

Kluwer Copyright Blog

Further developments on Italian enforcement against illicit distribution of sport events

Gianluca Campus (University of Milan) · Monday, November 23rd, 2020

In the last few months of 2020 there have been further developments in Italy with regards to private and administrative enforcement against illicit distribution of copyright content over the Internet.



1. New Italian case law against Content Delivery Network (CDN) operators

In a 2019 post on this Blog ([here](#)), we analysed the impact of illegal distribution of audiovisual content and the new wave of dynamic injunctions that the Court of Milan has adopted through orders against Internet Service Providers (ISPs) on the basis of complaints filed by the Lega Calcio with some major broadcasters. According to the [Communication of the European Commission COM\(2017\) 708](#), dynamic injunctions are injunctions which can be issued for instance in cases in which materially the same website becomes available immediately after issuing the injunction with a different IP address or URL and which is drafted in a way that allows it to also cover the new IP address or URL without the need for a new judicial procedure to obtain a new injunction.

Specifically, the Court of Milan ruled that the ISP must block access to the IP addresses used to access the domain name of the illicit IPTV services (together with the URL associated with the domain name), as well as any other IP address uniquely used to access the domain name of the illicit IPTV services and any other top level domain name (i.e. .org, .it, .com., .net etc.) associated with the second level domain name of the illicit IPTV services. The orders have immediate effect with regards to the ISP, which must comply without delay to inhibit access to the illicit services, taking into consideration the technical measures that the ISP has already adopted in similar cases and imposing fines for any delay in complying with the order 48 hours from the notification.

With a recent pronouncement dated 5 October 2020 (RG n. 42163/2019), the Court of Milan issued a similar order against some major Italian ISPs together with the hosting provider OVH and the CDN operator Cloudflare Inc., whose services were used for distributing the illicit IPTV services. What is interesting in this case is that the dynamic injunctions pursuant to Article 156 of the [Italian Copyright Law](#), implementing Article 8(3) of [Directive 29/2001/CE](#), have been issued against a new range of intermediaries, as compared to previous orders mainly against carriers whose services are used by third parties to infringe copyright or related rights, namely hosting providers (OVH) and CDN operators (Cloudflare).

The hosting providers at stake hosted the website where the illicit IPTV services were made available, offering optimised systems for managing high streaming traffic via a combination of Main Server and Load Balancers (i.e. a system where the core server is supported by other servers used for balancing the traffic among such servers in case of high traffic).

Both Cloudflare and OVH had received a prior notice from the claimants requesting the termination of the supply of their services in favour of the illicit IPTV services, and thus had actual knowledge of the fact that their services were used for distributing illicit content. The Court ordered Cloudflare and OVH to immediately cease: (i) the supply of their services with regard to the illicit IPTV services (whatever the domain name under which they are supplied); and (ii) access by the IP addresses associated with such IPTV services to the Main Server and to the Load Balancers. In addition, pursuant to art. 17.2 lett. (d) of [Legislative Decree 70/2003](#) implementing [Directive 2000/31/CE](#), the Court ordered Cloudflare and OVH to deposit available information for identifying the entities requesting the hosting and CDN services for distributing the illicit IPTV services.

The Court also rejected arguments challenging jurisdiction and claiming Cloudflare was merely providing technical services as CDN operator. With regards to such arguments the Court affirmed that: (i) jurisdiction could be affirmed since the flow of data was directed to users in Italy and this presumably also implied the presence of servers in the Italian territory; (ii) even if not engaged in acts of memorisation of the data, Cloudflare supports the distribution of the illicit IPTV services via temporary storage of data; and (iii) in any case, even if the CDN operator was acting as a mere conduit, this does not exclude the possibility of adopting a dynamic injunction against a technical intermediary pursuant to Article 8(3) of [Directive 29/2001/CE](#).

2. New administrative means of enforcement for AGCOM

It is worth noting that Italy has also introduced a system of administrative enforcement against distribution of illicit content over the Internet. AGCOM is the Italian independent authority established in 1997 by Law no. 249/1997 as a media regulatory body. On 16th October 2018, AGCOM approved [Resolution no. 490/18/CONS](#) (new Resolution) which introduces some modifications and integrations to the Regulation on copyright enforcement in electronic communications networks (“AGCOM Regulation” or simply the “Regulation”).

The Regulation allows AGCOM to order, following a short administrative procedure: (A) ISPs selectively to remove or block access to websites hosting allegedly copyright infringing materials; and (B) AudioVisual Media Service providers and on-demand providers to remove illegal content from their catalogues and refrain from retransmitting illegal works in their future schedules. This means that under the new Resolution AGCOM can also adopt a sort of administrative dynamic injunction by blocking the DNS resolution or the IP address, including via a fast-track procedure or interim protective measures.

According to the changes introduced by the new Resolution, 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.

More recently (in October 2020), with [Resolution no. 540/20/CONS](#), AGCOM started a public consultation on a new draft amendment to the Regulation based on Article 195-bis of Legislative Decree no. 34 of 2020 which recognised AGCOM enforcement powers against providers of information society services that use, even indirectly, national numbering resources. The so-called “Relaunch decree” (in particular art. 195-bis of the Decree-law 19 May 2020, n. 34, amended by [law 17 July 2020, n. 77](#)) has extended AGCOM’s competences to cases of dissemination of illegal content on the network through instant messaging services that use, even indirectly, the telephone numbers of users.

According to AGCOM’s October Resolution, the rationale of the legislative change is to be found in the need to include within the scope of the Regulation those subjects who, despite the presence of content in violation of the Copyright Law, under current provisions cannot be recipients of an order to selectively remove the content uploaded illegally because the servers used are located abroad. In such cases, in the absence of the new powers for AGCOM, it would only be possible for the Communication Authority to make an order to block access to the site. The provision therefore intends to fill this regulatory gap by giving AGCOM the power to impose orders for the selective removal of digital works or for disabling access to digital works disseminated in violation of the Copyright Law through instant messaging services, where, until now, the only possible outcomes were disabling access to the entire service or archiving the procedure

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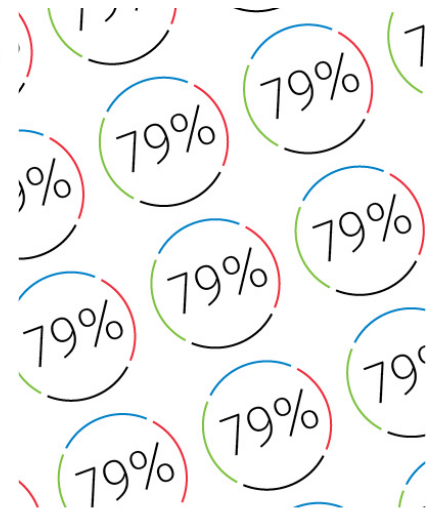
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