[IT] Dailymotion not protected by the E-Commerce Directive

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With a landmark decision published on 12 July 2019, the Court of Rome found Dailymotion SA (Dailymotion) liable for copyright infringement against Reti Televisive Italiane S.p.A. (RTI) and condemned it to pay EUR 5.5 million in compensation for damages.

The judges also ordered Dailymotion to (i) remove from its services all RTI's audiovisual content examined during the proceedings; (ii) abstain from further exploiting for commercial purposes the same audiovisual content; (iii) pay EUR 5 000 for any future infringements; and (iv) pay the legal fees and expenses. In addition, RTI has been authorised to publish the decisive part of the judgment (so-called PQM) in the paper and online editions of three major Italian newspapers (*Il Corriere della Sera*, *Il Sole 24 Ore*, and *Il Giornale*) and on Dailymotion's homepage, at Dailymotion's expense.

The case arose when RTI filed a law suit against Dailymotion,requesting that the latter be condemned for copyright infringement in connection with 995 pieces of content, hosted on its platform, depicting audiovisual content for which RTI claimed copyright. Dailymotion first objected on jurisdiction grounds, moving to dismiss the case on the ground that the Italian courts lacked jurisdiction. On the merits, Dailymotion claimed it was a hosting provider, protected by the 2000/31/EC directive's safe harbor (the E-Commerce Directive), and cited French case precedents confirming its qualification. Dailymotion also requested that the court refer the case to the Court of Justice of the European Union, as a matter of interpretation of the directive.

Consistently with its numerous case precedents on this specific issue, the Court of Rome dismissed the lack of jurisdiction objection in light of Article 5(3) of Regulation No. 2001/44/EC (Brussels I regulation) and Sections 78-*ter*and 79 of the Italian Copyright Law (Law No. 633/1941).

On the merits, the court analysed the European and national framework concerning Internet service providers. In particular, the court took into account the E-Commerce Directive and its national implementing instrument (that is, Legislative Decree No. 70 of 2003), as interpreted by the European Court of Justice, as well as the recent Italian Court of Cassation Decision No. 7708/2019 in

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the *RTI v. Yahoo!* case.

The main points that led to the final decision can be summarised as follows:

Article 14 of the E-Commerce Directive applies only to passive hosting providers. Passive hosting providers are those services of a "mere technical, automatic and passive nature" (recital 42 of the E-Commerce Directive). Active hosting providers cannot benefit from the safe harbor defence and fall outside the boundaries of the E-Commerce Directive.

The respondent, namely Dailymotion in this case, was the best candidate to submit evidence capable of demonstrating whether its activities could qualify it as an active or passive hosting provider, for the purposes of Article 14 of the E-Commerce Directive. Thus, the question of whether the exemption from liability applied was to be ascertained on the basis of the evidence submitted by the respondent, pursuant to the proximity of evidence principle.

That being said, the court was open to the possibility of one service qualifying as both an active and passive hosting provider, in connection with different activities carried out. On the basis of both the evidence submitted by the parties and the court-appointed expert's report, the panel of judges considered more likely than not that Dailymotion carried out an active role in connection with RTI's audiovisual content.

The copyrighted material was reported to Dailymotion by RTI with an *ex parte* communication and the latter failed to act. Consistently with its previous case law, the court did not consider decisive the circumstance that RTI's reports did not include the content's URLs. Thus, Dailymotion was declared liable for copyright infringement and the court condemned it to pay EUR 5.5 million.

This amount was calculated using the hypothetical licence fee criterion, which the Court of Rome had already applied in many other similar cases. Interestingly enough, the court determined the amount not from the moment the audiovisual content was reported, but from the instant it was uploaded to the platform.

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