



Court rules on television programmes on video-sharing platforms

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Summary

On January 20 2011 the Court of Milan ruled against ItaliaOnline Srl (IOL) for infringement of copyright held by Reti Televisive Italiane SpA (RTI) in respect of television programmes uploaded and displayed on IOL's online audio and video-sharing platform. The grounds for the decision were published on June 16 2011.

The court held that the liability exemptions for hosting providers under Legislative Decree 70/2003, which implements the EU E-commerce Directive (2000/31/EC), did not apply, as IOL had played an active role in organising the service and the videos uploaded to its website, offering additional services with a view to commercial benefit.

Facts

RTI produces television programmes and provides television broadcasting services. It claimed that a number of its broadcasts - estimated in January 2009 at around 1,000 - had been uploaded to IOL's website without its consent. RTI stated that:

- the video section of IOL's platform enabled users to find images from RTI programmes by searching by title; and
- videos of RTI programmes were connected to sponsored links, using the title of the programme as a keyword.

RTI sent a notice to IOL asking it to cease the infringing practice. IOL did not respond.

RTI claimed that IOL's activity:

- infringed its copyright in the television programmes that were uploaded and displayed on IOL's platform (under the Copyright Law (633/1941)), (1) including its moral right; (2)
- infringed its trademark rights in the titles of the television programmes under the Industrial Property Code (30/2005);
- constituted unfair competition on the grounds of confusion and parasitism under Article 2598 of

- the Civil Code, as RTI made the same content available through other websites; and
- constituted a tort under Article 2043 of the Civil Code and could not be exempted under the E-commerce Decree, as IOL had performed an active role - including uploading some of the allegedly infringing content - rather than merely storing videos uploaded by users.

RTI asked the court to:

- prohibit the infringements and order IOL to remove all audiovisual files of RTI programmes from its server;
- order damages of €100 million, with a further €100 million payable annually as the "price of consent", from the commencement of the lawsuit until a final decision;
- set a fine of €1,000 for each infringement and for each day of delay in performance of the decision; and
- order publication of the decision - in whole or in part, and at IOL's expense - in the newspapers indicated in the complaint.

Decision

The court did not agree with IOL's defence, which was based on exemptions from copyright (eg, for criticism and reporting of current events).(3) It found that IOL had failed to provide proof of relevant content that would qualify for such exemptions.

Therefore, the court held IOL liable for copyright infringement, as it offered users "an audiovisual product with a specific individuality and autonomy". It emphasised IOL's active role in organising and managing content, particularly the fact that IOL:

- provided a search tool that enabled users to search for content by keyword;
- indexed and selected videos and offered a 'related videos' search function, which automatically displayed content related to the user's search results;
- offered a notice and takedown mechanism for the notification of allegedly infringing content; and
- directly uploaded some content.

IOL's terms and conditions for its video service - wherein it reserved the right to display targeted links, thereby profiting from its activity - were also held to indicate an active role.

The court held IOL liable for copyright infringement and prohibited further diffusion of the infringing content. It set a fine of €250 a day for each item not removed from the video section of the website. Damages will be determined further to a technical consultation to quantify the available files that contain RTI content, as well as those that have already been deleted. The sum will also depend on IOL's related profits from advertising.

The court found that IOL had not infringed moral rights, which pertain only to authors (eg, the creator of a television programme format); nor was IOL liable for trademark infringement, since the use of RTI's trademarks (ie, the titles of its programmes) as keywords in IOL's advertising service was attributable to the advertisers, not to IOL.(4)

The court rejected RTI's unfair competition claim.

Comment

The case in question differs from the recent case involving Yahoo! Italia, in which the Court of Rome found that the search engine bore contributory liability for infringement of copyright in the film *About Elly* by illicit websites, which allowed the streaming or downloading and peer-to-peer sharing of the film without the consent of the film's distributor. Yahoo! Italia was held liable under the E-commerce Decree and the liability rules set forth for hosting providers, as it failed to act on the alleged infringement after being notified of it (for further details please see "Yahoo! Italia liable for film copyright infringement"). On July 11

