



IP issues in the DSM: Liability of service providers – Sharing Providers

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Article 14 of the E-Commerce Directive

Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

- (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or*
 - (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.*
- [...]*

Sharing providers of contents

The distinction between active and passive hosting providers

R.T.I. vs ITALIAONLINE S.r.l.

(Court of Milan, 20 January 2011 No. 7680)



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R.T.I. vs ITALIAONLINE S.r.l.
(Court of Milan, 20 January 2011 No.7680)

- If a hosting provider is **directly involved** in the website's operations by allowing users to upload videos and other content, it is deemed to manage the information and content that its users provide.
- In this case, the ISP would be regarded as an **active hosting provider**, subject to a duty to remove illicit content if so requested by the rights' holder.

R.T.I. vs ITALIAONLINE S.r.l.
(Court of Milan, 20 January 2011 No.7680)

On the contrary, if a hosting provider merely provides storage and connectivity to specific websites and plays **no active role** in managing information online, it should be regarded as a **passive hosting provider**, who is **not jointly liable with the website owner** for copyright infringement unless it fails to comply with a removal order issued by the competent administrative or judicial authorities or is aware of the illicit nature of the content on the hosted website and fail to alert the competent authorities.

R.T.I. vs ITALIAONLINE S.r.l.
(Court of Milan, 20 January 2011 No.7680)

According to the Court, Italia On Line is an active provider and, therefore, is liable for any illegal content on its platform.

The principle expressed comes close to a **strict liability** one.



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Italia On Line: side effects on recent rulings

- R.T.I. vs YAHOO! (Court of Milan, 9 September 2011 No. 10893)
- R.T.I. vs BREAK MEDIA (Court of Rome, 27 April 2016 No. 8437)

R.T.I. vs YAHOO!

(Court of Milan, 9 September 2011 No. 10893)

(First Instance)

The Court did not recognise the neutrality of the intermediary:

- Yahoo! holds control over its videos as the platform is an “active” hosting provider and therefore is liable for the non-removal of all the videos.

R.T.I. vs BREAK MEDIA

(Court of Rome, 27 April 2016 No. 8437)

The Court of Rome held TMFT Enterprises LLC - Break Media liable for copyright infringement for the unauthorised streaming of audiovisual content owned by Reti Televisive Italiane S.p.A. (“RTI”).



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R.T.I. vs BREAK MEDIA

(Court of Rome, 27 April 2016 No. 8437)

According to the Court, Break Media was an “active hosting provider” of media content. Indeed, the activity of Break Media was not limited to the activation of technical procedures for enabling the content to be loaded onto the platform (“passive hosting”), but involved complex service of advertising exploitation of the content.

In light of the above, the liability exemptions under Article 14 of the E-Commerce Directive were not deemed applicable.



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A turning point?

- **R.T.I. vs YAHOO!** (Court of Appeal of Milan 7 January 2015 No. 29)
- **DELTA TV vs DAILYMOTION** (Court of Turin, 3 June 2015)
- **FACEBOOK IRELAND Ltd. vs CANTONE** (Court of Naples, 10 August 2016 and 3 November 2016)

R.T.I. vs YAHOO!

(Court of Appeal of Milan 7 January 2015 No. 29)

(Second Instance)

- Overturning the decision of First Instance, the Court held that the distinction between 'active' and 'passive' hosting providers should be considered misleading.
- An active service is not sufficient to regard a provider as active.
- ISPs can be held liable only if they do not take steps after receiving a detailed takedown notice.

DELTA TV vs DAILYMOTION

(Court of Turin, 3 June 2015)

- A copyright owner may not require an ISP to prevent the publication of all the content involving its rights, as this would run against the ban to impose a general duty on intermediaries to monitor the content published by users;
- Such prohibition does not, however, preclude judicial authorities from ordering an intermediary to prevent publication of, and/or access to, a pre-determined set of contents matching with the one previously being the subject of a specific notice.

DELTA TV vs DAILYMOTION

(Court of Turin, 3 June 2015)

Every new upload to a different URL may not represent "new content" (different from the one previously removed), as the URL is merely the place where the content is available and should not be construed as the work to be protected.

FACEBOOK IRELAND Ltd. vs CANTONE

(Court of Naples, 10 August 2016 and 3 November 2016)

The Civil Court of Naples issued an urgent ruling providing that Facebook should remove the videos, along with links and information about the victim, at the request of the person involved, *“with or without an order from a court or other authority”*.

The Court also stated that a hosting provider has no obligation to pre-emptively check contents uploaded by users.

FACEBOOK IRELAND Ltd. vs CANTONE

(Court of Naples, 10 August 2016 and 3 November 2016)

- hosting providers have no duty to carry out in advance a general check of contents;
- hosting providers can only be held liable for illegal content such as child pornography material.

The Court of Naples introduced the principle that a hosting provider must remove illegal content when reported by a user, without waiting for a court order.

Is URL essential?

Yes:

R.T.I. vs Yahoo

Delta Tv vs Dailymotion

Facebook Ireland Ltd. vs Cantone

No:

R.T.I. vs Break Media

R.T.I. vs Kit Digital Fr.

Sharing providers of comments and reviews

The Italian case of **TripAdvisor**:
Active or Passive Hosting Provider?

- Court of Venice, 24 February 2015
- Court of Grosseto, 19 January 2016 No. 46

Court of Venice, 24 February 2015

Where a website operator acts as a provider of an integrated service which provides travel tips and includes links for booking tourist facilities, it shall first and foremost be obliged, pursuant to Article 2043 of the Italian Civil Code, to prevent damage as well as to verify the reviews posted by users, removing any that is openly defamatory or does not seem posted by real travellers.

According to the Court, TripAdvisor, by its own admission, performs a service of monitoring users' messages, ensuring, *inter alia*, it has "*appropriate technological resources available and a team that judges reviews...*".

Court of Venice, 24 February 2015

TripAdvisor did not limit itself to acting as a mere data and information intermediary, taking a “neutral” role (“Passive Hosting Provider”), but rather acted as the provider of an integrated service, providing additional services in order to optimise its multimedia platform.

The Court of Venice upheld the application for an interim injunction filed, pursuant to Article 700 of the Italian Code of Civil Procedure, by a restaurant owner slandered by a user’s review and ordered TripAdvisor to remove the defamatory post, which gave a very negative review based on unlikely factual circumstances.

Court of Grosseto, 19 January 2016 No. 46

The Court dismissed the claims of the plaintiff (the hotel), excluding that TripAdvisor be classifiable as a Hosting Provider.

According to the Court, the fact of TripAdvisor having a system of filters aimed at blocking certain kinds of information does not mean that it is able to pre-check the content published on its platform. Such filter does not prevent the statutory exemption applicable to Hosting Providers, it being merely a device intended to improve the service offered.

Thank you

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