Kluwer Copyright Blog

Italian public enforcement on online copyright infringements: AGCOM Regulation held valid by the Regional Administrative Court of Lazio (but there is still room for the CJEU)

Gianluca Campus (University of Milan) · Friday, June 16th, 2017

Introduction

On 30th March 2017, the Regional Administrative Court of Lazio ("TAR Lazio") had the last word, at least from a domestic perspective, on the validity of the AGCOM (Italian Communication Authority) Regulation on copyright enforcement in electronic communications networks ("AGCOM Regulation" or simply the "Regulation"). This finding of validity is the final step in a long process, which started in 2010, 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. This was by way of deliberation no. 680/13/CONS (see non-official English translation here), of a peculiar system of copyright public enforcement managed by the Italian Communication Authority, and entered into force on 1st April 2014.

The Regulation allows AGCOM to demand, 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.

The administrative procedure before AGCOM includes notice to the relevant parties that a procedure has started against them and the possibility: *(i)* to immediately comply with the right-holders' request by removing or blocking access to the infringing materials or, in the case of objections, *(ii)* to file counterarguments within five days of receiving the notice. An AGCOM collegial body, after a quick investigation and in any case within 35 days from the filing of the initial complaint, will assess whether the alleged infringement has occurred, and will adopt, in the case of actual online infringement, various 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 infringing digital work from the website; or *(b)* if the server is located outside Italy, AGCOM will order the Internet access service providers to disable the access to the

infringing website.

It is worth noting that the AGCOM Regulation also has the aim of boosting the development and protection of legal provision of digital works, by promoting education of users and encouraging the legal fruition of online content (the Regulation established a Committee for the development and the protection of the legal offer of digital works).

Italy is not the first or only EU Member State to introduce public enforcement of copyright (the other major experience – maybe even more disputed – was HADOPI in France). Despite this precedent, the AGCOM Regulation has suffered strong criticism from the start as to the legal basis of the regulatory power for the Italian Communication Authority, also because such regulatory power has been largely based on EU provisions (E-Commerce Directive 2000/31/EC) but no EU body (with the exception of a preliminary observation by the European Commission) has yet had the chance to assess compliance with the EU copyright framework.

In 2014 the Open Media Coalition (OMC), a group of Italian non-governmental organizations (i.e. associations for the defence of freedom of information and representing web-tv, blogs and video blogs, information portals, aggregators and video companies active in the online press), challenged the validity of the AGCOM Regulation before the Regional Administrative Court of Lazio. In the context of this administrative lawsuit, on 26th September 2014, TAR Lazio referred a number of questions to the Italian Constitutional Court regarding the constitutionality of the public enforcement procedures foreseen by the AGCOM Regulation. After the decision of the Italian Constitutional Court in late 2015, which basically declared the questions raised by TAR Lazio inadmissible, the Regional Administrative Court issued its final decision in March 2017, confirming the validity of the AGCOM Regulation three years after its introduction (TAR Lazio did not suspend the operation of the Regulation, and AGCOM had started implementing the Regulation in April 2014).

The preliminary judgment of the Regional Administrative Court of Lazio (2014)

In its first interim ruling of 26th September 2014 (TAR Lazio n. 10020/2014) the Regional Administrative Court of Lazio held that Legislative Decree n. 70/2003 (which implements E-Commerce Directive 2000/31/EC) introduced into the Italian legal system a binary system of protection – consisting of both private and public enforcement – against online copyright infringement, since the dematerialization of works had led to widespread infringement and the inefficiency of traditional private enforcement through injunctive relief. In addition, TAR Lazio held that the AGCOM Regulation did not introduce a para-judicial procedure to enforce copyright and was not aimed at solving disputes on copyright infringement but rather at introducing additional injunctive orders issued by a public body in the context of an administrative procedure, which is by its nature characterized by disclosure and by participation of the relevant private parties but not necessarily by the "adversarial principle" (this principle governs criminal and civil proceedings, as well as administrative proceedings of a contentious nature but does not apply to purely administrative proceedings).

Nevertheless, TAR Lazio highlighted that the AGCOM Regulation might impact many other principles of a constitutional nature, and, consequently, referred a number of questions of constitutionality of the AGCOM Regulation to the Italian Constitutional Court. Specifically, TAR Lazio questioned whether the Regulation may conflict with: *(i)* the principle of a fair balance between constitutional rights in favour of private entrepreneurship and ownership (Article 41-42

Cost) and those other rights of the same constitutional level such as the rights to information and freedom of expression (Article 21 Cost); *(ii)* the principles of "statutory reserve" (Article 23 Cost), since there is no express primary provision which sanctions AGCOM's regulatory power in this area; *(iii)* the principle of the access to judicial defence (Article 24 Cost) and before a natural judge (Article 25 Cost), because of the lack of legal guarantees and judicial safeguards for the exercise of freedom of expression online, at least equivalent to those laid down by the Constitution for the press; as well as *(iv)* the criteria of reasonableness and proportionality in the exercise of legislative discretion.

The decision of the Italian Constitutional Court (2015)

With its ruling n. 247 dated 21st October 2015, the Italian Constitutional Court substantially dismissed the questions referred by TAR Lazio by declaring all such questions inadmissible. The Constitutional Court found a lack of clarity in the *petitum* and its motivation; in particular it was not clear whether the Court of Laws had been requested to remove from the Italian legal system some unconstitutional laws or instead to add missing provisions in order to make the current laws compliant with the Constitution. Specifically, the Constitutional Court held that:

(1) TAR Lazio had already indicated a number of provisions as a legal basis for AGCOM's regulatory power – even if no one of these provisions expressly entitles AGCOM to such power, this means that AGCOM's regulatory power was found by TAR Lazio to be an implicit regulatory power under the current legal system;

(2) Legislative Decree n. 70/2003 only mentions, as a general provision (which replicates correspondent provisions of the E-Commerce Directive 2000/31/EC), that both the judiciary and public authorities are entitled to limit – under certain conditions – the free circulation of information society services; while Law n. 177/2005 (which implements AVMS Directive n. 67/2005/CE) attributes to AGCOM a regulatory power with reference to AVMS providers only;

(3) with regards to the need for the Court's guidance on the balance between economic rights and the freedom of expression, it is not clear whether TAR Lazio is requesting from the Constitutional Court an extension of the special regime for newspapers to other forms of communication via electronic means, and how it is possible to reconcile this request with the other request for a declaration of unconstitutionality of the legal provisions above (if interpreted as attributing the regulatory power to AGCOM).

The last word (from the Italian perspective) on the validity of the AGCOM Regulation

TAR Lazio ruled on 30th March 2017, finally declaring the AGCOM Regulation valid. Accordingly, all the actions brought by a number of consumer and ISP service providers have been rejected. The Court affirmed that the ruling of the Italian Constitutional Court cannot be read as questioning the legal basis for AGCOM's regulatory power in the electronic communication sector, since it was only an *incidenter tantum* argument in support of the declaration of inadmissibility of TAR's referrals.

TAR Lazio reasserted that such legal basis is found in the systematic reading of various laws:

(a) Law 21 July 1997, n. 249 – entitles AGCOM to regulatory power over the relationship between operators in the telecommunication sector (Art. 1.6 lett. b n. 3) and for the implementation of the laws on the access to network infrastructures (Art. 1.6 lett. c n. 2) and, most of all, attributes

to AGCOM the powers under Article 182-bis of the Italian Copyright Act (Art. 1.6 lett. b n. 4-bis);

(b) Article 182-bis of the Italian Copyright Act assigns AGCOM (and SIAE) a surveillance role in order to prevent and verify possible copyright infringements;

(c) Legislative Decree n. 70/2003 (Article 14 to 17) states that ISPs are not under a general obligation of verification of the information and data transmitted via their means but introduces some duties of collaboration for the ISPs with the judiciary and public authorities and requests that ISPs respect the orders of such authorities to remove infringing content (the reference to "public authorities" should also include AGCOM in the scope of this Legislative Decree);

(d) Article 156 of the Italian Copyright Act, regarding private enforcement, and notably allowing right holders to be granted injunctions in case of copyright infringement, does not prejudice the provisions of Legislative Decree n. 70/2003 (this should mean that the Italian legal system allows a binary system consisting of both private and public enforcement).

Several further complaints against the AGCOM Regulation were also rejected by TAR Lazio:

(i) the fact that costs for performing AGCOM's orders are mainly paid by the ISPs while right-holders may use the legal means of the AGCOM Regulation without limits and without particular costs does not affect the rationale for introducing public enforcement, since it cannot be considered a "service" to be paid by right-holders;

(ii) the procedure introduced by the AGCOM Regulation cannot be considered contrary to the "adversarial principle", since such procedure is an administrative proceeding of non-contentious nature and the aforementioned principle does not apply to purely administrative proceedings;

(iii) the powers attributed to AGCOM introduce injunctive orders that must be adequate, specific and proportionate, as per the current EU framework of the E-Commerce and Enforcement Directives.

The AGCOM Regulation from the European perspective

It should be noted that, even after almost seven years of consultations and proceedings before various national courts, some uncertainty remains as to the compliance of the AGCOM Regulation with the European copyright framework.

During the consultation phase, the draft Regulation was sent to the European Commission, which reported various comments. According to the information available on the content of such comments, it seems that the European Commission had some concerns over the use in the AGCOM Regulation of definitions that are not included in the European copyright framework, such as the definitions of "digital work" and "website manager", as well as on the introduction of abbreviated proceedings for cases of mass violations (Article 9) and on the remedy of disabling access to the digital works in case of mass infringements (Article 8.3). It cannot be excluded that such provisions could create some imbalance with the principle of proportionality of the measures against copyright infringements.

It should be also taken into account that, as well as the comments of the European Commission, the Regional Administrative Court raised concerns on the constitutionality of the Regulation but decided not to make a referral to the CJEU regarding consistency with EU laws. It therefore

cannot be excluded that in the future the CJEU will have the opportunity to rule on such consistency. According to the Regulation, access to public enforcement does not preclude access to private enforcement. This considered, a hypothetical referral to the CJEU could be made by a civil court seised after the establishment of the administrative procedure or in the case of the introduction of preliminary administrative investigations before a civil court.

The CJEU could further clarify possible tensions between the AGCOM Regulation and EU rules on enforcement of IP rights under Directive 2004/48/EC. In the relevant case law, the CJEU makes reference to measures (such as injunctions and orders) issued by "national courts" against technical intermediaries while it mentions a prohibition against "public authorities" adopting measures which would require an ISP to carry out general monitoring of the information that it transmits on its network (see C-70/10 *Sabam Vs Scarlet*, § 30-35; C-324/09 *L'Oréal and Others*, §131). In other relevant case law, the CJEU points out that authorities and courts of Member States must make sure that they do not rely on an interpretation of measures which would conflict with those fundamental rights or with the other general principles of European Union law, such as the principle of proportionality (C-461/10 – *Bonnier Audio AB and Others Vs Perfect Communication Sweden*, § 56) and that measures taken by national courts must not unnecessarily deprive internet users of the possibility of lawfully accessing the information available (C-314/12 *UPC Telekabel Wien Gmbh Vs Constantin Film Verleih Gmbh*, § 64).

The discussion above does not imply that, under certain conditions, public enforcement could not also result in an improvement of the system for combating online copyright infringement. And, as a matter of fact, the AGCOM Regulation has introduced effective means for reacting, especially for small copyright claims that probably would not otherwise have arrived before a court (for data on the results of AGCOM's procedure see here). It is nevertheless crucial that public enforcement on copyright matters is clearly inserted into the EU copyright framework and assures a fair balance between protection of proprietary rights and fundamental rights.

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