[IT] Italian Courts Affirm the Ban on The Pirate Bay

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In its order of 2 February 2010, the Court of Bergamo dismissed the appeal lodged against the order entered by the Court for Preliminary Investigations of Bergamo on 1 August 2008, which imposed a ban on the Swedish BitTorrent website The Pirate Bay, whose owners are facing charges of aiding and abetting, on a profit-making basis, the illegal sharing of copyrighted material in breach of Law No. 633 of 22 April 1941.

As per the Italian Code of Criminal Procedure, the Court of Bergamo was bound to apply the principles established by the Italian Court of Cassation in its judgment of 29 September 2009 (see IRIS 2010-2: 1/23), which had vacated and remanded an earlier decision by the Court of Bergamo lifting the ban on The Pirate Bay (see IRIS 2008-10: 13/21). The Court of Cassation, in particular, held that, on the basis of the Code of Criminal Procedure in conjunction with Legislative Decree of 9 April 9 2003 No. 70 implementing Directive 2000/31/EC on electronic commerce, criminal trial courts could enter a preventive seizure order against a website contributing to the illegal sharing of copyrighted works and, at the same time, enjoin Internet Service Providers (ISPs) from granting access to that website so as to prevent the further distribution of the said works.

In the course of the proceedings before the Court of Bergamo, counsel for The Pirate Bay argued that granting such an injunction in the case at hand would have resulted in the imposition on Italian ISPs of a general obligation to monitor the information provided by their users, an outcome allegedly at variance with Article 15 of Directive 2000/31/EC and the Italian Constitution. In that connection, The Pirate Bay’s attorneys requested that the Court of Bergamo stay proceedings and refer the matter for interpretation to the European Court of Justice and to the Italian Constitutional Court.

The Court of Bergamo, however, recalling its duty to comply with the rulings of the Court of Cassation, denied that motion. The court added, in a lengthy dictum, that enjoining ISPs to block access to a website where copyrighted works are illegally shared should not be construed as a general ex ante duty of supervision, but rather an ex post duty of cooperation with judicial authorities to prevent specific copyright infringements. Thus framed, the obligations placed on ISPs are, according to the Court of Bergamo, entirely consistent with the safeguard clauses set out in Articles 12, 13, and 14 of Directive 2000/31/EC, which expressly refer to

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the “possibility for a court or administrative authority […] of requiring the service provider to terminate or prevent an infringement” and to Member States’ power to establish “procedures governing the removal or disabling of access to information”.

The Court of Bergamo then turned to the finding of the Court of Cassation that court orders limiting or preventing internet access must not go beyond what is necessary to investigate and prosecute crimes, as the exchange of information over the web constitutes a manifestation of the freedom of expression enshrined in Article 21 of the Italian Constitution.

In its one-paragraph proportionality analysis, the Court of Bergamo perfunctorily observed that, since a significant part of the contacts to the Swedish website originating in the Italian territory were presumably aimed at sharing or acquiring audiovisual works contrary to copyright law, the exchange of information taking place on The Pirate Bay was not protected under the Italian Constitution. The court thus concluded that the ban placed on that website by the Bergamo Court for Preliminary Investigations was certainly proportionate, although no reference was made to the measure’s impact on other potentially conflicting interests, such as the freedom to provide services within the EU internal market and the freedom of expression, as protected at the EU and ECHR levels.

Dr. Giovanni Battista Gallus, one of Pirate Bay’s defence attorneys, has already announced his intention to challenge the order handed down by the Bergamo Court before the Court of Cassation.

Tribunale di Bergamo, Sezione del dibattimento penale in funzione di giudice del riesame, Ordinanza 2 febbraio 2010

Court of Bergamo, Criminal Division Acting as an Appeal Instance against Interim Measures, Order of 2 February 2010

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