[IT] The Yahoo! Decision (follow up)

IRIS 2011-8:1/29

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On 16 June 2011 the Intellectual Property Section of the Italian Court of Appeal overturned the Court of Rome's recent decision in the Yahoo! Case regarding the removal of links that infringe copyright (see IRIS 2011-7/30).

The Ninth Section of the Court of Rome had found that Yahoo! acted as an accessory in the proliferation of pirated links, establishing for the first time liability for contributory infringement of search engines that do not take an active role in combating online piracy.

The Court of Appeal has now accepted all the requests submitted by Yahoo!.

According to the Court, Yahoo! does not have "liability for contributory infringement" and does not have an obligation of preventive control. Furthermore, in cases concerning online piracy, the complainant has to be precise in their submissions and has to provide specific evidence. In order to obtain a "take down" on the presumed illegal material, IP rightsholders have to prove their ownership of the rights of copyright protection and have to clearly identify the challenged links. According to the appeal decision, PFA Films S.r.L., the film company and copyright holder for the Iranian film "About Elly", never precisely identified a URL in relation to the violation.

The Court of Appeal stated that "the limitation of liability introduced to the benefit of ISPs [i.e., the liability exemption prescribed by the E-Commerce Directive 2000/31/EC] is mainly aimed at avoiding a new case of objective liability [i.e., liability without negligence] that is not identified by the law or at least a contributory liability of providers to the unlawful contents published by third parties making use of the connectivity service of the ISP".

European copyright "enforcement" is built on the principle of balancing interests between the IP rightsholder, the user and the suppliers of services in the information society. The requirement of the promotion and protection of the free movement of services in the information society has to be assured.

In this context the limitations of liability introduced to the benefit of ISPs are aimed at avoiding the introduction of a new hypothesis of objective liability not provided in the law or at least of a hypothesis of a shared action in collaboration with the providers of the illegal material transmitted by third parties using the

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connectivity services furnished by the latter.

The appeal decision also found that there was no reason, in the field of online copyright protection, to derogate from the general rules relating to the burden of proof. The burden of proof remains with the rightsholder, who has to prove their ownership and identify the violation on every piece of material made available to the public whose removal or the blocking of the distribution of which is requested. A generic allegation of copyright infringement is not sufficient. The precise links have to be identified in order to prove their illegal nature.

In addition it was noted that PFA Films owns only some of rights for the use of the work “About Elly”, restricted to certain territories. Consequently, the rights can be legitimately used by third parties, including online intermediaries.

In relation to interim measures, Articles 14, 15 and 16 of the legislative decree 70/2003 require judicial verification of the alleged violations. However, no judicial verification is possible in the absence of clear evidence provided by the complainant.

Furthermore, it is important to stress that, considering that the interim measures requested may produce effects for numerous persons unaware of the procedure, this request requires rigorous verification of the facts.

Tribunale di Roma IX sezione civile, sezione specializzata in material di Proprietà Intellettuale - Sentenza Yahoo!

http://www.leggioggi.it/wp-content/uploads/2011/07/Yahoo_ordinanza_reclamo.pdf

Intellectual Property section of the Italian Court of Appeal - Yahoo! Decision, 16 June 2011

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