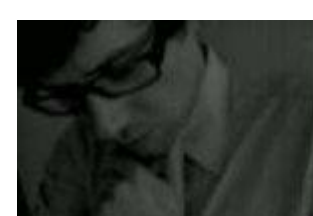


# Did anybody notice it? Active and passive hosting in Italian case law on ISP liability

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In recent years, Italian courts have struggled to create a new figure, the 'active hosting provider,' whereby providers that do not offer any content themselves, can nonetheless be held liable with regard to their (commercial) activities in relation to infringing content that was uploaded by users.

On the one hand, it could be argued that this approach favors a more balanced interpretation of the e-Commerce directive (at least that is the intention of the courts), but on the other hand, the approach appears to be a misinterpretation of the EU legislative framework, of the technology behind the services offered by the hosting providers and ultimately of the role played by copyright law in modern societies.

In the last 4 years or so, the Italian courts have attempted to find Internet intermediaries liable for the content that they or their services transmit, store, or even index. This trend is especially prevalent in the district courts (*Tribunali*) of Milan and Rome, two of the most important districts for population, media concentration, and cultural initiatives. The names of some of the defendants give the story away: YouTube, Google, Yahoo!, Yahoo! Video and Italia Online. The plaintiffs are all TV producers or exclusive distributors of movies and TV shows.

The first outline of this new trend appeared in a preliminary injunction delivered by the *Tribunale di Roma*, in an order of 16 December 2009. Parties to the case were RTI and YouTube, with the former claiming that the latter was liable for making available excerpts of the TV show 'Il Grande Fratello' (Big Brother). The court held that in cases such as these, a case-by-case analysis has to be made to determine the liability of a provider. This is particularly relevant for cases where providers do not limit their activity to providing access to the Internet, but also offer supplementary services and exert some form of control, although indirect, over the information transmitted on their website.

The injunction was upheld in appeal (January 22, 2010) where the court clarified that no obligation to exercise preventive control can be imposed on service providers, but that they should remove content once they are notified of the infringing nature of that content (we should infer from the alleged right-holder and without the necessity to identify univocally the supposedly infringing material).

This decision, although being 'just' a preliminary injunction, set the stage for the term 'active hosting' as used by the district court of Milan in its decision RTI v. Italia On Line of 7 June 2011. In this case, the court tells us that due to technological evolution, the activities of an Internet provider are no longer in line with those codified by EU legislation and therefore the system of liability exemptions therein contained needs to be re-adjusted. The court concludes that services identified as hosting in the e-Commerce directive, are to be classified as a new genus, somewhere in between mere hosting and directly offering content. This new genus is not completely passive in the transmission of third parties' content, and does not limit its activity to offer the storage of memory, but, on the contrary, has a specific role in organizing the content uploaded by users. Of particular relevance to the court are the advertisements that link to the infringing content, as such activity generates financial revenues. The court states that such characteristics are those of an "active hosting provider", one that should not benefit from the exemptions set forth by the e-Commerce directive and the Italian legislative decree 70/2003 that transposed it into national law.

The court goes further and lists two other fundamental aspects (in its opinion) that support this conclusion: 1) In its terms of use, the defendant requires that users grant a non-exclusive license on the uploaded content that allows the provider to reproduce said content for any purpose; and 2) the same provider offers a link below all videos that enables users to report eventual violations, including copyright infringement.

The court infers that the liability of the provider can be assumed because the presence of such terms of use and links equals control and knowledge of what is present on the provider's servers. In fact, the court states that, in absence of a general obligation of removal - unless so ordered by the authority following art. 16 of the legislative decree 70/2003 - the fact that the defendant has implemented a notification scheme through the aforementioned links, must be interpreted as the provider's awareness of the presence of infringing material. The district court restates the same arguments and reaches the same conclusion in a similar case between RTI and Yahoo! (*Tribunale di Milano*, 9 September 2011), once again condemning the defendant.

The trend culminated in a decision rendered by the district court of Rome, a preliminary injunction of 20 March 2011. In this case the court held Yahoo! liable for its activity of *indexing* websites that offered a movie ("About Elly") without permission of the exclusive distributor. In particular the court held that a general notification of the presence of websites offering infringing copies of the protected work, not accompanied by a precise list of URLs or other information necessary to identify the infringers, was sufficient to trigger an obligation to de-index all the infringing websites.

It is clear what the consequences a principle like this can engender, since it makes it the responsibility of a search engine to establish what constitutes a violation and to disable access and/or searching results on the basis of a presumption of liability. It is also clear that such an allocation of liability represents a strong incentive for the provider to remove or block any possibly infringing websites, including those offering excerpts of the movie for comment, critique, or for any other legitimate purpose. Fortunately, on appeal the court returned to reason and established that the person who claims the violation of his rights, bears the burden to identify specifically (indicating the relative URLs) the infringing content.

In a subsequent decision, the same district court held that the ISP's liability only triggers upon order of the judicial or administrative authority and that only a specific claim containing the precise identification of the allegedly infringing content can create an obligation for the ISP to block or remove it. This was confirmed, *mutatis mutandis*, in a similar case, brought on by RTI against another ISP, Worldstream (*Tribunale di Roma* 26 October 2011). Finally, the district court of Rome decided in favor of the defendant (Google) in a case where the claimant (RTI) complained about the presence of a website that distributed football games in streaming on defendant servers (*Tribunale di Roma*, 13 December 2011). In this decision the court of Rome states that, in accordance with the e-Commerce directive (implemented by leg. decree 70/2003), the Enforcement directive (implemented by leg. decree 140/2006), and the ECJ decision C-70/10 of November 2011, a hosting provider cannot be held liable for the hosted content. At first sight, this last decision seems to end the trend of Italian courts finding hosting providers liable for acts that should clearly be exempted in light of European and national legislation. Nonetheless, it is possible to read in the first 5 pages of the decision almost exactly the same arguments that were used before to conclude that "active hosting providers" are liable with regard to organization and (indirect) control, because of their ability to generate revenues, the employment of terms of use granting a non-exclusive license to the hosting provider, and the presence of links to report abuse. The first part of the decision is actually in contrast with the second part, which rejects the injunction. It seems quite likely that the last word on ISP liability in Italian courts has yet to be said.

As seen, the issue of ISPs liability is highly debated in Italy as well. Courts have diverging opinions on how to interpret the legislative framework set by the e-Commerce directive. A framework, it must be said, clear enough as not to give rise to any substantial interpretative issues.

In the courts' opinion, the creation of unknown legal concepts, such as that of "active hosting," should be viewed as an attempt to solve a problem with a solution that, as a matter of fact, makes the situation much worse. The legislative framework is clear enough and courts should refrain from adding confusion to an already delicate balance.

The only aspect covered by the reported case law that might benefit from some clarification is a determination of the form and content of the notification that a right-holder has to send to an intermediary in order to activate on the latter an obligation to do "something". The Italian Telecommunication Authority (AGCOM) has indeed attempted to regulate the field, but it probably endeavored too delicate a task, one that only the parliament should be asked to regulate.

I conclude by pointing out that even more important than the form of the notification, is the definition of the "something" that should be done. Among the different possibilities of 'notice-and-take-down' or 'notice-and-action', a particularly well balanced one seems to be the one chosen by the Canadian government and named "notice-and-notice". Still at the bill stage at the moment, such scheme would require a notified intermediary to further the notification to the subscribed user who uploaded the allegedly infringing material in order to be exempted from any liability. As the Canadian government website puts it, "concern has been raised that a "notice-and-takedown" regime could create incentives for ISPs to remove content without warning or evidence of actual infringement, which can potentially lead to a stifling of free expression". But, of course, Canada is also for 2012 on the Priority Watch-list of the US Trade Representative Special 301 Report, as one of "those foreign countries that deny adequate and effective protection of intellectual property rights."