[IT] Landmark Decision in Wikimedia v. Cesare Previti Concerning ISPs' liability for online defamatory content

IRIS 2018-6:1/26

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On 19 February 2018, the Court of Appeal of Rome published the appellate decision in the case between the Wikimedia Foundation and Mr. Cesare Previti, a former Italian politician. The case arose when Mr. Previti retrieved purportedly defamatory statements included in his biography on the online encyclopaedia Wikipedia, whose services are provided by the Wikimedia Foundation, based in San Francisco. He sent a take-down notice to Wikimedia, but received no response. Accordingly, Mr. Previti sued Wikimedia, seeking to have the latter censured for its failure to promptly remove the allegedly defamatory content reported.

The first-instance Court of Rome dismissed Mr. Previti's demands it a decision published on 20 June 2013. The judge stated that the Italian E-Commerce Decree (Legislative Decree no. 70 of 2003) could not be applied to Wikimedia, because the latter is not based in the European Union, and Article 1, par. 2, letter d) of the Decree excludes the applicability of its provisions to services established outside the European Economic Area. Moreover, the judge ruled that Wikimedia's liability could be established under the general provisions on tort claims enshrined in Sections 2043 and following of the Italian Civil Code. Mr Previti in fact had not been able to prove any subjective element (wilful intent or negligence) in Wikimedia's allegedly illicit activity. It was therefore impossible to ascertain the presence of joint liability on the part of Wikimedia and the author of Mr Previti's biography, the latter being solely liable for any unlawful content. The respondent could not in fact be considered liable for failure to ensure the correctness/unlawfulness of the information disseminated via its service. This was even more true if one were to consider that Mr. Previti could have avoided any damage caused had he himself accessed and amended his personal biography on Wikipedia.

Mr. Previti lodged an appeal against the Court of Rome's decision. Mr. Previti argued that the Court of Rome had erred in not considering the ex-parte communication sent to Wikimedia, which allegedly proved the latter's co-liability in the defamation conduct. Furthermore, he argued that Wikimedia's ability to intervene in the services provided via its site confirmed its capacity to generally control its content and therefore seemingly constituted further proof of its joint liability along with the biography's author under the Italian principles of tort law.

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Mr. Previti attempted also to frame Wikimedia's activities under Section 2050 of the Italian Civil Code, which provides for tort liability for so-called "dangerous activities" and exonerates the damaged party from the burden of proving a subjective element.

The Court of Appeal entirely rejected Mr. Previti's appeal and fully confirmed the first-instance decision, albeit correcting its reasoning. Indeed, even though Wikimedia is based outside the European Economic Area, the E-Commerce Decree provides a set of rights and obligations that through the years have become part of the legal background applicable to all ISPs such as Wikimedia. Since there is no provision under Italian law that imposes upon providers an obligation to monitor their services, no liability can be recognised for failure to prevent the alleged defamation from occurring.

On the liability regime, the appellate judges clarified that hosting providers can be held liable only after they are made aware of the presence of illicit activities/content on the services that they host, making clear that no general monitoring obligation exists. In contrast to what happens with copyright/IP claims, defamation complaints raised with ex parte notices cannot reasonably be cited to firmly deem a hosting provider like Wikimedia "on notice" of the presence of unlawful content, or be considered to trigger its obligation to take down content in order to avoid liability. This circumstance separates the case at hand from the jurisprudence developed in connection with copyright/IP claims. Similarly, the ex-parte notices sent by Mr. Previti do not demonstrate the subjective element (wilful intent or negligence) required by Italian tort law to recognise any liability whatsoever on the part of Wikimedia. Indeed, Mr. Previti's objections were absolutely generic and unsupported, while Mr. Previti's biography on Wikipedia was based on appropriate evidence, such as case law citations. Therefore, no element of the crime of defamation exists. The alleged clear unlawfulness of a certain statement is insufficient to deem Wikimedia jointly liable from a criminal law perspective. The Court of Appeals additionally clarified that if Wikimedia had failed to comply with a specific take-down order issued and properly served by the relevant administrative/judicial authority under the E-Commerce Decree, it could have suffered consequences also under criminal law.

Corte d'Appello di Roma, sentenza n. 1065/2018, pubblicata il 19 febbraio 2018, R.G. 4312/2013

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Court of Appeals of Rome, ruling no. 1065/2018, published on 19 February 2018, docket no. 4312/2013

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