Technology, Media and Telecoms

The evolution of technology has and will continue to move at a fast pace, and with this change, law firms and businesses alike are having to adapt swiftly and accordingly. To discover more about technology, media and telecoms and their ever present transformation, *Lawyer Monthly* speaks to Fabrizio Cugia di Sant'Orsola, founding partner of Cugia Cuomo & Associati, a medium-sized Italian law firm based in Rome and Bari, specialising in communications, corporate, intellectual property, finance and media law.

Please introduce yourself, your role and your firm.

I am honored to have chaired the Communications Committee of the IBA between 2011 and 2013, and our practice within the Firm includes all regulatory assistance in the field of communications services, however structured (IP based, broadband, wireless, satellite, etc.). We have often acted as counsels and advisors also in a number of international funded projects, financed for instance by the World Bank and the EU Commission. Our Firm is top ranked in international and domestic directories, in our specialized areas.

What are the common regulatory challenges you face in your work, within the technology, media and telecoms sector?

In the technology sector, the main difficulty lies in coping with the pace of technological evolution with the applicable regulatory framework. By way of example, we have recently assisted an international telecommunications operator in the recognition of IMSI international codes for M2M (machine to machine) communications in Italy. The difficulty here was to ensure applicability of M2M international standards and communications protocols in light of the existing national numbering plan, so to ensure competitive advantage to our client in the midst of an evolving regulatory scenario.

With regards to media and content provisioning, the matter is undergoing a dramatic revolution in all directions. Generally the IP protection of content, or the recognition of related rights in pervasive environments such as cloud computing is a most challenging issue. We have assisted cloud computing service providers in data mining or metadata storage, and one of the critical items was licensing, along with ensuring the ownership and control of data or trade secrets within consumer-generated environments.

Are you often involved in litigation? Can you tell us about any key cases you have worked on?

Often indeed; litigation and ADR have flourished as a side effect of the general economic crisis Italy is undergoing. But I believe this is not only a matter of liquidity crisis. Rather it is a "parallel level playing field" in which operators meet each other and cross swords in a highly critical moment, in which every loss may become fatal. Darwin would call it the natural selection…

One of our most important recent cases has been assisting a new entrant MVNO before the IP Court in Milan, in a fundamental IP case related to the use of trademarks. The operator was challenged in the deposit of signs and trademarks, and was about to be inhibited in the use of such signs right before the media take off of the initiative. As a matter of urgency, we have anticipated the counterpart and ensured to the operator a court recognition of his related rights, bypassing all challenges which would have inhibited the initiative.
In August we also represented and advised a group of six MVNOs acting against a national Enabler and the relevant MNO (H3G), in the recognition of portability rights, ancillary obligations, access and duty of service. The decision which followed, issued by Agcom (the Italian NRA) on the relevant case, has now become a landmark decision and sets once and for all how new entrant operators must be ensured their competitive rights in an oligopolistic world ruled by traditional mobile network operators. The decision dwelled also on side topics such as duty to supply of branded Sim Cards, customer management services and obligations of management of dedicated rates.

What are the key things organizations can do to protect their IP within these sectors?

We encourage operators to avoid taking uninformed decisions which may trigger prejudice to their IP rights, or jeopardize inevitably new initiatives without the correct due diligence validation process of the related IP aspects.

Prevention is better than the cure, naturally, so we tend to be aligned as lawyers with management of companies and operators while decisions are taken and initiatives are set to start, so to ensure that the legal aspects do not fall behind, but rather anticipate or, why not, inspire the process (think of IP, trade or know how secrets, for example: the protection aspects differ substantially).

Taking the right decisions in due time, ensuring protection and competitive advantage while generating new services is the secret of commerce, in a nutshell.

To answer the point, the holder of a trademark may prohibit third parties from utilizing the trademark or affixing signs to the products or to the packaging thereof for the purposes of offering such products in the market, as well as detaining, storing or holding such goods retaining trademarks for such purposes. Other measures are also possible, such as inhibiting the offering or supplying of services bearing undue signs, importing or exporting products bearing protected trademarks as well as using the sign on business papers and in advertising.

On its part, we must identify if patents are possible, and if IP protection may be ensured under the general international regulation which applies. Patent holders always retain the rights to forbid third parties from producing, using, releasing on the market, selling or importing products, and if the object of patent protection is a process (as it often happens with cloud-based or IT software or applications, as well as in data banks), we tend to ensure the right to forbid third parties from applying such a process also pending the protection request.

Have there been any legislative changes particularly relevant to the technology, media and telecoms sectors in 2013?

The most important is the December 12, 2013 Regulation of Agcom on copyright protection in electronic communications networks, which indicates the protective measures adoptable in the offering of services on electronic communication networks. Such Regulation, which will enter into force in 2014, aims to encourage a stable and legal environment in the offering of contents, and to promote users access to the related content. It states procedures to the establishment and termination of violation of copyright and related rights, carried out on electronic communications networks.

The Regulation does not apply to end users of digital contents, and it does not impact on peer-to peer applications. It also does not limit the freedom of expression and information, but ensures the full guarantee of the rights of inform, comment, discuss and the educational and scientific purposes as well as any use not adversely affecting the normal exploitation of the content. As an effect, Agcom may now act at the request of a party, in order to ensure the protection of IP rights.

Do you foresee the need for legislative change in 2014, if so why?

Both at national and EU level, privacy and data protection regulation must be reviewed. It's not a matter only of the NSA scandal, with the well-known interception and illegal storage of personal data being automatically processed on all IP based services by foreign agencies.

This is the top of the iceberg, I presume.

The protection of personal data, as currently regulated, has much to do with location-based approaches and an individualistic cut, which appears quite far from reality.
With respect to the NSA-Snowden case, people have been questioning on the application of side "safe harbor" conventions with the US, which may or may not apply, but seen in perspective, the problem appears not so much the storage facilities or location of data, but rather the use of data or metadata and related rights.

The same definition of personal data appears now somewhat out of the picture, taking into account what technology is doing, i.e. multiplying the spontaneous generation of data referred to individuals up to a certain extent.

The vexatious question is: what about anonymous data on cloud-based applications? What about location-less data? Or what about M2M spontaneously generated content?

For example, is the data referred to safety or telemetric services of a driven car owned by its proprietor or rather the driver? And why not the car assembler or industry involved in the spare part? Most assembled or spare parts of a car have now embedded IT systems, as most electrical appliances in households, all capable of communicating data, which is a fundamental marketing resource. Is this personal data?

The Article 29 Working Party has issued a guidance on the meaning of personal data back in 2007, interpreting the concept of personal data as "all information concerning, or which may be linked, to an individual".

I would tend to believe that this definition is somewhat outdated.

A bit medieval, if I may say. **LM**

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