen in the event the infringing website/ service is hosted on a server located outside the Italian territory. In such a case the Authority may order to mere conduit providers (as referred to in the Decree implementing e-commerce directive) to proceed disabling the access to the website.

Against the measures adopted by the Authority under this Regulation it is possible to file an appeal before the administrative judge. Legally, it is not clear what interaction is going to subsist (if any) between the administrative procedure and the proceeding on actual existence of the copyright violation. In principle, the administrative judge may only decide on the formal legitimacy of the Agcom's orders and is not competent in copyright substantial issues (such issues being normally reserved to specialized IP sections of selected Courts).

The non-compliance with the Authority orders is sanctioned according to art. 31 of law 249/97, by means of a pecuniary sanction between 10.000 € and 250.000 €. Notice to the criminal Court

follows pursuant to art. 182-ter of the copyright law.

For the measures implying the disabling of the access to the infringing websites/webpages, the Authority can order also the automatic redirection of the users to an Internet page specifically drafted to educate the users to the legal enjoyment of digital works. This special measure is intended to encourage the framework of the promotion of the development of legal offer of copyright content. The initiatives and studies to be carried forward in this respect are entrusted essentially to the special Committee chaired by the Secretary general of the Authority, formed by the representative of stakeholders and by all public organisms involved. The Committee promotes the education to the legal enjoyment of digital works and monitors the development of the legal offer of copyright content.

The Committee has wide ranging tasks involving the simplification of the distribution chain of digital works; the adoption of codes of conduct by the information society service providers; the identification of actions in collaboration with payment service providers, based on the analysis of the economic transactions and of the business models associated to the offer of copyright infringing contents. The Committee monitors also the enforcement of the Regulation and can present proposals for its adaptation in accordance with technological innovation and market evolution.

Amendment to Copyright Law

The Copyright Law was amended in 2013 [2]for the stated purposes to promote book reading and recitation, museums and archives. A new paragraph is added to art. 15, concerning the right of public performance. The provision specifies that the recitation of literary works within the premises of public museums, archives and libraries is not considered to be public provided that it is not carried out with gainful intent. The identification of cases corresponding to the mentioned purposes is deferred to Memoranda of Understanding between the Ministry of Culture and SIAE.

The "Liberalization" of neighbouring rights

After Law of March 25, 2012, n. 27, annex, (modifying Decree Law of January 24, n. 1, the legal monopoly of Nuovo IMAIE in the field of performers' rights (that succeeded IMAIE after its dissolution for not reaching its institutional goals), some organizations were founded according to the minimum requirements established in the decree issued by the President of the Council of Ministers (http://www.itsright.it/pdf/gu_n59_110312.pdf).

One of these new collecting organisms negotiated with the record producers' collecting society SCF an arrangement. With the arrangement, dated November 8, 2013, SCF accepted to pay a certain amount to Itsright, as an advance payment for the royalties due to the performers it represents. The parties (Itsright and SCF) were sued in front of the Tribunal of Roma, that rejected the request of precautionary measure presented by Nuovo Imaie by order dated xxx. The case is pending in front

[2] Law 7 October 2013 n. 112, art. 4, concerning urgent provision to support the development of libraries and archives and for the promotion of recitation and reading.

of the Court and Nuovo Imaie presented a further complaint asking for provisional measures. The merits of the case will not be discussed before the end of 2014.
It is therefore most likely that the fight between the old monopoly and the new entrants in the performers' right collective management will continue both in Court and in the Ministry of Culture. The most rational solution to the current confusion is the intervention of the Parliament establishing a general framework for collective management that takes into account also the CRM directive that should be implemented before the end of 2015.

Case law

Other interesting developments concern neighbouring rights after the decision of the European Court of Justice in case C-135/10 SCF v. Del Corso on related communication to the public right in private dental practices.