[IT] Ruling on ISP Liability for Online TV Programmes

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On 7 January 2015, the Appeals Court of Milan issued a decision that represents a turning point in Italian case law on the role and liability of internet service providers (ISPs), insofar as it rejects the "Italian" distinction between "active" and "passive" hosting providers, lending a new perspective to the issue. The case was brought by Reti Televisive Italiane S.p.A (RTI), Italy's main private broadcaster and part of the Mediaset group, against Yahoo! Italia S.r.l. (Yahoo! Italia) and Yahoo!, Inc.

The decision overturned a previous decision of the Milan Court of First Instance issued on 19 May 2011, in which Yahoo! Italia was found liable for infringement of copyright held by RTI in respect of television programmes that were uploaded and displayed on Yahoo! Italia's online video-sharing platform. The Court of First Instance held that the liability exemptions for hosting providers under the E-commerce Decree (Legislative Decree 70/2003), which implements the EU E-Commerce Directive (2000/31/EC), did not apply to Yahoo! Italia, as it was an "active hosting provider", since it played an active role in organising its services and the videos uploaded to its platform with a view to commercial benefit (e.g., (i) it provided a search tool that enabled users to search for content by keyword; (ii) it indexed and selected videos; (iii) within its T&Cs, it reserved the right to reproduce and adapt videos and display them to the public, as well as the right to use them for promotional or advertising purposes). In this respect, the Court of First Instance's decision adhered to the distinction between "passive hosting providers" and "active hosting providers" stemming from previous decisions of Italian courts (e.g., amongst others, Court of Rome, 20 October 2011, RTI vs. Choopa).

The Appeals Court rejected the distinction between "active" and "passive" hosting providers. In the Court's words, "the notion of active hosting provider is today misleading and shall be rejected because it does not fit the actual features of the hosting services." Indeed, in keeping with recent case-law of the Court of Justice of the European Union (CJEU) on ISPs' liability (such as case C-314/12, Telekabel (see IRIS 2014-5/2)), the Appeals Court stressed that in a possible clash between fundamental rights, such as the protection of intellectual property rights versus freedom of speech and freedom to conduct business, the latter shall prevail.

In addition and in accordance with recent CJEU rulings on the matter, the Appeals Court clarified that the features of the service at issue are not able to make the provider of such service liable with respect to the hosted contents, insofar as such features do not make the provider the “owner” of said contents. According to the court, a different interpretation would weaken the safe harbour clause for hosting providers set forth by the E-Commerce Directive, whereby ISPs are liable only where they fail to remove the infringing contents upon receipt of a notice from the right holder or they fail to comply with a removal order issued by the competent administrative or judicial authorities.

Finally, according to the Appeals Court, a detailed cease and desist letter (which contains the URL where the infringing content can be found) sent by the right-holder is equivalent to a removal order issued by the competent authority. Both instruments are able to oblige the ISPs to remove infringing contents from their platforms.

Corte di Appello di Milano, sentenza del 7 gennaio 2015

http://www.oppic.it/index.php?option=com_docman&task=doc_details&gid=503&Itemid=60