

Kluwer Copyright Blog

Italian public enforcement of online copyright infringement: new powers and procedures for AGCOM

Gianluca Campus (University of Milan) · Friday, December 14th, 2018

Introduction



AGCOM is the Italian independent and convergent regulatory authority, established in 1997 by Law no. 249/1997 as the national media regulatory body. On 16th October 2018, AGCOM approved the deliberation no. 490/18/CONS (available [here](#)) which introduces some modifications and integrations to the Regulation on copyright enforcement in electronic communications networks (“AGCOM Regulation” or simply the “Regulation”, updated text available in original language [here](#)). These were introduced according to the new powers attributed to AGCOM on the basis of art. 2 of the Law n. 167/2017 for further combating copyright infringements with interim protective measures and measures for preventing reiteration of the offences.

The AGCOM Regulation was introduced with the deliberation no. 680/13/CONS (see non-official English translation of the original text [here](#)) and entered into force on 1st April 2014. This followed numerous consultations and workshops from 2010 onwards, which included three public consultations conducted by AGCOM (in 2010, 2011 and 2013), continued with the observations of the European Commission within the framework of the so-called Transparency Directive (98/34/EC), and arrived at the final approval on 12th December 2013 (see [here](#) our previous post on the validity of the Regulation under European laws).

The Regulation allows AGCOM to order, following a short administrative procedure, that: (A) Internet service providers selectively remove or block access to websites hosting allegedly copyright infringing materials; and (B) AVMS providers and on-demand providers remove illegal content from their catalogues and refrain from retransmitting illegal works in their future schedules. In cases of non-compliance with the orders, AGCOM can impose fines. The targets of AGCOM's intervention – in cases of online copyright infringement – are service providers, uploaders of the infringing content and website operators hosting infringing material, rather than users. Right holders are entitled to file – through online forms – complaints of online copyright infringement with AGCOM.

According to the changes introduced by the deliberation no. 490/18/CONS, right holders can also apply for: (i) interim protective measures, under a procedure with tighter deadlines and based on a preliminary assessment of facts, where there is an alleged threat of imminent, serious and irreparable harm; and (ii) measures against the reiteration of violations already declared by the Authority, applicable after the issuing of AGCOM orders under an ordinary or special procedure, on the basis of a mere notice and without the need to start a new procedure.

The ordinary and the “fast track” procedures

The ordinary procedure applies to copyright violations over telecommunication networks (mainly websites and media services), which includes illicit exploitation of works mentioned in the Italian Copyright Law (Law n. 633/1941) that are covered by AGCOM activity: i.e., songs, audiovisual works, pictures, newspapers, books, video-games and software. The Regulation does not apply to use of peer-to-peer programmes aimed at a direct file sharing activity to end-users or to instant messaging systems for private communications, but does apply to the offer to the public of links or torrent files via websites, computer programmes and devices, and to instant messaging systems where freely available over the Internet and offering the possibility to access public channels for sharing content.

The deliberation no. 490/18/CONS has widened the scope of the Regulation, clarifying that copyright violations can also consist of acts of promoting or making public means for searching or accessing infringing content, as well as the offering of means or devices which allow search or access to infringing content or enable the circumvention of technical protective measures for digital rights management; these are all types of activities that constitute indirect violations of copyright.

The enforcement proceedings are launched only after a complaint has been made by the right holders and where there is no pending proceeding before a court. All interested parties (e.g. Internet service providers, uploaders, page/site owners) are then invited to participate and present relevant documentation. Where an actual infringement of copyright law is attested in the online environment, AGCOM may adopt different measures depending on the location of the server hosting the content:

- (a) if the server is located in Italy, AGCOM may order the hosting provider to selectively remove the digital works from the website where the works are hosted and (according to the deliberation no. 490/18/CONS) also adopt measures aimed at preventing the reiteration of the violation, such as the re-uploading of the same digital works (so-called *stay down* measures);
- (b) if the server is located outside Italy, although AGCOM cannot order the selective removal of

the illegal content, as this would require deep packet inspections and thus be against EU law, AGCOM may order access providers established in Italy to disable access to the website disseminating illegal content, by blocking the DNS resolution or the IP address. In order to prevent reiteration (according to the deliberation no. 490/18/CONS), AGCOM will issue and update from time to time a list of blocked websites, whose services access providers established in Italy must not make accessible.

While the ordinary proceedings take place within 35 working days, a “fast track” proceeding is activated whenever the violations involved are massive (e.g. large number of works, websites entirely devoted to piracy) and/or create very serious damage for the right-holders (e.g. very recent works, such as a music album in preview or movies still in the cinema). In these cases, AGCOM has to deliver its final decision within 12 working days.

The special procedures

The new provisions introduced in the Regulation with the deliberation no. 490/18/CONS also include a sort of special and simplified procedure for requesting measures against reiteration of violations and interim protective measures.

Article 8-bis regulates a special procedure applicable where the applicant has already obtained an order from AGCOM under an ordinary or fast track procedure but alleges that the violations are recurring. According to this special procedure, the applicant has to submit a mere notice to AGCOM, without starting a new ordinary or fast track procedure. If AGCOM finds the notice of reiteration well grounded, within 3 days from the notice, where the servers are established in Italy, it shall impose fines on those responsible (from 10,000 to 250,000 Euro) and will inform the judicial authorities or, where the servers are not established in Italy, it shall update the list of blocked websites with which the access providers must be compliant.

Article 9-bis regulates a second special procedure according to which the applicant may request interim protective measures based on the alleged threat of imminent, serious and irreparable harm. In this case AGCOM shall adopt within 3 days, after a preliminary assessment of facts and where the application is clearly grounded, interim measures against the host provider or access providers (depending on where the servers used for the infringing activity are located). Providers must comply with the AGCOM order within 2 days from notice of the order and can appeal the order within 5 days from notice, even if the appeal does not suspend the order. If the order is not appealed within the term, it will remain a valid and final order.

Some data on AGCOM’s enforcement

According to the most recent data made available by AGCOM on 7th December 2018 ([here](#)), it has so far received 1,285 complaints -1,278 for online infringements and 7 for infringements on media services. Excluding those complaints which have been withdrawn or rejected at the preliminary stage, AGCOM has started 942 proceedings, 285 under the ordinary procedure and 657 under the fast track procedure. It is worth recalling that only complaints coming from the effective right holders or subjects entitled to represent them can be accepted. The complaints are mainly about audiovisual works (movies, tv series, live football games) and artistic works, while smaller percentages relate to musical and editorial works, such as newspapers and journalistic content. For the music, this data is partially justified since almost every complaint concerning musical files concerns a massive copyright infringement, with a huge number of files spread over the Internet

without holding the exploitation rights. For audiovisual works the data is explained by the recent changes in technology provided by the sites, moving from the download of the content, which requires some technical skills by the user, to the direct, and user-friendly streaming of content. This way of providing content also requires a huge and expensive amount of bandwidth on the part of the site.

Since the introduction of the deliberation no. 490/18/CONS, the data shows that AGCOM has already adopted 16 orders against reiteration of violations and, in 4 cases, has granted the new interim protective measures.

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