

Previti v. Wikimedia Foundation, Inc.

The Court of Rome, 17 June 2013 (n. 12261/2013)

The Italian courts ruled again on the liability of ISPs and confirmed that, in principle, the providers of hosting services are not liable for unlawful content uploaded by third parties, even in this instance where content editing tools were provided by Wikimedia.

Through its decision (in Italian legal jargon '*ordinanza*') dated 17 June 2013, the Court of Rome rejected all the claims raised against the Wikimedia Foundation Inc. by Mr. Cesare Previti, an Italian lawyer (among the closest friends and collaborators of the former prime minister Mr. Silvio Berlusconi) who served for several years as a minister and a member of Parliament and was later forced to resign having been found guilty in certain criminal proceedings and subsequently banned from holding public offices. On 26 November 2012, Mr. Previti filed with the Court of Rome a complaint (technically, a complaint pursuant to Section 702-bis of the Italian code of civil procedure) against Wikimedia, alleging, *inter alia*, that: (a) his biography published in Wikipedia, the well-known online encyclopedia, included certain information that was incorrect as well as defamatory and highly detrimental to his reputation; (b) Wikimedia was jointly liable with the authors of the biography, on account of fact that it is not only the creator and owner, but also the manager of the Wikipedia website; (c) being the manager of the Wikipedia website, Wikimedia is not merely a hosting services' provider, and therefore cannot benefit from the limitation of liability set forth in Section 16 of the Italian legislative decree 70/2003 (implementing the European Directive 2000/31/CE on E-Commerce), pursuant to which the hosting services' providers are not required to monitor the contents uploaded by third parties nor are liable for the unlawfulness of such contents (subject to the conditions discussed below); and (d) in the unlikely event that Wikimedia was to be deemed as a hosting services provider, it was nevertheless liable, since, after having been informed by the

plaintiff of the presence of alleged defamatory contents through a cease and desist letter, did not remove them.

Wikimedia challenged all the plaintiff's allegations, claiming, among other things, that: (a) Wikimedia is indeed a provider of mere hosting services, consisting of the recording and storage of contents, aimed at creating a free online encyclopedia built by internet users; (b) Wikimedia does not exercise any kind of preemptive control on the above contents, and informs of such a circumstance, by means of specific disclaimers, all of Wikipedia's users, drawing their attention also to the fact that no warranty is given as to the completeness and/or reliability of the provided information; (c) everybody is entitled to autonomously modify the information set forth in Wikipedia's pages as well as to ask for its removal (by filing a request thereof with a board of independent administrators, not subject to Wikimedia's control, who are entitled to remove the unlawful contents following a specific procedure); (d) Wikimedia did not remove the information deemed as defamatory by Mr. Previti since the cease and desist letter sent by his lawyers was very generic and did not provide any clear indication as to the information that was alleged to be defamatory.

Wikimedia's defences have been deemed as well grounded by the Court (although not on the base of the E-Commerce regulations to which both parties made reference). The judge, while acknowledging that it had not been proved that the defendant was anything else than a mere hosting services' provider, clarified that its alleged liability could not be assessed pursuant to the regime set forth in the Legislative Decree

70/2003, which was inapplicable in the case at instance (since it only applies to ISPs located in the European Union territory, whilst Wikimedia is based in the US). Nor could Wikimedia's liability be ascertained pursuant to law regulations governing the press-related slander, since the hosting services' providers may not be compared to subjects (i.e. the owners and the editor of a newspaper) who, in certain events, may be jointly liable with the writers for the publication of defamatory news. The judge deemed that Wikimedia's liability could be evaluated pursuant to rules of law governing liability in tort. In this respect, according to the court, an ISP can be regarded as a subject who performs a dangerous activity (and such activity cannot enjoy the E-Commerce regulations), on account of the risk of dissemination of illegal contents through the relevant website, and therefore can be deemed as subject to the provisions of Section 2050 of the Italian civil code. Pursuant to such a rule of law, any subject who, in the performance of a dangerous activity, causes harm to third parties, is bound to compensate such damages unless he proves he has implemented all measures suitable to prevent the type of harm that occurred. In the case at instance, the judge ruled that Wikimedia had indeed implemented such measures, since it had: (a) included in the Wikipedia website disclaimers informing users of the fact that no warranty is given as to the completeness, truthfulness and reliability of the given information; and (b) put in place a procedure specifically aimed at granting the users the chance of modifying (or having altogether deleted by the website's independent administrators) the allegedly

unlawful contents.

This decision of the Court of Rome is well in line with Italian case law regarding ISPs' liability based on the applicability of the said regulations. Indeed, Italian courts have repeatedly stated (in compliance with section 15 and 16 of Legislative decree 70/2003) that the ISPs are not liable in the event that the third party users of the service upload on to the internet contents which turn out to be in breach of third parties' rights, subject to the condition that the ISPs: (a) provide a mere hosting/caching service; (b) are not aware of the unlawful contents disseminated by third parties; and (c) as soon as they are made aware of such unlawfulness, remove the above contents (subject to terms and conditions set forth in the Legislative Decree 70/2003)¹. Amongst the most recent decisions that uphold this principle, it is worth mentioning the ruling of the Court of Milan dated 25 March 2013 (case no. 68306/2012). Google had been sued by a natural person who claimed that, by inserting his name (as well as the charity institutions chaired by him) in the Google search engine, the latter (through the so-called 'autocomplete' and 'related searches' functions) associated the above names with terms such as 'fraud,' 'plagiarism' and 'sect.' The court ruled that Google was not liable for this, since it only provided a mere caching of news and information uploaded by third parties to the internet, among which an algorithm automatically selected the words that were most frequently associated with the plaintiff's name in the queries made by Google users.

However, it is worth pointing out that some Italian courts deem the limitation of liability set forth in the Legislative Decree 70/2003 does not apply to ISPs who take an

active role in respect of the contents distributed by third parties, by exercising on the latter activities something more than the mere storage on internet servers ('active service providers'). This applies, by way of example, to ISPs who, based on the terms and conditions of the relevant service, reserve to themselves a right to use or modify the third parties' contents, or provide a service or indexation of such contents. Pursuant to the above principle, the Court of Milan (cases R.T.I. Italia S.p.A. v. Yahoo! Italia S.r.l. and Yahoo! Inc., decision dated 19 May 2011, and R.T.I. Italia S.p.A. v. Italia on Line S.r.l., decision dated 17 June 2011), ruled that Yahoo! and IOL were liable for hosting on their internet portals several TV broadcasts produced by RTI (a company of the Italian TV group Mediaset). In this particular case, the judges pointed out that Yahoo! provided a search engine which enabled users to surf among the available contents and suggested to users who searched for a specific content (e.g. a video) other contents that were somehow related. The court of Milan also clarified that an 'active service provider' is not required to perform a preemptive control on the lawfulness of each and any material uploaded by third parties but must be highly responsive to communications of third parties who claim to be the owners of rights breached by the hosted contents, under penalty of being held liable for such breaches. In this respect, however, it is worth noting that Italian courts repeatedly pointed out that the communication of the owners of the allegedly infringed rights must include a specific indication of the contents which are supposed to be illegal: a generic reference to the presence on a website of unlawful contents is not sufficient to trigger

the ISPs' reaction duty (see, by way of example, the decisions of the court of Rome dated 22 March 2011 and 16 June 2011, in the case PFA Films S.r.l. v. Yahoo! Italia s.r.l.). In compliance with the above principles the Italian Supreme Court (decision dated 23 December 2009, no. 49437) deemed that the website 'Pirate Bay' was directly liable for the exchange between its users of materials breaching certain third parties' IP rights (in this case, Pirate Bay had set up an indexation of the uploaded contents). The European Court of Justice issued decisions which appear to be in line with the Italian courts' opinion: in the case L'Oréal v. eBay (no. C-324/09, decision dated 11 July 2011), the Court ruled that eBay was jointly liable for the infringement of L'Oréal trade marks made by the eBay users (who sold through the defendant's marketplace items counterfeiting L'Oréal products) since it provided not a mere hosting service but an active support of sale (and was therefore aware of the presence of the infringing items).

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1. The conditions upon which the removal obligation is triggered vary depending on the kind of service provided. The provider of caching services must expeditiously remove or disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement (Section 15 of the Legislative Decree 70/2003). The provider of hosting must remove the unlawful contents as soon as he has been informed by competent authorities of their illegal nature services (Section 16 of the Legislative decree 70/2003).