[IT] Italian Courts Ban Pirate Bay, but then Lift the Block

IRIS 2008-10:1/21

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Over the past two months the attention of the media and of Peer-to-Peer users has been focused on two recent rulings with which two Italian courts first imposed and subsequently lifted a ban on the popular Swedish BitTorrent tracker website Pirate Bay.

By its decree of 1 August 2008, the Giudice Per le Indagini Preliminari (Court for Preliminary Investigations) of Bergamo placed the said website under preventive seizure (Sequestro preventivo) on the basis of Article 321 of the Italian Code of Criminal Procedure. This interim measure was adopted in the context of criminal investigations against the owners of the Swedish website, who were charged with aiding and abetting, on a profit-making basis, the illegal sharing of copyrighted material, in violation of Law no. 633, of 22 April 1941 concerning copyright and related rights.

In its lengthy list of reasons, the Bergamo Court for Preliminary Investigations noted that, albeit no copyrighted files were being hosted on Pirate Bay, that website provided its users with alphanumerical codes, known as “torrents”, which allowed them to retrieve and download specified files from their respective computers. Since many of the users exchanging copyrighted works were Italian nationals, the Italian Court deemed that it had jurisdiction over the case.

The Court further observed that the site’s willingness to facilitate illegal file sharing was apparent inter alia from the name of the website (www.thepiratebay.org), which constitutes an express reference to online piracy. That activity, moreover, was found to be conducted on a profit-making basis, as the inclusion on the website of advertising banners generated a revenue estimated at “million of dollars”.

The Bergamo Court, therefore, held that the said website constituted either the corpus delicti or “a commodity pertaining to” the violation of copyright laws insofar as it made illegal file sharing possible. Since the operation of the website could, under the terms of Article 321 of the Italian Code of Criminal Procedure, “worsen or extend in time the consequences” of the said criminal offence, the Court placed it under preventive seizure, thereby enjoining Internet Service Providers (ISPs) established in the Italian territory from granting their users access to www.thepiratebay.org, its aliases and its respective static IP address.

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The Pirate Bay's lawyers Giovanni Battista Gallus and Francesco Micozzi promptly challenged the seizure decree. By its order of 24 September the Court of Bergamo, sitting as an appeal instance, quashed the decree by the Court for Preliminary Investigations, thus lifting the ban on Italian ISPs.

The grounds of the decision, however, make it apparent that the earlier decision was not reversed because of a lack of jurisdiction on the part of the Italian courts or due to insufficient evidence linking the website to the alleged illegal file sharing. The reasoning of the decision lifting the ban, instead, focused on the legal notion of "preventive seizure", under Article 321 of the Italian Code of Criminal Procedure, as a measure which is real in nature and has erga omnes effects, insofar as the commodity concerned becomes unavailable to everybody.

The decree adopted by the Court for Preliminary Investigations, conversely, constituted a sui generis personal injunction, as it required specific addressees having no responsibility in the offence (i.e. the ISPs) to prevent their users from accessing the website. Article 321 therefore, could not serve as a legal basis for the contested decision. Since, in the context of a criminal procedure, interim measures have to be expressly laid out in legislation, the impugned decree was invalid.

Finally, it is worth mentioning that, for reasons yet to be clarified, the users who attempted to access the Pirate Bay whilst the ban was in force were redirected by their respective ISPs, instead of to a warning webpage by the Italian authorities, to a website run by FIMI, an association of Italian record labels. This caused considerable dismay among those users, who feared that the Italian majors might have logged their IP addresses for the purpose of prospective legal action. Relying on the outcome of the recent Peppermint case, whereby such a conduct on the part of record labels was clearly outlawed, the consumers' association Altroconsumo filed a complaint with the Italian Authority for the Protection of Personal Data.

Tribunale di Bergamo, Sezione del Giudice per le Indagini Preliminari e della Udienza preliminare, Decreto 1 agosto 2008

http://www.ictlex.net/?p=934

Court of Bergamo, Court for Preliminary Investigations and Pretrial Hearing, Decree of 1 August 2008

Tribunale di Bergamo, Sezione penale del dibattimento in funzione di giudice del riesame, Ordinanza 24 Settembre 2008

http://www.giuristitelematici.it/modules/bdnews/article.php?storyid=1520

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Court of Bergamo, Criminal division acting as an appeal instance against interim measures, Order of 24 September 2008

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