

Online copyright infringement: is the Communications Authority going too far?

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Italy is currently being interested by an intense querelle about the role of the Communications Authority ("Autorità per le Garanzie nelle Comunicazioni") in the enforcement of the provisions of Law n. 633/1941 ("Copyright Law") with respect to users' unauthorized posting of copyrighted contents online. The debate has become particularly hot after the Communications Authority has issued Resolution 668/10/CONS proposing the enactment of a regulation concerning the exercise by the same authority of powers in the protection of copyright on electronic communication networks. The document is currently under public consultation.

The Communications Authority finds its competence for regulating the matter in certain provisions of Copyright Law, Legislative Decree n. 70/2003 on e-commerce and Legislative Decree n. 177/2005 (amended after the implementation of Directive 2007/65/EC) regulating audiovisual and radio media services. On the basis of such provisions, the Communications Authority maintains to have power to enforce Copyright Law towards providers of audiovisual media services, website owners, network operators, ISPs, caching/hosting providers, and more generally towards any electronic communications operator (hereinafter simply "provider").

Specifically, the authority makes reference to art. 182-bis of the Copyright Law entrusting it with the power of surveillance over, inter alia, reproduction and duplication activities of copyrighted works, through any process, on audiovisual or other media and on radio and TV broadcasting, and to art. 32-bis of Decree 177/2005 that expressly imposes audiovisual media service providers the duty to ensure respect of copyright and neighbouring rights, empowering the Communications Authority to enact regulations having the scope to enforce such provisions.

In the proposed regulation the Communications Authority suggests the following procedure in 5 steps for detection and removal of contents that have been posted online without the authorization of the holders of copyright or neighbouring right. (1) The holder of copyright or neighbouring right who ascertains the presence of an infringing content on a website must notify the provider a request of removal of the content; if the request appears grounded, then the provider must remove the content within 48 hours. (2) If the content is not removed within 48 hours, the holder of copyright or neighbouring right may request the intervention of the Communications Authority. (3) The Communications Authority opens a short proceeding (5 days of maximum duration) with the participation of all the parties involved. (4) If the Communications Authority ascertains that the Copyright law has been violated, it orders the provider to immediately remove the infringing content. (5) The Communications Authority then monitors that the provider respects the order and, in case of non-compliance, it renews the order and imposes fines on the provider. Should the Communications Authority find that the sole purpose of the website is the dissemination of copyright-infringing contents, or that the servers where the website is hosted are located outside Italy, upon request by the interested parties, may include the website in the list of illegal websites, or (in extreme cases) inhibit the access to the website.

The proposed regulation is being heavily criticized. There are in fact doubts about the possibility for an administrative authority to enact a regulation that sounds more as a form of primary legislation than an implementation of the provisions of law and entrusts the Communications Authority with powers that may conflict with the competences of the judicial authority. Furthermore, certain commentators point out the risk that the proposed regulation could become a discretionary instrument of censorship towards foreign websites.

The hope is that the Communications Authority takes into account these critiques and reconsiders the position.