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**STUDY ON THE LIABILITY OF
INTERNET INTERMEDIARIES**

COUNTRY REPORT – Italy

Executive summary

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By Giovanni Maria Riccio, University of Salerno (Italy)

Part 1: Legislation

ECD has been implemented by the Legislative Decree April 9, 2003, No. 70, passed by Parliament on March 28, 2003 and came into effect on May 14, 2003.

Par. 1 and 2 of article 14 LD No. 70 have implemented verbatim article 12, par. 1 and 2 ECD. Par. 3 of article 14 has opted for the possibility mentioned in paragraph 3 of article 12.

Similarly, article 15 LD No. 70 has implemented verbatim article 13 ECD.

Let. a) of the article 16 LD No. 70 has implemented verbatim the lett. a) of the article 14 ECD. On the contrary, lett. b) of the article 16 of the Legislative Decree No. 70, if synoptically compared with article 14 lett. b) of the ECD, contains a significant difference.

In fact, the ECD holds that ISP is not liable if it “upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information”. Article 16 Legislative Decree No. 70 states that the obligation to remove is triggered only by a “communication of the competent authorities”. It means that the ISP cannot remove or disable access before receiving this communication.

Article 17, par. 1 (corresponding to article 15 ECD) of the LD No. 70 implements verbatim the corresponding article 15, par. 1 of the ECD. Article 17, par. 2 of the LD No. 70 implements article 15, par. 2 of the ECD as follows: “the provider must (i) inform promptly the judiciary or administrative monitoring authority whenever it gains knowledge of alleged illegal activities or information related to one of the recipients of its service; (ii) with the objective of finding and preventing illegitimate activities, provide promptly, upon request of the competent authorities, information it possesses that may allow the identification of a recipient of its services with whom it has storage agreements”.

Article 17, par. 3 holds that the service provider is civilly liable for the content of the services defined in article 17, par. 2, lett. b if, having been requested to do so by the judiciary or administrative monitoring authority, it fails to act promptly to block access to such content or if, having been informed that the content of a service to which it ensures access is of an illegal nature or is detrimental to a third party, it fails to inform the competent authority. This article has caused a strong debate² because ISPs and telecommunications companies stand on the opinion that any provision permitting injunctive relief against an Internet service provider should be limited to blocking access to material or hyperlinks residing on an ISP's system.

Part 2: National Case Law

If compared with other legal systems, Italian case-law does not seem very interesting.

There are no Courts of Appeal decisions dealing with ISP liability. The only Court of Cassation decision on linking did not involve on-line intermediary liability. In that situation, the whole discussion is among lower courts and it does seem very remarkable in a civil law legal system.

Furthermore, there are no cases concerning caching activities, search engines, or auction platforms. The few cases concerning blogs and hyperlinks do not specifically deal with intermediary liability.

Only a few rulings address other activities. Furthermore, judges – who presumably do not fully understand how the web functions– sometimes are not very accurate in defining the specific roles of internet operators (see, for instance, Court of Milan, February 25 – March 18, 2004).

It is noteworthy, however, that the implementation of the ECD has immunized ISPs from the application of publisher liability and other kinds of vicarious liabilities.

Before the Legislative Decree No. 70, courts had sometimes applied strict liability rules. In one case, they applied publisher liability, analogically comparing the activities developed by ISPs to those developed by newspaper and journals. In another case, they applied article 2050 Civil Code, which regulates cases of liability arising from the exercise of dangerous activities. Article 2050 is interpreted as a form of near-strict liability based upon negligence.

Briefly, we could state that ECD implementation has clarified the nature of ISP liability, which is based upon a negligence standard (see Court of Catania, June 25, 2004).

After Legislative Decree No. 70 was passed, the only criminal law case decided by courts concerned child pornography. Even in this case, judges stated that for liability resulting from a failure to act on the part of the ISPs, it is necessary to recognise that at the time of unlawful conduct by ISPs a legal duty existed, which at the time prevented the provider from avoiding such conduct.

Similarly, the already mentioned decision of Court of Catania, June 25, 2004 holds that host providers do not have any duty or obligation to monitor their web-sites for illegal activity, or disable or block customer access to websites. The court also affirmed that press law can not be applied to ISPs (especially articles regulating publisher liability).

Some uncertainties remain for injunctions and NTD procedures. As already stated, Legislative Decree No. 70 does not contain specific rules. Court of Bari, June 13, 2006, is the only case in which a court has allowed the application for preventive remedies being submitted by plaintiffs.

Part 3: Notice and take down procedures

A. Regulation

There are no specific notice and take down (hereinafter: NTD) procedures in place in the Italian legal system and, for the time being, there are no official bills for the introduction of NTD procedures.

Italian legislation regulates two main cases that impose obligations on ISPs to block access to web-sites diffusing specific contents.

On-line gambling

Articles 50 and 51 of the Law December 27, 2006, No. 296 (Financial Law for 2007) hold that the Autonomous Administration of State Monopolies, a part of the Ministry of Economy and Finances, is entitled to communicate to connectivity suppliers as well as to network operators the list of the sites in which someone offers games or bets where money can be lost or won without having the proper authorization that is usually granted by AAMS itself.

Child Pornography

The second example is represented by the so-called Gentiloni decree on child pornography. According to this act, the National Centre for the fight against child pornography on the Internet will communicate to access providers a list of the websites that they are required to hijack. The same decree holds that ISPs must be equipped to block out prohibited sites, according to requirements set by those same provisions, that is, within 60 days after the publication of the decree in the Official Gazette for the relevant “domain name” and within 120 days starting from the same date for the relevant “IP address”. Outcomes, technologies and conformance with purposes of the law will be verified every six months.

International terrorism

Article 6 of Law Decree 144/2005 against international terrorism (the so-called Pisanu Decree, converted into Law 31 July 2005, No. 155) allows the acquisition of identity data from ISPs, under a request of the public prosecutor and only in cases of urgency, even without a preliminary order confirmation by the magistrate.

B. Self-regulation

C. Co-regulation

Copyright Law

On March 2005, copyright holders and ISPs signed the so-called Pact of Sanremo. The aim of this pact was to create a code of conduct.

Until now, only ISPs have formulated, under the aegis of the trade association, Confindustria Servizi Innovativi, a self-regulation code regulating the protection of Intellectual Property Rights (“Code of Good Practice for Connectivity Suppliers”). Copyright holders have not signed the Code and have proposed several amendments.

The main argument between copyright holders and ISPs concerns NTD procedure. The Confindustria Servizi Innovativi version of the code of conduct does not contain any specific measure regulating this aspect. ISPs stand on the opinion that if they inform their users about the received notifications they could be liable for complicity or aiding and abetting, under article 378 of the Criminal Code.