

ARTICLE 19

Italy: Draft Regulation on Copyright Protection on Electronic Communication Networks

September 2013

Legal analysis

Executive summary

In this analysis, ARTICLE 19 examines the Italian Draft Regulation on Copyright Protection on Electronic Communication Networks (Draft Regulation), which was published by the Italian Communication Authority (AGCOM) on 25 July 2013. It seeks to contribute to the public consultation, which was opened to evaluate the proposed provisions of the Draft. Our analysis is based on international freedom of expression standards and the best practices in this area.

In our view, the Draft Regulation contains some positive elements in terms of freedom of expression, particularly the exclusion of Internet users who download content on peer-to-peer networks from the scope of the Draft. It also puts emphasis on the promotion of legal content and education of consumers.

At the same time, the Draft Regulation falls short of international standards on freedom of expression in key respects. We are especially concerned that the Draft Regulation provides for the blocking of entire websites, domain names or IP addresses. These measures are both ineffective and deeply inimical to free expression due to the high risks of over-blocking. We are also concerned that blocking powers would be entrusted to a regulator rather than the courts.

ARTICLE 19 urges AGCOM to consider the recommendations outlined in this analysis in the final draft of the Regulation and make sure that the copyright regime in Italy fully complies with international human rights standards.

Key recommendations

1. Blocking orders of entire websites, domain names and IP addresses should be left out of the Draft Regulation;
2. In the event that blocking orders are not removed from the Draft, AGCOM should not be empowered to issue blocking or content removal orders. Instead, these powers should be entrusted to the courts or other independent adjudicatory body;
3. AGCOM should not be empowered to order the disclosure of private information about subscribers. Instead, these powers should be entrusted to the courts or other independent adjudicatory body;
4. Consideration should be given to adopting rules, such as 'notice-and-notice', which do no more than require intermediaries to pass on complaints about copyright infringement to the alleged infringing party instead of requiring them to take down the material at issue upon notice;
5. The deadline for submitting a counter-notice under the Draft Regulation should be extended to at least 14 days;

6. Time limits of between 1-3 days to comply with removal or blocking orders are too short and should be extended in order to allow for parties to appeal such orders;
7. The Regulation should expressly mention the possibility of judicial review of blocking orders;
8. The level of fines that can be imposed against website hosts and ISPs for failing to comply with blocking or removal orders should be reduced;
9. A full list of blocked sites should be made public and regularly updated;
10. The Regulation should explicitly provide penalties for abusive claims of online copyright infringement and abusive threats of litigation.

About the ARTICLE 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at <http://www.article19.org/resources.php/legal/>.

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Introduction

On 25 July 2013, the Italian Communication Authority (AGCOM) adopted the Draft Regulation on Copyright Protection on Electronic Communication Networks (Draft Regulation).¹ The Draft Regulation is the latest in a series of attempts by AGCOM to establish procedures to deal with online copyright enforcement in Italy. Previous proposals, published in 2010, were withdrawn following public consultations, which highlighted AGCOM's lack of competence to legislate in the area of copyright generally and online copyright enforcement in particular.

Notwithstanding continuing questions about AGCOM's competence in this area, the Draft Regulation lays down administrative procedures to deal with allegations of commercial copyright infringement online. Individual Internet users who use torrent sites are in principle excluded from the scope of the Draft Regulation. At the same time, the Draft Regulation seeks to promote legal content offers as well as consumer information and education in the area of copyright.

In this analysis, ARTICLE 19 examines the compatibility of the Draft Regulation with international standards on freedom of expression and best practices in the area of freedom of expression and copyright online. While we generally welcome AGCOM's decision to focus its enforcement efforts on commercial 'piracy' rather than crackdown on individual Internet users, we believe that the proposed copyright enforcement scheme nonetheless falls below international standards on freedom of expression. Our key concerns, which we explain in detail in the legal analysis, relate to AGCOM's powers to order the blocking of entire websites or IP addresses.

The analysis itself focuses on two key aspects of the Draft. First, we offer some general comments in relation to the scope and general purpose of the Draft Regulation. Secondly, we examine the proposed administrative copyright enforcement procedures and make recommendations to address the issues identified.

ARTICLE 19 hopes that AGCOM will incorporate these recommendations in the final version of the Regulation. We also stand ready to provide further comments or assistance to AGCOM in this process.

¹ The analysis is based on an unofficial translation and our understanding of the original version of the Draft Regulation in Italian; available at: <http://www.agcom.it/Default.aspx?DocID=11564>. ARTICLE 19 takes no responsibility for the accuracy of the translation or for comments made on the basis of any inaccuracies in the translation.

International standards on freedom of expression

The protection of freedom of expression under international law

The International Covenant on Civil and Political Rights² guarantees the right to freedom of expression in Article 19:

1. Everyone shall have the right to freedom of opinion
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.

Importantly, General Comment No. 34, adopted by the UN Human Rights Committee (HR Committee), a treaty monitoring body for the ICCPR, in 2011, states that Article 19 ICCPR protects all forms of expression and the means of their dissemination, including all forms of electronic and Internet-based modes of expression.³ In other words, the protection of freedom of expression applies online in the same way as it applies offline.

The right to freedom of expression is also protected under Article 10 of the European Convention on Human Rights (ECHR):⁴

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The protection of intellectual property under international law

With the sole exception of Article 17 (2) of the EU Charter of Fundamental Rights, intellectual property is protected only indirectly under international human rights law.

² Italy ratified the ICCPR on 15 September 1978 and is therefore legally bound to respect and to ensure the right to freedom of expression as contained in Article 19 of the ICCPR.

³ UN Human Rights Committee General Comment No.34, para. 12.

⁴ Italy ratified the ECHR in 1955.

In *Anheuser-Busch Inc. v Portugal*⁵, for example, the European Court of Human Rights (European Court) recognised that intellectual property fell within the scope of Article 1 of Protocol No. 1 to the ECHR (protection of property).

At the same time, the value of a diverse array of ideas and information has been recognised under international law. For example, Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees the right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its application, and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.⁶

In addition, intellectual works are extensively protected by a number of international treaties that are administered by the World Intellectual Property Office (WIPO), including the Berne Convention for the Protection of Literary and Artistic Works, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations and the WIPO Copyright Treaty.⁷

Permissible limitation on the right to freedom of expression

While the right to freedom of expression is a fundamental human right, it is not guaranteed in absolute terms. Article 19(3) of the ICCPR permits the right to be restricted in the following terms:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals

Thus, restrictions on the right to freedom of expression must be strictly and narrowly tailored and may not put into jeopardy the right itself. In order to determine whether a restriction is sufficiently narrowly tailored, the criteria of Article 19(3) of the ICCPR need to be applied. Any restrictions on freedom of expression must be (i) prescribed by law; (ii) pursue a legitimate aim, such as respect of the rights or reputations of others, protection of national security, public order, public health or morals; and (iii) should be necessary to secure the legitimate aim and meet the test of proportionality.⁸ It is important to note that this same test is incorporated in all regional human rights treaties and applied by international and regional human rights bodies.⁹

⁵ *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, 11 January 2007

⁶ The Committee on Economic, Social and Cultural Rights has published General Comment nos. 17 and 21 in respect of Article 15 ICESCR. The Committee's General Comments provide authoritative guidance on the meaning of Article 15; available at: <http://www2.ohchr.org/english/bodies/cescr/comments.htm>. See also Article 27 of the Universal Declaration on Human Rights which is drafted in very similar terms to Article 15 ICESCR.

⁷ A full list of the treaties and other international agreements administered by the WIPO is available at: <http://www.wipo.int/treaties/en/>

⁸ See HR Committee, Communication No 1022/2001, *Velichin v Belarus*, Views adopted on 20 October 2005.

⁹ See, for example, the European Court in the case of *The Sunday Times v UK*, Application No 6538/7426, Judgment of April 1979, para 45.

Website blocking and filtering

One of the measures used by States to restrict access to copyright infringing material is website blocking. However, in his report of 16 May 2011, the UN Special Rapporteur on freedom of expression summarized the key concerns as follows:¹⁰

States' use of blocking or filtering technologies is frequently in violation of their obligation to guarantee the right to freedom of expression, as the criteria mentioned under chapter III are not met. **Firstly**, the specific conditions that justify blocking are not established in law, or are provided by law but in an overly broad and vague manner, which risks content being blocked arbitrarily and excessively. **Secondly**, blocking is not justified to pursue aims which are listed under article 19, paragraph 3, of the International Covenant on Civil and Political Rights, and blocking lists are generally kept secret, which makes it difficult to assess whether access to content is being restricted for a legitimate purpose. **Thirdly**, even where justification is provided, blocking measures constitute an unnecessary or disproportionate means to achieve the purported aim, as they are often not sufficiently targeted and render a wide range of content inaccessible beyond that which has been deemed illegal. Lastly, content is frequently blocked without the intervention of or possibility for review by a judicial or independent body. [our emphasis]

The Special Rapporteur concluded by recommending the following:

As such, the Special Rapporteur calls upon States that currently block websites to provide lists of blocked websites and full details regarding the necessity and justification for blocking each individual website. An explanation should also be provided on the affected websites as to why they have been blocked. Any determination on what content should be blocked must be undertaken by a competent judicial authority or a body which is independent of any political, commercial, or other unwarranted influences.

The four special mandates on freedom of expression thus held in their June 2011 Joint Declaration on Freedom of Expression and the Internet that:¹¹

- a. Mandatory blocking of entire websites, IP addresses, ports, network protocols or types of uses (such as social networking) is an extreme measure – analogous to banning a newspaper or broadcaster – which can only be justified in accordance with international standards, for example where necessary to protect children against sexual abuse.
- b. Content filtering systems which are imposed by a government or commercial service provider and which are not end-user controlled are a form of prior censorship and are not justifiable as a restriction on freedom of expression.
(...)

Similarly, the OSCE concluded in the 2011 report on Freedom of Expression and the Internet that:

¹⁰ See UN Special Rapporteur on freedom of expression, A/HRC/17/27, 16 May 2011, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

¹¹ See Joint Declaration on Freedom of Expression and the Internet, *op. cit.*

Blocking measures are not always provided by law nor are they always subject to due process principles. Furthermore, blocking decisions are not necessarily taken by the courts of law and often administrative bodies or Internet hotlines run by the private sector single-handedly decide which content, website or platform should be blocked. Blocking policies often lack transparency and administrative bodies (including hotlines) lack accountability. Appeal procedures are either not in place or where they are in place, they are often not efficient. Therefore, increasingly, the compatibility of blocking with the fundamental right of freedom of expression must be questioned.

In addition, based on international best practices, ARTICLE 19 – in cooperation with international experts on human rights, freedom of expression and copyright - has developed a set of international principles on the balance between freedom of expression and copyright in the digital age, the *Right to Share Principles: Principles on Freedom of Expression and Copyright in the Digital Age* (the Right to Share Principles).¹² In particular, Principle 9 deals with website blocking in the context of copyright and, in its relevant parts, reads as follows:

9.3 Insofar as website blocking may already be permitted by law, this measure should only be imposed by courts or other independent adjudicatory bodies. In determining the scope of any blocking order, the courts or adjudicatory bodies should address themselves to the following:

- (a) Any blocking order should be as targeted as possible;
- (b) No blocking order should be granted unless the rights holder seeking the order has established copyright in the works which are said to be unlawfully accessed;
- (c) No blocking injunction should be granted beyond the works in which copyright has been established by the rights holders;
- (d) Whether the blocking order is the least restrictive means available to bring an end to individual acts of infringement including an assessment of any adverse impact on the right to freedom of expression;
- (e) Whether access to other non-infringing material will be impeded and if so to what extent, bearing in mind that in principle, non-infringing content should never be blocked;
- (f) The overall effectiveness of the measure and the risks of over-blocking;
- (g) Whether the blocking order should be of limited duration;
- (h) Website blocking orders to prevent future copyright infringements are a form of prior censorship and as such are a disproportionate restriction on freedom of expression.

9.4 Because of their potential adverse effect on internet users' right to freedom of expression, there should be procedures in place allowing consumer groups or other interested parties to intervene in injunction proceedings in which a blocking order is sought.

9.5 Knowingly submitting a court application for blocking of content without copyright should be penalised and those harmed by such applications should be compensated.

¹² *The Right to Share Principles: Principles on Freedom of Expression and Copyright in the Digital Age*, ARTICLE 19, 2013; available at <http://www.article19.org/data/files/medialibrary/3716/13-04-23-right-to-share-EN.pdf>.

The same applies to overbroad and negligent blocking applications.

Intermediary liability and content removal under international standards

International bodies have also commented on the compliance with international standards on freedom of expression of 'notice-and take-down' procedures, which have been adopted in a number of countries for web hosting services to remove allegedly unlawful material.¹³ For example, a recent OSCE report on Freedom of Expression on the Internet highlights that:¹⁴

Liability provisions for service providers are not always clear and complex notice and takedown provisions exist for content removal from the Internet within a number of participating States.

Also, the UN Special Rapporteur on freedom of expression recently noted:¹⁵

42. [W]hile a notice-and-takedown system is one way to prevent intermediaries from actively engaging in or encouraging unlawful behaviour on their services, it is subject to abuse by both State and private actors. Users who are notified by the service provider that their content has been flagged as unlawful often have little recourse or few resources to challenge the takedown. Moreover, given that intermediaries may still be held financially or in some cases criminally liable if they do not remove content upon receipt of notification by users regarding unlawful content, they are inclined to err on the side of safety by over-censoring potentially illegal content. Lack of transparency in the intermediaries' decision-making process also often obscures discriminatory practices or political pressure affecting the companies' decisions. Furthermore, intermediaries, as private entities, are not best placed to make the determination of whether a particular content is illegal, which requires careful balancing of competing interests and consideration of defences.

Accordingly, the four special rapporteurs on freedom of expression recommended in their 2011 Joint Declaration on Freedom of Expression and the Internet that:

- (i) No one should be liable for content produced by others when providing technical services, such as providing access, searching for, or transmission or caching of information;
- (ii) Liability should only be incurred if the intermediary has specifically intervened in the content, which is published online;
- (iii) ISPs and other intermediaries should only be required to take down content following a court order, contrary to the practice of notice and takedown.¹⁶

Similarly, the UN Special Rapporteur on freedom of expression has stated that:

¹³ See, for example the E-commerce directive in the EU and the Digital Copyright Millennium Act 1998 in the USA

¹⁴ OSCE report, Freedom of Expression and the Internet, July 2011, p 30, available at: <http://www.osce.org/fom/80723>.

¹⁵ See UN Special Rapporteur on Freedom of Expression report, cited above at n 38, para. 42.

¹⁶ See UN Special Rapporteur on Freedom of Expression report, *op. cit.*

Censorship measures should never be delegated to a private entity, and that no one should be held liable for content on the Internet of which they are not the author. Indeed, no State should use or force intermediaries to undertake censorship on its behalf.¹⁷

He has further recommended that in order to avoid infringing the right to freedom of expression and the right to privacy, intermediaries should:¹⁸

[O]nly implement restrictions to these rights after judicial intervention; be transparent to the user involved about measures taken, and where applicable to the wider public; provide, if possible, forewarning to users before the implementation of restrictive measures; and minimize the impact of restrictions strictly to the content involved.

Finally, the Special Rapporteur has emphasised the need for effective remedies for affected users, including the possibility of appeal through the procedures provided by the intermediary and by a competent judicial authority.¹⁹

Based on these international standards and comparative best practices, ARTICLE 19's *Right to Share Principles* recommend the following:

- 10.3 Intermediaries should not be required to monitor their services to prevent copyright infringement.
- 10.4 Laws governing the liability of intermediaries in respect of infringing content must contain due process safeguards sufficient to protect freedom of expression and the right to privacy. In principle, intermediaries should only be required to remove infringing content if the measure is provided by law and ordered by a court, tribunal or other independent adjudicatory body in accordance with the rule of law.
- 10.5 Intermediary liability provisions, known as 'notice-and-takedown', which give an incentive to hosting services to remove content without proper notice or evidence of actual infringement, have a chilling effect on freedom of expression. Insofar as such provisions are already in place, they should be interpreted in a way that is maximally compatible with the requirements of the right to freedom of expression, including:
 - (a) Only copyright owners or their authorised representatives should be allowed to file notices of alleged infringement;
 - (b) Copyright in the allegedly infringing content must be established;
 - (c) The notice of complaint must be specific, including details of each act of infringement, location of the infringing material and date and time of the alleged infringement;
 - (d) The alleged infringer should be informed of the copyright notice;
 - (e) A right of counter-notice should be provided and clearly explained;
 - (f) Effective remedies should be available to challenge improper takedowns, including through clearly accessible internal appeals mechanisms and/or through the courts;

¹⁷ Ibid., para. 43.

¹⁸ Ibid., para 47.

¹⁹ Ibid.

(g) Abusive or negligent copyright notices should be penalised and compensation paid to the injured party.

10.7 Because unjustified content removals affect the public's right to receive information as well as the right of individuals to express themselves, takedown requests and decisions should be transparently documented and available to challenge by both the content publisher and members of the public.

10.8 Consideration should be given to adopting rules, such as notice-and-notice, which only require intermediaries to pass on complaints about copyright infringement to the alleged infringing party without taking down the material at issue upon notice.

In addition, in its recent policy brief *Internet Intermediaries: Dilemma of Liability*, ARTICLE 19 fleshed out what a notice-and-notice model could look like. The key features would be as follows:

- The person who wants to complain about a particular content would have to pay a fee and complete a standardised notice explaining among other things why that content is unlawful and where that content is located.
- The intermediary would then pass on the complaint to the person identified as the wrongdoer.
- Upon receipt of the notice, the alleged wrongdoer could then decide whether to remove the material at issue or dispute the complaint by means of a counter notice which would have to be submitted within a reasonable time.
- If the alleged wrongdoer decides to send a counter-notice, the complainant would have a choice to either drop the complaint or take the matter to court or other independent adjudicatory body.

If the alleged wrongdoer fails to respond or file a counter-notice within the required time limit, the intermediary would have a choice to either take the material down or decide not to remove it, in which case it may be held liable for the content at issue if the complaint proceeds to court.

The key feature of this system is that the intermediary is just a conduit between the maker of the content at issue and the person complaining about it. The intermediary is not put in a position where it has to make a decision about the legality of the content immediately upon notice of a complaint. Rather, this system puts the resolution of the dispute primarily in the hands of the maker of the statement and the complainant. In our view, such a system would comply with international standards on freedom of expression.²⁰

²⁰ For more details about ARTICLE 19's proposed notice-and-notice procedure, see: http://www.article19.org/data/files/Intermediaries_ENGLISH.pdf

Analysis of the Draft Regulation

The Draft Regulation is made up of 19 Articles and is divided into five Chapters as follows:

- Chapter I deals with General Principles (articles 1-2);
- Chapter II sets out measures to foster the development and the protection of digital works (articles 3-4);
- Chapter III lays down the procedures for the enforcement of copyright online (articles 5-10);
- Chapter IV is concerned with provisions on the protection of copyright in relation to media services.
- Chapter V contains final provisions (articles 16-19).

Scope and Purpose – General Observations

Chapter I of the Draft Regulation lays down some key definitions, including the general purpose of the Draft Regulation and its scope. Under Article 2.1, the stated objectives of the Draft Regulation are (1) to promote legal digital content alongside consumer information and education about copyright; and (2) to establish procedures with a view to prevent and put an end to copyright infringement online. Article 2.3 further provides that the Draft Regulation does not apply to individual Internet users who use torrents and other file-sharing sites to *download* content, which may be infringing. Article 2.2 states AGCOM's commitment to freedom of expression and recalls the applicability of the European Convention on Human Rights and the EU Charter of Fundamental Rights.

ARTICLE 19 generally welcomes the above provisions. In particular, we observe:

- The exclusion of individual Internet users who download content on peer-to-peer networks from the scope of the Draft Regulation is a positive feature. In line with international standards on freedom of expression online, we believe that it would be a disproportionate interference with Internet users' freedom of expression to seek to punish them with Internet disconnection or criminal penalties merely for engaging in non-commercial file-sharing.²¹ This would both fail to address the problem of large-scale copyright infringement and alienate the very consumers that the creative industries seek to attract.
- While we are not in a position to comment on ways in which to promote legal digital content, it seems to us that stimulating the market for legal digital works is a sensible means to discourage online copyright infringement. This approach was recommended by the *Lescure* report in France, for instance.²² Other studies

²¹ UN Special Rapporteur on freedom of expression, report of 16 May 2011, HRC/17/27, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf; see also ARTICLE 19 Right to Share Principles, Principle 12.

²² Lescure report, *Contribution aux politiques culturelles à l'ère du numérique*, May 2013; available at: http://www.culturecommunication.gouv.fr/var/culture/storage/culture_mag/rapport_lescurer/index.htm#/7

similarly indicate that consumers often turn to ‘illegal’ content because of the lack of competitive legal offers for the digital content they seek to obtain.²³

- We also appreciate Draft Regulation’s explicit commitment to the protection of fundamental rights, and freedom of expression in particular. We observe, however, that the real test for the protection of those rights lies in the balance struck by AGCOM between freedom of expression and copyright interests in the enforcement procedure.

Administrative enforcement procedures

In ARTICLE 19’s view, the most controversial aspect of the Draft Regulation concerns Chapter 3 (Articles 5-10), which establish the administrative procedures to enforce copyright online.

Article 6 lays down a self-regulatory ‘notice-and-takedown procedure’, whereby rights-holders who believe that there has been a violation of their copyright can send a notice to the manager of the website containing the alleged infringing content. If the website manager has published a self-regulatory procedure for dealing with copyright infringement, the rights-holder must wait 7 days before he or she can take the issue to AGCOM for investigation. In the absence of a self-regulatory procedure, the rights-holder can send a request to AGCOM within 2 days of notifying the website manager. If it is impossible to notify the website manager, the rights-holder can contact AGCOM directly (Article 7.1-7-3). However, a rights holder will not be able to launch a complaint with AGCOM if he or she has already elected to take the matter to court (Article 7.4). Moreover, AGCOM may reject the complaint as inadmissible if, among other things: (i) the rights holder fails to complete the standard application form; (ii) the complaint is out of scope; (iii) the rights holder has failed to exhaust the self-regulatory procedure under Article 6; or (iv) the complaint is manifestly ill-founded (Article 7.5). If the request is admissible, AGCOM will initiate proceedings within 10 days (Article 7.8).

Under Article 8, AGCOM must notify the uploader, website manager and relevant ISP of the start of copyright enforcement proceedings. The notice must identify the digital work in question and set out the facts of the case, the provisions allegedly violated and the procedure for submitting a counter-notice (Article 8.1). If the website manager cannot be traced, AGCOM may submit a request for information to the internet service provider for identification of the website manager which must be acknowledged within 48 hours (Article 8.2). The counter-notice must be submitted within 3 days of receipt of the notice (Article 8.5). However, this period can be extended in complex cases and in order to complete any necessary enquiries (Article 8.6).

If AGCOM considers that there has been an infringement and the content has not yet been removed, AGCOM can order internet intermediaries to (1) either ‘selectively’ remove the infringing content or (2) disable access to it (Article 9.1). ‘Selective removal’ includes both removing the infringing content as well as hyperlinks and trackers leading to it. ‘Disabling access’ includes preventing access to an entire

²³ See for instance, OFCOM’s research into online copyright infringement, *OCI Tracker Benchmark Study, Deep Dive Analysis Report prepared for Ofcom by Kantar Media*, May 2013, available at: <http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/online-copyright/deep-dive.pdf>

website identified by one or more domain names or IP address associated with it. AGCOM may also order ISPs to issue an automatic redirection from the infringing webpage (Article 9.2). The same provision expressly states that the order must be proportionate in light of the severity of the infringement and location of the server. Internet intermediaries must comply within 3 days of notification of the order. A website manager or ISP which fails to comply with AGCOM's order can be fined from €10,000 to €250,000 depending on the severity of the infringement (Article 9.4).

In cases of severe copyright infringement, the relevant deadlines for the procedure under Articles 7-9 are significantly shortened (Article 10).²⁴ In particular, the deadline for the submission of a counter-notice is reduced from 3 days to 1 day. It is unclear however whether this can be extended in complex cases. Similarly, compliance with blocking orders must take place within 24 hours as opposed to 3 days under the normal procedure.

Positive features

The Italian procedure outlined above gives a prominent role to the country's independent regulator for the communications sector (here AGCOM) in dealing with online copyright enforcement.

ARTICLE 19's preferred model to deal with allegations of illegality online is a court-based model (or a model involving an independent adjudicatory body). This is also in line with the recommendations of the four special mandates on freedom of expression in their 2011 Joint Declaration on Freedom of Expression and the Internet. In our view, the courts are best placed to make determinations as to whether or not copyright infringement has taken place and if so, whether it was indeed unlawful. We note, for instance, that Chile has recently adopted this model to deal with allegations of copyright infringement online.

In circumstances where a court-based model is not adopted, ARTICLE 19 recommends as an alternative the adoption of a notice-and-notice system, as detailed in our policy brief *Internet Intermediaries: Dilemma of Liability* and summarised in Part I of this analysis.²⁵

Notwithstanding our position on these issues, we recognise that the procedure laid down in the Draft Regulation nonetheless contains certain positive features, in particular:

- AGCOM cannot initiate enforcement proceedings until it has received notice from a rights-holder complaining about copyright infringement. This prevents the Authority from engaging in preventative action, which could have a chilling effect on freedom of expression (Article 5).

²⁴ Chapter 4 (Article 11-15) establishes almost identical administrative procedures towards radio and audio-visual service providers that are alleged to have infringed copyright. ARTICLE 19's analysis however focuses on the procedures aimed at internet service providers only and the Chapter 4 provisions will not be subject to analysis.

²⁵ See ARTICLE 19, *Internet Intermediaries: Dilemma of Liability*, 2013, available at: http://www.article19.org/data/files/Intermediaries_ENGLISH.pdf

- Copyright holders are required to submit sufficiently detailed information in order for the notice of complaint to be declared admissible by AGCOM. In particular, copyright holders must establish copyright in the work at issue, identify its location and the provision of the Copyright Law which is alleged to have been violated.
- The relevant parties are notified by AGCOM when enforcement proceedings are initiated. A right of counter-notice is also provided.
- The procedure before AGCOM is an alternative to and does not replace ordinary court proceedings. AGCOM cannot initiate proceedings if the same cause of action is already pending before judicial authorities (Article 7.4).
- The Draft explicitly provides that AGCOM's blocking orders must be proportionate to the severity of the infringement (Article 9.1).

Negative features

Despite some positive features, ARTICLE 19 is concerned that the procedure laid down by the Draft Regulation fails to comply with international standards on freedom of expression in several respects:

- **The self-regulatory 'notice-and-takedown' procedure:** Article 6 of the Draft Regulation promotes notice-and-takedown procedures to deal with allegations of copyright infringement. ARTICLE 19 has long condemned notice-and-takedown procedures on the ground, among other things, that in the vast majority of cases, they fail to provide for minimum due process safeguards and can have a chilling effect on freedom of expression.²⁶ In this instance, it is impossible to ascertain whether such self-regulatory procedures respect due process standards since such procedures have yet to be devised and published. At any rate, we draw attention to ARTICLE 19's *Right to Share Principles*, which clearly set out what we consider to be the minimum due process safeguards required in order for notice-and-takedown procedures to comply with international standards on freedom of expression.

In our view, the self-regulatory procedures referred to under Article 6 of the Draft Regulation are unlikely to give sufficient regard to fundamental rights. In particular, given the suggested timeframe to deal with copyright complaints under the self-regulatory procedure, we are doubtful that such procedures would respect minimum due process safeguards, e.g. by allowing sufficient time for a counter-notice to be submitted. The upshot of such procedures is therefore likely to be that a large amount of material would be removed without adequate scrutiny and would ultimately have a chilling effect on freedom of expression.

²⁶ See for example ARTICLE 19's legal analysis on Russia's 'SOPA' legislation: <http://www.article19.org/data/files/medialibrary/37202/Russia's-new-legislation-on-online-copyright-enforcement-.pdf>

- **Request for subscriber information:** Under Article 8.2, AGCOM may request internet intermediaries to provide information about subscribers who are alleged to be engaged in copyright infringement. ARTICLE 19 is concerned however that as the body tasked with copyright enforcement, AGCOM lacks the independence necessary to order the disclosure of private information. In our view, such disclosure should be ordered by the courts who are better equipped to balance the rights to privacy and freedom of expression with copyright interests.
- **Unduly short time frame to submit a counter-notice:** Under the normal procedure, the uploader, website host and ISPs are required to submit a counter-notice within 3 days of being notified that enforcement proceedings have been initiated (Article 8.5). This period is reduced to 1 day in cases of serious copyright infringement under the abridged procedure (Article 10.1(c)). In ARTICLE 19's view, a time limit of 1-3 days is unduly strict and does not provide sufficient time to submit meaningful counterarguments, especially in complex cases. While we appreciate that AGCOM may grant an extension of the time-limit under the normal procedure, we believe that this is inadequate to protect due process rights as AGCOM retains discretion to refuse the extension. Moreover, there is no possibility of applying for an extension of the time-limit under the abridged procedure. This is all the more regrettable given that cases of serious copyright infringement are likely to be the most complex ones. Therefore, we believe that the timeframe for submitting a counter-notice should be entirely reviewed. In *Internet Intermediaries: Dilemma of Liability*, for instance, we recommend 14 days as a reasonable period within which to submit a counter-notice. In our view, such a period would better take into account the time necessary to seek legal advice in complex cases.
- **'Targeted removal' or 'disabling of access' orders:** Although the Draft Regulation requires that removal or blocking orders must respect the criteria of proportionality, ARTICLE 19 considers that website blocking on grounds of copyright protection must always be considered a disproportionate restriction on freedom of expression because of the associated risks of over-blocking and the general lack of effectiveness of this measure. This is consistent with the findings of the UN Special Rapporteur on Freedom of Expression in his report of 16 May 2011.²⁷

Furthermore, and in any event, we note that 'disabling access' orders may be aimed at entire domain names or IP addresses. This effectively means that instead of blocking access to the infringing material at issue, legitimate material could be blocked as well, in clear breach of the international standards on freedom of expression outlined above.

- **Implementation of blocking orders, lack of safeguards and disproportionate sanctions:** ARTICLE 19 notes that under the Draft Regulation, internet intermediaries are required to implement blocking or removal orders within 1 to 3 days of being notified of the order. In our view, this is an unduly short period of time that is likely to lead to mistakes being made by internet intermediaries, particularly in light of the risk of over-blocking. Moreover, we are concerned that

²⁷ See Part I above.

the Draft Regulation does not make any express reference to the possibility of judicial review against overbroad blocking orders of the type described above. This is especially important given that under the proposed copyright enforcement scheme, a regulatory body, AGCOM, rather than the courts is empowered to issue blocking orders (see also further below). Finally, we consider that the fines ranging from €10,000 to €250,000, which may be imposed on websites hosts or ISPs for failing to remove infringing content in time, are excessively high.

- **Lack of qualification and independence of AGCOM:** Given the concerns outlined above, we are concerned that ultimately, copyright enforcement powers are entrusted to a regulator. While we understand that AGCOM may constitute an independent authority we are worried that regulators in the communications sector often have close ties with the industry they regulate and do not pay sufficient regard to users' fundamental rights. Moreover, communications regulators do not normally have sufficient expert knowledge to deal with complex copyright claims. In our view, in so far as website blocking may already be permitted by law, it should only be imposed by the courts or other independent adjudicatory bodies. This is in line with international standards in this area, such as the 2011 Joint Declaration of the Four Special Mandates on Freedom of Expression and the Internet, and also corresponds to the practice of several countries such as the United Kingdom, France, Belgium or Germany.
- **Lack of transparency:** ARTICLE 19 observes that the blocking measures supervised by AGCOM, presuppose the existence of lists of "pirate" sites that must be blocked. Although the law makes references to "administrative storage" which presumably contains this information, no provision is made for making access to such blocking lists available to the wider public. It is therefore extremely difficult to assess whether access to a particular site is being restricted on copyright grounds or for some other purpose. Given that the use blocking measures almost inevitably leads to innocent sites being blocked, it is vital that blocking lists are published to allow public oversight and for mistakes to be rectified. This is especially important given the need to ensure that public authorities act within the law and comply with fundamental rights.

Recommendations:

- Blocking orders of entire websites, domain names and IP addresses should be left out of the Draft Regulation;
- In the event that blocking orders are not removed from the Draft, AGCOM should not be empowered to issue blocking or content removal orders. Instead, these powers should be entrusted to the courts or other independent adjudicatory body.
- AGCOM should not be empowered to order the disclosure of private information about subscribers. Instead, these powers should be entrusted to the courts or other independent adjudicatory body.
- Consideration should be given to adopting rules, such as 'notice-and-notice', which do no more than require intermediaries to pass on complaints about

copyright infringement to the alleged infringing party instead of requiring them to take down the material at issue upon notice (Principle 10.8, ARTICLE 19 *Right to Share Principles*).

- The deadline for submitting a counter-notice under the Draft Regulation should be extended to at least 14 days.
- Time limits of between 1-3 days to comply with removal or blocking orders are too short and should be extended in order to allow for parties to appeal such orders.
- The Regulation should expressly mention the possibility of judicial review of blocking orders.
- The level of fines that can be imposed against website hosts and ISPs for failing to comply with blocking or removal orders should be reduced.
- A full list of blocked sites should be made public and regularly updated.
- The Regulation should explicitly provide penalties for abusive claims of online copyright infringement and abusive threats of litigation.