

## Italy Adopts New Rules for the Safeguard of Copyright Online

On December 12, 2013 - after an extensive consultation with the stakeholders, including with the European Commission - the Italian communications regulatory authority (“AGCOM”) issued the “*Regulation on copyright on the electronic communication networks and implementing measures pursuant to Legislative Decree of April 9, 2003 No. 70*” (the “Regulation”).<sup>1</sup>

The Regulation will enter into force on March 31, 2014 with the aim of: 1) developing a legal offer of digital works over the Internet;<sup>2</sup> and 2) protecting copyright by means of an administrative proceedings before AGCOM.<sup>3</sup> The Regulation applies to infringements committed both over IP and media services networks (its application to on-line infringements proved more controversial during the consultation phase).

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<sup>1</sup> AGCOM’s Decision No. 680/13/CONS, Annex A.

The Regulation is divided into 5 chapters as follows:

- Chapter I – General Principles (Articles 1-2);
- Chapter II – Measures to Foster the Development and the Protection of the Digital Works (Articles 3-4);
- Chapter III – Procedures for the Protection of Online Copyright pursuant to the Legislative Decree of April 9, 2003 no. 70 (Articles 5-10);
- Chapter IV – Provisions For the Protection of Copyright on the Media Services (Articles 11-15);
- Chapter V – Final Provisions (Articles 16-19).

Substantive law is Law No. 633 dated April 22, 1941 on the “Copyright and neighboring rights protection” and subsequent modifications and integrations.

<sup>2</sup> In addition to AGCOM’s surveillance, the Regulation introduces measures aimed at developing a culture of legality in the use of copyrighted content on the web by means of a technical committee composed by stakeholders (“Committee for the fostering and the protection of the legal offer of digital works”), which will be tasked with encouraging self-regulation in the form of user education initiatives and the promotion of legally available content.

<sup>3</sup> See Article 2, paragraph I of the Regulation.

The Regulation is intended to cover commercial and industrial infringements, being outside its scope downloading or streaming carried out by end-users or applications and direct sharing software programs used by the latter.<sup>4</sup>

The Regulation's three cornerstones are:

1. Protection conditional upon right-holders' initiative (AGCOM will not act *ex officio*);
2. Administrative action against copyright infringers;
3. Fast track proceedings in case of massive infringements.

The Regulation does not provide for the so-called "notice and take down" system.<sup>5</sup>

- ***Protection upon initiative of the right-holder***

The process is initiated by a right holder's **complaint** filed before AGCOM via a specific form available on the Authority's web site. Within 7 working days from the complaint's filing, AGCOM will start the proceedings by sending a kick-off communication<sup>6</sup> to service providers,<sup>7</sup> website and webpage managers<sup>8</sup> and uploaders<sup>9</sup>.

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<sup>4</sup> See Article 2, paragraph 3 of the Regulation.

<sup>5</sup> According to the so-called "notice and take down" system, the copyright holder would send a request to the website administrator for the removal of material considered in violation of copyright. Should the website administrator acknowledge that the rights of the reported content are in fact attributable to the alleged copyright holder, the website administrator may remove the contents of his own free will within a specific time-limit.

<sup>6</sup> It contains detailed description of the digital works involved; indication of the Copyright Law provisions allegedly infringed, information on the competent office and of the responsible of the proceedings; brief description of their facts and of the preliminary outcomes of AGCOM investigations; and notice that the receiver of the notice might remove the disputed contents on a voluntary basis.

<sup>7</sup> "Service providers": the provider of services of the information society pursuant to Article 2, paragraph 1, letter a), of the Legislative Decree No.70 dated April 9, 2003, who delivers *mere conduit* or *hosting* services, as respectively defined by the Articles 14 and 16 of the same decree. Article 1.f) of the Regulation.

<sup>8</sup> "Website and webpage managers": the information society service provider, other than those referred to in Articles 14, 15 and 16 of the Legislative Decree No.70 dated April 9, 2003, that, on the Internet, manages a space including digital works or parts thereof or hyperlinks (link or torrent) to the same, also uploaded third parties. Article 1. g) and 1. f) of the Regulation.

<sup>9</sup> "Uploaders" are intended as natural persons or the legal entities which upload digital works on electronic communication networks making them available to the public also by means of links

The complaint will be **dismissed** when:

- the complainant commences a judicial litigation;<sup>10</sup>
- the right holder does not use the form available on AGCOM's web site;
- the complaint lacks important information;
- the complaint is out of the scope of the Regulation, or plainly groundless;
- the complaint is withdrawn before the issuance of the AGCOM decision.

Service providers, website and webpage managers, and uploaders can: (i) file a **defensive brief** and documents within 5 working days starting from the kick-off communication; or (ii) voluntarily **remove the contested contents** and communicate their removal to AGCOM.

All the communications provided for by the Regulation, including briefs and documents, are to be filed by emails.

- *Administrative action against online copyright infringers*

Where the claimant's claim is accepted, within 35 working days from the filing, AGCOM may order to the hosting service providers the **selective removal of the content** from the relevant webpage and/or of the links or trackers related to infringing contents within 3 working days from the receipt of the order.

If the server is located abroad or in case of massive infringement, AGCOM can order to access providers to **disable the access to the relevant digital works (shutdown of the website)** within 3 working days from the receipt of the order. It follows an automatic redirection to a webpage containing information provided by AGCOM and the AGCOM's order.

As abovementioned, the Regulation also contains provisions related to the copyright protection on **media services**. In particular, a right-holder could file a complaint before AGCOM if it considers a program within a programming schedule of a linear media service provider or a

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<sup>10</sup> This procedure is indeed considered as an alternative to and not as a substitute for judicial process.

program available within a catalogue by a non-linear media service provider to be illegally broadcasted. Where the right holder's request is accepted, AGCOM may proceed by: (i) **ordering** the linear service media providers **not to transmit** again programs in violation of copyright; or (ii) ordering to the on-demand service media providers to **remove** from the catalogue the programs at hand, within 3 days from the order's notice.

In any case, AGCOM's orders should be proportionate and justified in light of the infringement's gravity. AGCOM should also comply with fundamental principles of free information, pluralism and democracy.

In case of **non-compliance** with its orders, AGCOM might issue **pecuniary fines** ranging from EUR 10,329 to EUR 258,228. AGCOM's orders can be appealed before the **Administrative Court of Lazio – Rome** (*Tribunale Amministrativo Regionale del Lazio*) within 60 days starting from their issuance. AGCOM's fines are subject to full scrutiny on the merits.

- ***Fast track proceeding***

Whether it considers the infringement as a **massive infringement** (according to indicative criteria set forth by the Regulation<sup>11</sup>), AGCOM proceeds with an abbreviated procedure. In this case, the complaint could be dismissed or the proceedings should be started within 3 working days from the filing; defensive briefs are to be filed within 3 working days from the receipt of the kick-off communication; AGCOM orders are to be released within 12 working days from the filing; and the term to comply with the orders is 2 working days.

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The Regulation constitutes a crucial step of the regulatory work performed by AGCOM in recent months. It is likely to impact over the activities performed by Internet service providers in Italy.

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<sup>11</sup>See Article 9.3 of the Regulation. AGCOM would consider *inter alia* the amount of works illegally transmitted; their economic value; their misleading presentation, etc.

To this extent, it is noteworthy that AGCOM's know-how is currently more focused on e-communications and audiovisual regulatory issues than on copyright protection. Therefore, interested companies should develop internal procedures to deal with AGCOM requests providing them with a timely and effective response.

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If you have any questions concerning this memorandum, please feel free to contact [Mario Siragusa](#) in our Rome office (+39 06 69 52 10), any of our other Italy-based partners and counsel listed under [Antitrust and Competition Practice](#) Area under the "Practices" section of our website at [www.clearygottlieb.com](http://www.clearygottlieb.com), or any of your regular contacts at the firm.

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