

Civil Liability of an ISP for infringement of IP rights

Some (almost) settled points

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Abstract: this paper summarizes three interpretations of the current law that are to be found in EU and national case law on just as many issues debated in relation to the liability of Internet service providers for infringement of IP rights pursuant to the Directive 2000/31/EC and the relevant national implementation laws (with particular reference to the Italian Legislative Decree No. 70 of 2003, hereinafter the Legislative Decree). In particular: the absence of liability of an ISP that stores information furnished by third parties without having any “editorial” input as regards the content (or without contributing to the third parties’ promotional strategy); the concept of “actual knowledge” as “actual cooperation” of the owner of the allegedly infringed right; and classification of the activity undertaken by a search engine as comparable to that of caching.

1. Introduction

I. This work summarises three interpretations of the current law that are to be found in EU and national case law on just as many issues debated in relation to the liability of Internet service providers (hereinafter also ISP) for infringement of IP rights pursuant to the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of Information Society services, in particular electronic commerce, in the Internal Market (hereinafter

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the Directive) and the relevant national implementation laws (with particular reference to the Italian Legislative Decree No. 70 of 2003, hereinafter the Legislative Decree). In particular: the absence of liability (short of “actual knowledge” of the illegal activity) of an ISP that stores information furnished by third parties without having any “editorial” input as regards the content (or without contributing to the third parties’ promotional strategy); the concept of “actual knowledge” as “actual cooperation” of the owner of the allegedly infringed right; and classification of the activity undertaken by a search engine as comparable to that of caching.

2. “Hosting”

I. The features of and limits to “hosting” services that enable an ISP to enjoy the ‘attenuated’ liability set forth in Article 14 and 15 of the Directive have been widely discussed. Almost three decades after the adoption of Directive 2000/31, it is however possible to identify a prevalent trend that favours interpreting the rules taking into account their original rationale of fostering the (then) fledging Internet industry. That approach, even though called into question today (and perhaps for good reason too in certain respects) clearly emerges from the *travaux préparatoires* and provisions of the Directive.

In order to attain the objectives of the Directive, it is necessary to bring any hosting of content uploaded by third parties within the scope of application of the above mentioned limitation of liability as long as the ISP does not intentionally and effectively interfere with that content. In other words, for the purposes of the application of the rules governing hosting providers, all that is required is that the activity in question correspond to the “type” described in the relevant law irrespective of the functionality furnished by the ISP designed to make its services more efficient, unless of course the latter interferes with the uploaded information (in as much as it is a functionality that creates or modifies the data/messages in a way that facilitates the perpetration of the infringement)¹.

1. See the Advocate General’s Opinion in C-324/09, *L’Oréal SA & Others v. eBay International A.G.*, paragraphs 146–149.

According to that approach « the mere fact that the operator of an on line marketplace stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers cannot have the effect of denying it the exemptions from liability provided for by Directive 2000/31 »².

This is the line that has been adopted in various judgments of the European Court of Justice³ and the Italian Supreme Court, in authoritative case law of Italian trial courts⁴ and in *inter alia* French, German and Spanish case law⁵.

2. Court of Justice judgment of 12 July 2011, C-324/09, *L'Oréal SA & Others v. eBay International A.G.*, paragraphs 115 and 116. See also the previous Court of Justice judgment of 23 March 2010, in C-236/08, C-237/08 and C-238/08, *Google France SARL e Google Inc. v. Louis Vuitton Malletier SA*, paragraph 118, to the effect that the liability of an ISP must be assessed having regard to the « role played by Google in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keywords ».

3. Court of Justice judgments of 14 April 2011, C-70/10, *Scarlet Extended SA v. Société belge des auteurs compositeurs et éditeurs (Sabam)* and 16 February 2012, C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV* (exhibit 12). See also Court of Justice judgment of 27 March 2014, C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*.

4. See Italian Supreme Court judgment no. 3672 of 17 December 2013 — 3 February 2014, which with reference to the “Google Video” concluded that « regarding those liable for the infringement, they are to be identified as the users who have uploaded the video to the Google Video platform and not the persons in charge of managing that platform since, as noted at length before, it is a mere hosting service ([...]) in the present case the provider has limited itself to hosting the videos uploaded by the users without playing any role in determining the content of those videos ». In the case law of appeal courts and trial courts: Milan Court of Appeal judgment of 7 January 2015. A different approach was taken in Italy by Court of Turin order of 23 June 2014; Court of Turin order of 6 May 2014; Court of Rome judgment of 20 October 2011; Court of Milan judgment of 9 September 2011; Court of Milan judgment of 7 June 2011; Court of Rome order of 11 February 2010; Court of Rome order of 16 December 2009.

5. In France see Supreme Court judgment of 17 February 2011, upholding Court of Appeal of Paris judgment of 6 May 2009 (holding that the company Dailymotion was to be treated as a hosting services provider and could benefit from the exemption from liability for videos uploaded on line by users of the service); Tribunal de grande instance of Paris judgment of 22 September 2009 (holding that YouTube was to be treated as a hosting services provider and could benefit from the exemption from liability for videos uploaded on line by users of the service). In Spain, see the decisions of the Madrid Court of Appeal of 14 January 2014, the Tribunal Superior de Justicia de Madrid of 20 September 2010 and the Tribunal de commerce de Madrid of 23 October 2008, holding that YouTube was a hosting service, and the Barcelona Court of Appeal judgment of 3 March 2010, holding that the Yahoo! España discussion forums were hosting services. In Germany see Düsseldorf Court of Appeal judgment of 21 December 2011, holding that Rapidshare was a hosting

II. This interpretation is confirmed by the wording of the current legislation, which defines hosting in very broad terms as the « storage of information provided by a recipient of the service » (Article 14 of the Directive).

Neither is it possible to find in the Directive elements suggesting that the hosting activity should be further qualified to enjoy the regime established herein. Recital 42 of the Directive does not refer to hosting services providers but provides as follows:

The exemptions from liability established in this 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.

That provision refers expressly solely to providing access to a network, transmission of information and temporary storage: what is involved here is the different activity of “Mere Conduit” as per the heading of Article 12 of the Directive and “Caching” as per the heading of Article 13 of the Directive. In describing the activity of hosting provider, Article 14 provides as aforesaid that hosting consists of the “storage of information provided by a recipient of the service” and not “temporary storage” as mentioned in Recital 42 and Article 13 of the Directive. It is therefore clear that Recital 42, taking into consideration as it does just the mere conduit of data and caching, does not cover hosting, with the consequence that the limitation of liability of a hosting services provider is subject to the sole condition laid down by Article 14 of the Directive⁶.

services provider. For a different legal system, see the judgment of the District Court for the Southern District of New York of 23 June 2010, which held that the activities of YouTube and Google were perfectly lawful and clarified that they fell within the scope of exemption from liability for violations committed by users who posted copyright-infringing material on line.

6. In the same vein see the Opinion of Advocate General Jaaskinen in case C-324/09 (compare paragraphs 141 and 142), according to whom: “Even if recital 42 of the directive speaks of “exemptions” in plural, it would seem to refer to the exemptions discussed in

III. The fact that when describing the types of activity associated with a provider of information society services, the EU deliberately employed precise but broad concepts like the “transmission of information”, “temporary storage” and “storage” confirms that the definition of hosting should cover also future developments which could offer additional functionality capable of making the search for the information stored by the provider more efficient.

On the other hand, the current services offered by ISPs are solely a more refined and sophisticated version of that which already existed at the time of the issuance of the Directive. The picture of the industry that the European Commission painted at the end of the 1990s when it commenced preparatory work for adopting a directive on electronic commerce that would enable the laws of the Member States to be harmonised did not envisage solely merely “passive” hosting providers⁷. The *travaux préparatoires* entailed, as is the practice when regulating a sector, in-depth consultations with the main players, including com-

the following recital 43. The exemptions mentioned there concern — expressly — “mere conduit” and “caching”. When read this way, recital 42 becomes clearer: it speaks of 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’ (my emphasis). To my mind, this refers precisely to “mere conduit” and “caching”, mentioned in Articles 12 and 13 of Directive 2000/31/EC. Rather, in my view, it is recital 46 which concerns hosting providers mentioned in Article 14 of Directive 2000/31/EC, as that recital refers expressly to the storage of information. Hence, the limitation of liability of a hosting provider should not be conditioned and limited by attaching it to recital 42”. Among legal scholars see: VAN EECKE and TRUYENS, *L’Oréal v. eBay: the Court of Justice clarifies the position of on line auction providers*, in *Computer Law Review International*, Volume 12, Issue 5/2011, pages 129–136; SALSAS and HARTING, *L’Oréal v. eBay — Consequences for EU Member States*, in *Computer Law Review International*, Volume 12, Issue 5/2011, pages 137–142; VAN EECKE, *Online service providers and liability: a plea for a balanced approach*, in *Common Market Law Review* 48, 1455–1502, 2011.

7. For example, at the end of the 1990s the Yahoo! Portal, in its various local emanations, started offering social media services like chat rooms, forums, groups and “Yahoo! Answers”, services offered also by Virgilio, Tiscali and AlterVista in Italy. In 1999 the Geocities and Lycos sites were active, at the time the largest networks of personal sites in the world (a service that enabled people to create their own personal pages / blogs hosted by the ISP and in which the user could post content of all types, text, images and videos). As far back as the 1990s there were also video sharing sites like www.shareyourworld.com (managed by the company Share Your World Inc.), which are generally considered as “the predecessor of YouTube”, which users could post and share videos on and which already at the time offered ancillary functions like: i) internal search engine, ii) highlighting of “favourites”, iii) links to related content, iv) classification by topic and categories of subjects, v) toplists and hotlists, and vi) systems for reporting abuses.

panies that already offered services that hosted personal content and video with functions that made searching more efficient. Therefore, it is not sound to base an 'evolutionary' interpretation of current law (that creates more severe liability for the hosting provider than that established by legislation historically) by arguing that the model of hosting as originally contemplated by the law has been superseded by the present one.

IV. In this framework, in interpreting the very broad clause contained in Article 14 of the Directive, the courts have adopted the above mentioned solution favouring ISPs since it would "attain the objectives of the directive"⁸ and in particular that of maintaining « a European favour to the spread of information services that national legislation has sought to implement to the greatest extent »⁹.

Moreover, this favourable regime operates to free the hosting provider from an obligation to monitor in advance the content uploaded by third parties. As it is a legislative choice shared by the main legal systems¹⁰ and warranted by a need not to encumber Internet operators (not necessarily always Internet giants) with the very burdensome task of prior monitoring, which at any rate would actually be impossible without the cooperation of the owners of the infringed rights and indeed the IP sector (see *infra*). In any event, the system strikes a balance if one considers that an ISP is obliged to take steps and is liable if it has knowledge of the unlawfulness of the contents uploaded to its domains, knowledge that the owner of the rights can provide if it accepts to work in good faith with the ISP.

8. See the Advocate General's Opinion in C-324/09, paragraphs 146–149.

9. To cite amongst many Milan Court of Appeal judgment of 7 January 2015, paragraph 23.

10. See, for example, section 512(c) of the US Code (introduced by the Online Copyright Infringement Liability Limitation Act, OCILLA) which rigorously limits the liability of an ISP that provides mere "storage at the direction of the users" as regards what third party users upload to its servers. Those rules provide that a service provider: (a) is free from having to actively monitor and check the behaviour of users; (b) is not liable to injunctive relief or damages for illegal content introduced into its system of which it has no "actual knowledge"; and (c) is legally deemed to know of the illegal activity only if it has received a "notification of claimed infringement" from an interested party that complies with rigid formal requirements.

3. “Actual knowledge”

I. A second issue on which there would appear to be broad agreement is precisely the concept of “actual knowledge” of the infringement, which in effect removes the exemption from liability that an ISP would otherwise enjoy obliging the ISP to act.

Although (also in Italy) it has been discussed whether that duty to act arises following an order issued by the authorities¹¹ or simply upon unilateral notice from a third party¹², the majority of case law certainly seems to tie knowledge on the part of the ISP to the *actual cooperation* of the owner of the allegedly infringed right, holding that the principle ruling out that the ISP¹³ has a general obligation to monitor cannot be circumvented through general notice of illegal content on its domains.

In its judgment of 12 July 2011 in case C-324/09, the Court of Justice specified in this regard that “a notification admittedly cannot automatically preclude the exemption from liability provided for in Article 14 of Directive 2000/31 given that notifications of allegedly illegal activities or information may turn out to be insufficiently pre-

11. The principle that a demand to remove certain content can be given to the provider solely by a court has been established in France by the Supreme Court judgment of 17 February 2011, the Paris Appeal Court judgement of 6 May 2009, and the Tribunal de grande instance de Paris judgement of 22 September 2009; in Spain by the Madrid Court of Appeal judgement of 14 January 2014, the Tribunal de commerce de Madrid judgement of 20 September 2010, the Tribunal de commerce de Madrid judgement of 23 July 2008, and the Barcelona Juzgado De Primera Instancia judgement of 3 March 2010; and in Italy by the Court of Florence order of 25 May 2012, to the effect that “*actual knowledge of the alleged unlawfulness of the contents of the site in question cannot be deduced either from the content of another party’s cease and desist letters since the latter express just a unilateral view*”; and also by the Court of Milan judgement of 20 March 2010, and again by the Court of Milan order of 16 July 2007. Among legal scholars see Musso, *La proprietà intellettuale nel futuro della responsabilità sulla rete: un regime speciale?*, *ivi*, p. 795, at 804 e 826; and, with convincing arguments, RICOLFI, *Contraffazione di marchio e responsabilità degli Internet Service Providers*, in *Dir. Industriale*, 2013, 3, 237 *et seq.*

12. On this point see Milan Court of Appeal judgment of 7 January 2015, paragraph 46.

13. See Article 17 of Legislative Decree (No general obligation to monitor), which — with wording reflecting that of article 15 of the Directive — provides as follows as regards all types of activities (mere conduit, caching and hosting): “1. When providing the services covered by articles 14, 15 and 16, providers are not under a general obligation to monitor the information which they transmit or store nor a general obligation actively to seek facts or circumstances indicating illegal activity”.

cise or inadequately substantiated". That statement suggests that, even though one cannot rule out that notice from a third party triggers actual knowledge of the illegal activity (and hence the duty of the ISP to act), not every notice from the alleged owner of a right suffices for that purpose. In particular, it is essential that any notice be "precise and substantiated" regarding who is engaging in illegal activity, where and how¹⁴.

If general notice were sufficient to force an ISP to act through putting in place an advance monitoring system covering all users at the latter's expense and without time limits, the result would be similar to that which would be achieved if an ISP were subject to a monitoring obligation of the type expressly excluded by law.

Therefore, also case law that maintains that a (detailed) notice capable of giving rise to an obligation for the provider to attain the result demanded by the owner of the rights sending the notice, clarifies that « the prior identification of illegal web content constitutes an activity that certainly cannot be required of the provider since that activity will be the result of an assessment conducted in the first place by the owner of the rights alleged to have been infringed »¹⁵.

II. This outcome (and the rules on which it is based) is warranted not only in light of a criterion of allocation of the costs of seeking out illegality on the Internet (which by legislative choice must not be borne by the ISP) but also taking account of the effective capacity to verify the existence of any such illegality.

If an ISP were obliged to actively seek unlawful content on behalf of the owner of the infringed rights, the former would end up having to act as the "judge and jury" regarding whether the third party claims were well founded. For example, the ISP would have to ascertain (on the basis of legal knowledge and skills that the provider does not have) whether every relevant item of content uploaded on its server is lawful, for instance, in cases of free use or the existence of licence agreements.

14. Moreover, in systems where a "notice and take down" regime operates, the owner of the allegedly infringed right has a duty to provide a detailed statement of the rights sought to be enforced and how they have been infringed.

15. Court of Rome order 11 July 2011; Milan Appeal Court 7 January 2015, reversing Court of Milan 9 September 2011.

That inconvenience would be ever greater if the solution sought by the owner of the rights entailed the implementation of an automatic “filtering system” apt to indiscriminately block a whole series of content (for example, through relying on certain key words). Such a system would not appear to be consistent with current law because it « would not be respecting the requirement that a fair balance be struck between the right to intellectual property [...] and the freedom to conduct business », « may also infringe the fundamental rights of [...] users, namely their right to protection of their personal data and their freedom to receive or impart information » and « could potentially undermine freedom of information, since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications »¹⁶.

Moreover, those in the industry have shown that they accept this approach. The large ISPs provide the holders of rights with sophisticated methods for protecting intellectual work, which in the great majority of cases are appreciated and widely used by the main players.

16. Court of Justice, 16 February 2012, C-360/10, *Netlog v. Sabam* (paragraphs 33, 34 and 45-49).

4. The service provided by search engines

I. A third issue on which there would seem to be general agreement in EU¹⁷, Italian¹⁸ and foreign¹⁹ case law concerns classifying the service provided by search engines as caching (article 13 of the Directive and article 15 of the Decree transposing it) and applying the ensuing liability rules. That approach seems to be correct for a variety of reasons.

The service offered by a search engine consists of providing an instantaneous search system that, depending on the keywords entered by the user, returns a list of links to pertinent websites whose solely textual content is temporarily stored on the operator's server. This activity corresponds in literal terms to the legislative definition of caching (« transmission in a communication network of information provided by a recipient of the service » through the « automatic, intermediate and temporary storage of that information ») because the search engine transmits on a communication network information published by the owners of the source site (link, presentation of meta-data and preview of the contents). To do this it automatically and temporarily stores that information (when carrying out the search and transmitting the result) for the sole purpose of making more

17. See the Opinion of the Advocate General Poiares Maduro in C-236/08, C-237/08 and C-238/08 concerning paid referencing services, maintaining « those sites can be regarded as the recipients of a (free) service provided by Google, namely of making the information about them accessible to internet users, which means that Google's search engine may fall under the liability exemption provided in respect of "caching" in Article 13 of that directive ».

18. See in Italy Court of Milan judgment of 25 April 2014 (confirmed by the Milan Appeal Court on 22 April 2015) which has ruled that « the service provided by a search engine appears to [...] fall within caching under article 15 of Legislative Decree No. 70/30 since its function as a search engine is to seek and organise in a list of sites pertinent to the search words used by the querying user, providing the links that enable one to connect to each of them » through the « automatic, intermediate and temporary storage of the information ». See also Court of Milan judgment of 29 May 2014 specifying that the obligations incumbent on a search engine operator « are those listed in article 13 of Directive 2000/31/EC and article 15 of Legislative Decree No. 70/2003: in particular, as regards the point under discussion the search engine must disable users that make illegal links [...] when a court or administrative authority has ordered their removal or disabling ».

19. Among foreign decisions in the same vein, one can mention *Gordon Roy Parker v. Google Inc.*, 422 F. Supp. 2d 492; *Gordon Roy Parker v. Google Inc.*, 242 Fed. Appx. 833.

efficient « the information's onward transmission to other recipients of the service upon their request » (and in particular users).

Ever apart from the actual wording of the law, equating a search engine's activity to caching is also correct if one considers the rationale of the law. The fact that the provider of caching will forfeit its exemption from liability if it is involved with the information (cases covered by subparagraphs a, b and d of Article 15 of Legislative Decree) or does not faithfully set it out in an updated manner (cases covered by subparagraphs c and e of Article 15 of Legislative Decree) suggest that the exemption in question is justified since:

- a) the said providers do not check at source the site of origin of the information/content, for which a third party is solely liable; and
- b) it is inconceivable that the said providers could monitor/select the content of third party sites because that would not be feasible economically and technically given that any selection of or interference with the content would distort the very nature of the service provided, which by definition is aimed at a faithful reproduction of the sites in a cache.

The activity of search engine providers has much in common with that of other caching service providers, especially because they do not influence the content of the source sites and cannot be asked to monitor that content. Moreover, envisaging such an obligation would actually serve no use for the community as a whole since at that point the search engine would cease to provide a 'faithful photograph' of what is on the Internet.

II. The complementary functions offered by search engines to users like preview, embedding and suggested search cannot in themselves alter the nature of the service (of caching) that they provide. The wording of Legislative Decree and Directive expressly excludes the liability of an ISP that limits itself to the "transmission" and "storage" of information made available by third parties if the services are provided in a "technical, automatic and passive" way, without however specifying the level of organisation/optimisation of the said services. Indeed, the Directive expressly ties the exemption from liability of

the service provider to the fact that the information is “transmitted or temporarily stored ” precisely for the “purpose of making the transmission more efficient” (recital 44).

The technical sophistication of the functionality with which the service is rendered is thus not relevant for the purposes of assessing the liability of the intermediary. By contrast, that aspect is linked to the services not being provided in a “technical, automatic and passive” way, although that wording does not preclude any involvement (once again “technical”) by the intermediary with the information transmitted because while it is true that the intermediary must not modify the transmitted information, « this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission » (recital 45). The requirement is not met solely where the provider has “knowledge” and « control over the information which is transmitted or stored » (recital 42) and in particular « deliberately collaborates with one of the recipients of his service in order to undertake illegal acts » (recital 44).

In order for an intermediary that provides a mass and technically neutral service (such as the organisation of a search engine) to be held liable for infringements committed by third parties, it is therefore necessary that the said intermediary “deliberately” alter the “technical”, “automatic” and “passive” functions of its services in order to facilitate the illegal activity. In other words, again in this case, to decide whether the provider plays an “active” or “passive” role in relation to the information transmitted, it is not sufficient to limit oneself to ascertaining that the service provider offers also additional services. In fact, it is necessary to establish whether those additional services are organised and operate on the basis of standard and automatic mechanisms of an algorithmic type or on the basis of other criteria that imply the possibility for the provider to condition the transmitted information in order to exercise (in agreement or otherwise with the recipient of the service that the content published in the web is a part of) some form of editorial control in broad sense aimed at deliberately facilitating the illegal activity²⁰.

20. In this regard in Italy see Court of Milan judgment of 24 April 2014 in which it is stated that the applicability “of the special rules laid down in articles 15 and 17 of

In other words, the court decisions that have addressed this issue hold the provider liable or not depending not on the mere offer of additional services but through assessing on a case by case basis whether the system and method of organisation of those services entails power for the provider to have some involvement in the content transmitted by others and stored²¹. Among decisions one can most certainly cite a number of orders issued by Milan courts that — clashing with a different approach adopted by other Italian and foreign courts²²— have ruled that search engine activities entailing an additional “auto-complete” service are not “neutral”. On closer examination, however, those orders do not hold that the provision of additional services excludes the “neutrality” of the search engine but simply that in some particular cases the “autocomplete” service loses its neutrality²³.

Legislative Decree No. 70/03 must be confirmed also for activities other than the mere linking highlighted by the claimant, i.e. embedding and suggested search” because « there is no actual evidence that enables one to hold that they are the product of participation in the strategy of the owners of the websites as regards devising and determining the means of advertising [...] (in that sense see EU Court of Justice judgment of 12 July 2011 in case C-324/09)» and they « must therefore be considered as pertinent to a normal lawful activity of optimising the search service that does not overstep the boundaries of attributability of that activity to the figure contemplated by article 15 of Legislative Decree No. 70/03» (pages 22 to 25 of the judgment). In Italian literature, see most recently RICOLFI, *Contraffazione di marchio e responsabilità degli Internet Service Provider*, *op. loc. cit.*

21. In France it has been held that the preview of the images shown as the results of an images search using the Google search engine does not infringe third party rights because that operation falls within the scope of the exemption granted to intermediaries since “it has not seriously been doubted that the Google search engine automatically selects and orders (by means of a robot) the images of websites [...] and the sole fact that the algorithm that enables viewing has been conceived by Google Inc. cannot take away from the nature of the selection made” and “a merely textual result or any other conceptual representation would be difficult to utilise and would hardly be appropriate in view of the objectives of the service” (Court d’Appel de Paris, 26 January 2011, *SAIF v. Google France S.a.r.l. e Google Inc.*; and in the same vein the previous Court d’Appel de Paris judgment of 19 March 2009, *Publison System S.a.r.l. v. Google France S.a.r.l. and Yahoo! France S.a.s.*). UK case law has likewise ruled out that the operator of a search engine is liable for defamatory content published on a third party website since « it has not authorised or caused the snippet to appear on the user’s screen in any meaningful sense »: High Court of Justice, QBD, 16 July 2009, *Metropolitan International Schools Ltd. v. Disegnatechnica corp. and Google UK Ltd. e Google Inc.*). The same stance had been adopted by the Spanish courts (Juzgado de lo Mercantil di Madrid, 13 May 2009, *Palomo S.A. v. Google Inc.*).

22. Court of Milan order of 25 March 2013; Court of Giura Canton judgment of 12 February 2011; Hamburg Landgericht judgment of 22 February 2001.

23. Court of Milan order of 24 March 2011 and Court of Milan order of 25 May 2013, according to which « with particular reference to the “Autocomplete” and “Related Searches”

III. Classifying a search engine as a caching service has important implications and in particular implies that its operator will be obliged to take action to disable access to certain unlawful information solely in specific and exhaustive cases such as previous removal of the information from the source site or a specific decision adopted by a court or administrative authority²⁴. It follows therefore that even « actual knowledge of the fact that the activity or information is unlawful » does not oblige the caching provider to intervene in relation thereto (governed by the special rules set out respectively in Articles 14 and 15 of Legislative Decree No. 70/2003) in the absence of removal of the content at the initial source and/or a decision of the authorities, save for an obligation to inform the “competent authorities” pursuant to the second and third paragraphs of article 13 of Legislative Decree No. 70/2003.

In this regard, even a list of the URLs of allegedly unlawful sites given to the search engine operator by an interested third party does not oblige the intermediary to disable the links that the search engine has created (in an automatic and passive manner) to the content in question²⁵. Indeed, it was noted above that the rules on the exemption

function, Google does not operate as a mere intermediary — passive ISP — but as an “active ISP” in the specific case where it creates “an improper link between search words” (and in particular defamatory). On this point see the Court of Milan judgment of 24 April 2014, which reveals the special features of this case law concerning as it does “cases of defamation of natural persons in which the harm was caused by the association of the individual’s name with a word that tarnished his honour” ».

24. In particular, the ISP is liable for the information that it processes as part of its caching activities solely in the following exhaustive cases (Article 13 of Directive 2000/31/EC and article 15 of Legislative Decree No. 70 of 2003). (a) the provider modifies the transmitted/stored information; (b) the provider does not comply with conditions on access to the information; (c) the provider does not comply with rules regarding the updating of the information, specified in a manner widely recognised and used by industry; (d) the provider interferes with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; (e) the provider does not act expeditiously to remove or to 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.

25. Court of Milan judgment of 24 April 2014 ruling that the duty of the search engine operator to take action “must be held to exist solely in relation to content that has specifically and individually been identified and whose unlawfulness has been established through measures adopted by the authorities responsible for making the checks in question” (p. 28 of the judgment). See also the Court of Rome order of 20 November 2013; Court of

from liability of the caching services provider are warranted by the fact that (save for exceptional circumstances ascertained by the competent authorities) intervention by caching services providers on the transmitted/stored information is not even socially desirable given that the (legally protected) function of the services that they offer is precisely to guarantee that the source and transmitted data is identical. It is thus clear that if a mere communication were sufficient to force those providers to take action, one would end up with a result inconsistent with the rationale of the above mentioned rules, which is that persons damaged by what is published on websites should in the first instance turn to the publishers of the sites concerned in order to obtain a change to the site that is the source of the illegal activity with a subsequent obligation for search engines to ensure that the results offered to their users reflect the changed reality (i.e. removal of the source site).

Florence order of 25 May 2012; Court of Rome order of 14 April 2010 relating to mere conduit but which clearly states that actual knowledge of the illegal activity may oblige solely the hosting provider to remove the content