

Media & Entertainment - Italy

Active or passive? Court of Rome rules on role and liability of ISPs

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Decision

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On October 20 2011 the Court of Rome issued a decision that will contribute significantly to the ongoing debate - both in Italy and the rest of Europe - on the role and liability of internet service providers (ISPs). The lawsuit was initiated by a request for precautionary measures filed by RTI, Italy's main private broadcaster and part of the Mediaset group. The action was brought against a company which provided connectivity and storage services to a company operating a video-sharing website.

Facts

The petition was based on the presence on the website of several videos that related mainly to television series of which RTI was either the rights owner or a licensee. The videos in question had been uploaded by website users or directly by the website owner.

Before commencing legal proceedings, RTI sent a generic notice to the defendants, requiring the removal from the video-sharing platform of all content related to the series in question. In order to prevent the dissemination of such content through the website, RTI asked the court to:

- order the defendants immediately to remove from their servers all videos hosted by the website that related to three specific television series;
- order measures to prevent the defendants from continuing to violate RTI's IP rights;
- impose a fine of no less than €50,000 for every minute for which RTI's videos remained available after the order and for each day of delay in complying with the order;
- order the publication of an excerpt of the decision in Italy's main daily newspapers; and
- order the defendants to pay the costs of the proceedings.

The company that operates the video-sharing website, which was involved in the proceedings as direct infringer, decided not to appear before the court. However, the hosting services provider chose to defend its position. Its main arguments were as follows.

Passive hosting provider

The hosting services provider argued that it was a passive hosting provider because it merely stored information at the request of a recipient of its service. A passive hosting provider is subject to the provisions of Article 14 of the EU E-commerce Directive (2000/31/EC). According to the directive, a passive hosting provider is not liable for stored information and is not required to monitor information that is transmitted through, or stored on, the hosted website. Furthermore, hosting providers are not required actively to look for evidence or circumstances that indicate illegal activity. They are not responsible for stored information if they are unaware of its illegal nature, and are not required to remove illegal content unless ordered to do so by the competent public authorities.

Generic notice

The notice sent by RTI was generic and imposed no legal obligation on the hosting provider. Pursuant to Article 17 of Legislative Decree 70/2003, when a provider becomes aware of alleged illegal activities or information related to one of the recipients of its service, it must inform the competent authorities. However, any such notice and information must be analytical. Consequently, a hosting provider cannot be found liable for contributory copyright infringement unless the notice reports the URLs where the infringing content can be found.

Decision

In addressing the hosting provider's arguments, the court faced various issues relating to the role and liability of ISPs. It found the website owner to be liable, but rejected RTI's request in respect of the hosting provider.

Active and passive hosting providers

In keeping with recent Italian case law, the court acknowledged the distinction between active and passive hosting providers, which is based on an analysis of the activities performed by the entity in question. The court held that if a hosting provider is directly involved in the operation of a website by allowing users to upload videos and other content, it is deemed to manage the information and content that its users provide. As a consequence, the ISP in this case would be regarded as an active hosting provider, making it subject to a duty to remove illicit content if so requested by the rights holder. However, such a duty would arise only pursuant to a detailed notice.

If a hosting provider merely provides storage and connectivity to specific websites, and plays no active role in managing information online, it is a passive hosting provider and is covered by the limitation of liability under the directive.

As the court highlighted, passive hosting providers are not jointly liable with website owners for copyright infringement unless they:

- fail to comply with a removal order issued by the competent administrative or judicial authorities - in practice, an order from an ordinary Italian court will meet this requirement; or
- are aware of the illicit nature of the content on the hosted website and fail to alert the competent administrative or judicial authorities.

In other words, the court ruled that the duty to remove illicit content may derive only from a specific order from the competent authority. As a consequence, a passive hosting provider may be considered liable only in the event of non-compliance with such order.

For the first time in Italian case law, the court stated that, in itself, a notice from a rights holder - even if it contains adequately specific information - is insufficient to require a passive hosting provider to remove the infringing content in question.

Responsibility for monitoring content

The court stated that under the directive and its Italian implementing provisions, neither active nor passive hosting providers are responsible for the general monitoring of information stored on, or transmitted by, the websites that they host. As such, active providers are not required to undertake preventive monitoring of the information and content that users upload to such platforms. However, if a detailed notice from a rights holder so requires, they must remove illicit content and information even before a specific court order is issued.⁽¹⁾

Detailed and specific notice

The court stressed that copyright holders wishing to protect their IP rights by obtaining the removal of unauthorised content from video-sharing websites must communicate their demand in a detailed and specific notice, indicating the URLs that host the unauthorised content.

In this case, a generic reference to the titles of television programmes or series was deemed insufficient to identify the allegedly illicit content; as such, the generic reference was not an adequate basis for imposing a removal obligation on the hosting provider.

Comment

The decision represents a milestone in Italian case law on the role and liability of ISPs. The distinction between active and passive hosting providers - as clearly identified - will lend a new perspective to the

Italian debate on the issue by recognising different forms of liability in relation to activities performed by hosting providers in the development of internet services.

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Endnotes

⁽¹⁾ In recent Italian case law, see the Court of Rome decision in RTI's action against YouTube on December 16 2009 and the Court of Milan decisions of June 17 2011 and September 9 2011 in RTI's action against Italia on Line and Yahoo!, respectively.

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