

# Kluwer Copyright Blog

## Hosting providers: passive vs. active

Francesco Spreafico · Tuesday, January 31st, 2012



We are experiencing a new trend by Italian first instance courts in addressing the issue of liability of hosting providers for contents posted by users in copyright infringement cases. The new approach is likely to impose providers of video sharing platforms (such as YouTube, Dailymotion and others) dramatic changes in their model of business, with relevant consequences for the whole information society.

In recent judgments, courts have in fact elaborated the theory that the provision contained in art. 14 of the E-Commerce Directive that exempts hosting providers from liability in case of unlawful activities carried out by the users of their service, applies only to “passive” hosting providers, whose activity consists exclusively in the provision of an online space where users can store and display personal contents, those being – in the opinion of the courts – the type of hosting providers that the EU legislator had in mind at the end of the 90s when it drafted the directive.

According to the decisions, the “safe harbor” contained in art. 14 was not intended to be (and cannot be) extended to hosting activities that are not merely “passive” or “neutral” with respect to the organization of contents posted by the users and that economically benefit from the advertising connected with the (organized) presentation of such contents. To support this conclusion reference has been made to recital 42 of the E-Commerce Directive, pursuant to which the exemptions from liability established in the Directive “*cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored*”.

In other words, hosting providers that do not merely offer users a platform where to post their videos, but rather have an “active” role in the organization of such contents, cannot *tout court* benefit from the exemption of liability when users of their services

post unauthorized videos in violation of third-party rights. More specifically, according to the mentioned court decisions, a provider of “active” hosting services enjoys the exemption only until it is notified by the copyright holder that users have posted on the provider’s property a copyright-infringing content. Once the provider has received the notification of the copyright holder, the special regime does not apply any longer and the hosting provider’s conduct is evaluated on the basis of the ordinary criteria for tort liability, meaning that the provider must diligently activate to locate and remove the copyright-infringing content from its properties in order to avoid/limit the damage to the copyright holder, otherwise it can be held liable for such damages (to be noted that, contrary to this conclusion, according to the Italian law implementing the E-Commerce Directive, the provider has a duty to remove contents only after it has received the order of a judicial or administrative authority).

The courts’ decisions at issue, however, move from two incorrect assumptions: (1) that Recital 42 explains the rationale behind art. 14 of the E-Commerce Directive and (2) that the drafters of the E-Commerce Directive (and of its art. 14 in particular) had in mind the idea of hosting services as just “passive” because at that time that was the only type of hosting activity present on the market.

Actually, a logical reading of Recital 42 leads to conclude that the exemptions (and the limits to their application) mentioned therein refer just to “*mere conduit*” and caching activities, while the explanation of the rationale for exempting hosting activities must be found in Recital 46 of the directive, that does not make a difference between active and passive role of the providers (see, among others, P. van Eecke and M. Truyens, “*L’Oreal v. eBay: The Court of Justice Clarifies the Position of Online Auction Providers*”, CRi 5/2011, page 132). Furthermore, as far as the historical market analysis is concerned, the decisions do not consider that the hosting activity carried out at the time of enactment of the E-Commerce Directive is not much different from that carried out today. Indeed, hosting services since their origin used to provide for different functionalities, including a search engine, a tool for keeping track of favorites, links to related contents, classification of the contents per categories, systems for reporting abuses. Therefore, hosting providers had an “active” role even at the time of enactment of the E-Commerce Directive and it is at least doubtful that drafters of the directive had not in mind these considerations, that were the market reality at that time.

Paradoxically, the arguments of the judgments in comment have been used only in copyright infringement cases involving video sharing platforms and not in cases involving other types of social media services, where courts continue to take the approach that the exemption of art. 14 of the E-Commerce Directive fully applies to the hosting provider.

Anyhow, the decisions are now in appeal, we will keep you posted on how the case law develops on this matter.

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