

Developments in advertising law, the Internet, e-commerce and IP in 2012, and trends for 2013

2012 was characterized by a number of innovations in legal provisions, case law and regulations concerning the Internet, e-commerce, advertising and intellectual property that affected the evolution of these sectors.

This article deals with the main innovations of 2012 in the aforementioned fields and tries to predict some possible new trends for the coming year.

Review of 2012

Advertising law - consumer protection

- **Alcoholic beverage advertising**

The amendment to Section 22 of the Self-Regulatory Code for Commercial Communication introduced a prohibition on advertising alcoholic beverages using signs, symbols, drawings, fictitious characters or real people directly and explicitly linked to minors. The prohibition is designed to reduce the appeal of such advertising to minors.

- **Restrictions on gambling advertising**

Section 7 of Law Decree No 158/2012 ('The Balduzzi Decree') set forth a number of restrictions on gambling advertising, such as its prohibition during television shows aimed at minors and a provision concerning the advertiser's duties to provide certain information to consumers.

- **AGCOM's survey on the advertising sector in Italy**

The Italian Communication Authority (AGCOM) published the results of a survey carried out in the advertising sector. The survey revealed that the online advertising market is highly concentrated and is growing continuously.

- **Administrative protection against abusive clauses in consumers' contracts**

Law Decree No 1/2012 introduced Article No 37-bis of the Italian Consumer Code, which provides a form of administrative protection to consumers against abusive clauses inserted into contracts between consumers and professionals.

- **Protection of 'micro-businesses' against unfair commercial practices**

Law Decree No 1/2012, converted into Law No 27/2012, amended the Italian Consumer Code by extending to 'micro-businesses' the protections already granted to consumers against unfair commercial practices. The Consumer Code defines as 'micro-businesses' the entities, partnerships or associations which carry on small-business activities employing less than ten employees and with annual turnover not exceeding €2 million.

- **Higher fines for unfair commercial practices**

Law Decree No 95/2012, converted into Law No 135/2012, set forth higher fines for unfair commercial practices. The maximum value of such fines has been increased from €500,000 to €5 million. The minimum fine remains €5,000.

Internet/e-commerce

- **The role and liability of Internet service providers**

In 2012, Italian Courts continued to make a distinction between 'active' and 'passive' hosting providers. Such a distinction implies a different degree of ISP liability for the activities carried out in connection with the management of user content. The Courts reaffirmed the principle according to which rights holders of infringed content/information must provide a detailed and specific notice for the removal of the infringing material. A generic notice that does not contain a specific indication of the content to be removed is held to be insufficient to oblige the ISP to take action.

The Court of Florence, in a crucial decision, held that in order to ascertain whether the provider has "effective knowledge" of the existence of illicit contents, it is necessary that "a competent body has declared that the data is illicit, or has been ordered to remove the data, or disable access to the data, or that the existence of damages has been declared, and that the ISP itself has knowledge of a such a decision by the competent body".

The Court of Appeal of Milan with its decision of 21 December 2012 has overturned the decision of the Court of Milan of 2009 in the Google/Vividown case. The Google managers' that were involved in the case have been acquitted in connection with alleged illicit treatment of personal data. In addition, the number of criminal proceedings and Public Prosecutor orders against intellectual property right infringements grew.

Generally speaking, rights holders enjoy broader protection against intellectual property infringements in Criminal Courts than in Civil Courts. In the European context the European Court of Justice (ECJ), with its decisions in the SABAM cases (ECJ, 24 November 2011 case C-70/10 and ECJ, 16 February 2012 case C-360/10), held that orders to ISPs to provide filters preventing the diffusion of copyrighted materials over the Internet were inconsistent with European law.

- **Domain grabbing as unfair commercial practice**

With decision No 23976/2012, the Italian Competition Authority (AGCM) held that the registration of a domain name identical to a trademark distinguishing a third party's product ('domain grabbing') could be deemed as an unfair commercial practice under the Consumer Code.

• A Digital agenda for Italy

A Digital agenda for Italy has been adopted aiming to enhance measures promoting economic growth, such as encouraging the use of computers, enhancing the digitalization of public administration through open data, digital education, digitalizing the activities of the Courts, using electronic payments, and reducing the digital divide within Italy. The most innovative measures outlined are those concerning corporate law, which make provisions for new types of companies and contain measures aimed at innovative start-ups.

Intellectual property

• Towards the liberalization of the intermediation of rights related to copyright

Law Decree No 1/2012, converted into Law No 27/2012, eliminated the monopoly of collecting societies by liberalising the rights related to copyright intermediation market.

• Proposal for a directive on collective management of copyright and multi-territorial licensing for the online use of musical works

On 11 July, the European Commission issued a proposal for a new directive aimed at modernizing the collective management of the rights to musical works by fostering the development of multi-territorial licensing schemes for the supply of online services. The proposal has been submitted to the European Parliament for approval.

• Directive on certain permitted uses of orphan works

Directive 2012/28/EU introduced common rules that allow certain uses of so-called 'orphan works', (i.e. works whose authors or other rights holders are not known or cannot be located). The directive will also foster the use of orphan works in the digital environment.

• Regulations on European unitary patent

Regulations No 1257/2012 and No 1260/2012, published on 31 December 2012 in the context of the so-called 'European patent package', introduced the European unitary patent, which will enter into force in 2014. The ability to protect patent rights across 25 countries of the European Union (Italy and Spain did not participate in the project) through a single registration will ensure simplified procedures and a possible reduction in the costs of enhancing innovation in Europe. The package provides for the institution of a Unified Patent Court with exclusive jurisdiction over European unitary patents.

• The most relevant decisions of the ECJ

In 2012 the ECJ made a large number of interesting rulings on intellectual property rights. With its decision of 1 March in case C-604/10 (Dataco) the Court held that a calendar of soccer matches cannot be protected by copyright when its creation and rules are not affected by creativeness. With its decision of 15 March (cases C-135/10 and C-162/10) the Court held that a professional that broadcasts phonograms to clients within its offices does not "communicate to the public" these works and that, by contrast, a hotel owner that broadcasts phonograms within the lobby of a hotel is bound to pay equitable remuneration to the phonograms' producers.

Regarding software protection, with its decision of 2 May in case C-406/10 (SAS Institute) the Court ruled that the functionality of a computer program and its programming language cannot be protected by copyright. In its decision of 3 July 2012 (Case C-128/11 UsedSoft) the ECJ stated that the author of a piece of software cannot prevent the resale of his second-hand licences since the exclusive right of distribution of a copy of a computer program covered by such a licence is exhausted upon its first sale. Finally, in connection with domain names, with its decision of 19 July in case C-376/11 (RTR) the Court clarified that a person authorized solely to register a .eu domain name for the proprietor of a trademark cannot be deemed a "licensee of prior rights".

Preview of 2013

• The role of the independent administrative authorities and the Internet

The new role of the independent administrative authorities, and the attention directed towards the growth of the Internet and new technologies will be some of the most important trends of 2013. It is likely that the Italian Competition Authority (AGCM) will continue to challenge unfair commercial practices carried out on the Internet through invasive measures similar to those adopted in 2012.

It will be interesting to analyse AGCM's decisions on abusive clauses within consumer contracts. Also in this field, attention will be paid towards the Internet more generally, as demonstrated by the first proceedings started by AGCM that involve the main e-commerce operators. It is also likely that AGCM will pay more attention to anticompetitive behaviour within the Internet services sector, and among services linked to it.

• Discussion of the role and liability of ISPs and cloud computing

The growth of cloud computer services will, in the near future, prompt the Courts to analyse and discuss the role and liability of cloud computing service providers. The Courts will debate issues surrounding the protection of stored data and the protection of intellectual property rights. In light of the recent steps taken by European bodies in this field, cloud computing will also be subject to new legal provisions and regulations.

• Net neutrality and the growth of the Internet

Net neutrality will be a major issue this year due to the greater frequency of discrimination towards certain traffic (e.g. VoIP traffic) and the interest demonstrated by the Body of European Regulators for Electronic Communications (BEREC) and AGCOM. The main challenge will be to decide if, in addition to measures aimed at providing clear information to consumers on traffic management practices, it is necessary or even advisable to adopt measures aimed at avoiding the widespread use of traffic management practices by operators.

• The growth of mobile Internet: new functions and perspectives

In Italy the greatest proportion of Internet traffic derives from mobile devices. New projects are proliferating based on this phenomenon, such as those aimed at enhancing mobile e-commerce and mobile payments. For instance, there are a number of projects based on NCF (Near Field Communication) technology. The growth of such projects will lead to the need for specific regulations to protect the different interests involved.

• TV as an instrument of the growth of the Internet

The diffusion of the Internet will be influenced by its convergence with TV. This phenomenon affects not only the possibility of watching TV shows on the Internet but also the development of hybrid broadcasting approaches and the possibility of accessing TV content on mobile devices. A transformation from the (passive) TV viewer to the (potentially active) consumer is occurring, which subsequently also affects privacy issues, since it is possible to profile viewers and collect a huge quantity of data. As a consequence, new European and national legal provisions and regulations will be enacted.

• The Internet of Things and consumer protection

The growth of the Internet of Things through the integration of physical objects into the information network will determine the development of new services and opportunities for digital consumers. The implementation of this technology will require regulations able to guarantee the security and control of consumers' data. Last year the European Commission launched a public consultation aimed at collecting stakeholders' opinions on the subject. After this initial phase, the next step will be to provide European and national regulation aimed at ensuring the protection of consumers.

- **Towards the adoption of the Digital Agenda**

In 2012 the Digital Agenda was adopted in order to enhance Italy's levels of innovation and competitiveness. In 2013 measures provided by the Digital Agenda, such as the enhancement of e-commerce, digital alphabetization and the diffusion of digital systems in Public Administration will be adopted.

- **The adoption of European Directives**

The adoption of Directive 2011/83/UE will lead to provisions aimed at protecting consumers in the e-commerce field. Directive 2012/28/UE concerning copyright and orphan works will lead to the development of digital services based on the sharing of such works, and will contribute to the conservation of European and Italian cultural heritage.

- **A new era for the protection of copyright on the Internet?**

The protection of copyright on the Internet will be a crucial issue in 2013. Even if it seems unlikely that any new provisions or measures will be adopted in Europe as a whole, they could by contrast be adopted in Italy. For instance, AGCOM intends to restart the debate on the issue of a specific regulation on the protection of online copyright.