[IT] Court of Cassation Endorses Ban on The Pirate Bay

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On 29 September 2009, the Third Criminal Chamber of the Italian Court of Cassation entered a judgment against the owners of the Swedish BitTorrent website The Pirate Bay, holding that the website could be placed under 'preventive seizure' (*sequestro preventivo*) and Italian Internet Service Providers (ISPs) could be enjoined to block access by their users to the website.

The decision of the Court of Cassation is but the latest development in Italy in the criminal investigations brought against the owners of the Swedish website, charged with aiding and abetting, on a profit-making basis, the illegal sharing of copyrighted material, contrary to Law no. 633, of 22 April 1941. In its decision of 1 August 2008, the Court for Preliminary Investigations of Bergamo placed the website under preventive seizure, but, on appeal by The Pirate Bay, the ban was subsequently lifted by the Court of Bergamo (see IRIS 2008-10: 13)

In reaching that decision, the Court of Bergamo had at the time observed that preventive seizures are court orders of an objective nature, which according to the Italian Code of Criminal Procedure can be imposed where the public availability of a given commodity pertaining to the crime may exacerbate the latter's consequences or enable the perpetration of further offences. By contrast, by requiring Italian ISPs to block access to The Pirate Bay website, the Court for Preliminary Investigations of Bergamo had in fact adopted a personal measure addressed at private parties uninvolved in the crime, thus acting beyond its powers under the Code of Criminal Procedure.

On appeal by the District Attorney of Bergamo, however, the Court of Cassation reversed the decision of the Court of Bergamo and remanded the case to the latter. The Court of Cassation first dealt with the likelihood of the charges (*fumus commissi delicti*) brought against the defendants. With regard to this question, the court held that, even though The Pirate Bay did not host any copyrighted work, by indexing and publishing BitTorrent files it contributed appreciably to illegal file-sharing.

The court then turned to the preventive seizure order. As a preliminary matter, the court ruled that the fact that the website's servers are located in another Member State does not in itself place the case outside of the jurisdiction of the Italian criminal courts. Indeed, in the case of illegal file-sharing, the moment at

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which the crime is perpetrated is when the copyrighted work becomes available to downloaders, many of whom access peer-to-peer networks from locations within Italian territory.

On the merits, the Court of Cassation held that the preventive seizure order has in fact a twofold nature, both objective and personal. Relying on the preparatory work of the Code of Criminal Procedure, the Court of Cassation determined that the legislative intent was to prevent certain criminal behaviours from being accomplished with the aid of the object placed under seizure: while objective in nature, therefore, the preventive seizure order has inherently personal implications.

The court further noted that, with specific regard to internet file-sharing, the personal scope of preventive seizure orders is even broader, as the provisions of the Code of Criminal Procedure must be read in conjunction with Legislative Decree of 9 April 2003, no. 70 implementing Directive 2000/31/EC on electronic commerce. Section 17(3) of the said decree, indeed, expressly empowers courts to request that ISPs disable access to illegal content.

The Court of Cassation therefore concluded that the Court for Preliminary Investigations of Bergamo could legitimately enter a preventive seizure order against a website contributing to illegal sharing of copyrighted works and, by the same token, enjoin ISPs from granting access to that website so as to prevent further distribution of the said works.

Corte di Cassazione, Sezione Terza Penale, Sentenza 29 settembre 2009 n. 49437

http://www.ilsole24ore.com/fc?cmd=document&file=/art/SoleOnLine4/Norme%20e%20Tributi/2009/12/cassazione-sentenza-49437-2009.pdf?cmd=art

Court of Cassation, Third Criminal Chamber, Judgment of 29 September 2009, no. 49437

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