

FUTURE OF COPYRIGHT

NEWS AND OPINIONS ABOUT THE FUTURE OF COPYRIGHT

49437/09

REPUBLIC OF ITALY

In the Name of the People of Italy

THE SUPREME COURT OF APPEALS

Consisting of the following magistrates:

Dr. Ernesto Lupo, President,

1. Dr. Agostino Cordova

2. Dr. Aldo Fiale

3. Dr. Giovanni Amoroso

4. Dr. Luigi Marini

Section III, Criminal Matters

Closed Session of 29 September 2009

SENTENCE No. 1055

General Registry no. 40884/08

HEREBY PRONOUNCES THE FOLLOWING SENTENCE

on the appeal filed by the Prosecutor of the Republic before the Court of Bergamo against the injunction of 24 September 2008 of the Court of Bergamo, in the criminal proceedings pending against, born at Uddevalla (Sweden), on, as well as, and

Having heard the report by Dr. Amoroso;

Having heard the Public Prosecutor's Office, in the person of Dr. Gioacchino Izzo, arguing in favour of acceptance of the appeal;

Having heard counsel for the courts of Cagliari and Rome, the latter substituting for, arguing in favour of rejection of the appeal;

The Court holds as follows:

HISTORY OF THE PROCEEDINGS

1. By injunction issued 1 August 2008 in the criminal proceedings against ... and ..., all under investigation for the crime referred in Articles 110 of the Criminal Code and 171 *ter*, subparagraph 2, letter *a-bis*) of the Law of 22 April 1941, no. 633, the judge, during the preliminary stage of the proceedings before the Court of Bergamo, in accepting the application of the Public Prosecutor, ordered the preventive seizure of the internet site www.thepiratebay.org, furthermore ordering that the Internet service suppliers, and, in particular, the Internet providers operating in the territory of the Republic of Italy, deprive the respective users -- under the terms of Articles 14 and 15 of the Legislative Decree of 9 April 2003 no. 70 at all times -- of access to the above mentioned Internet address, related aliases and domain names referring to the said site.

The Public Prosecutor – after a lengthy description of the data processing technology involved (so-called “peer-to-peer” technology by means of “torrent” files) involved in the unauthorised Internet publication of copyright works – considered the *fumus delicti* and *periculum in mora* referred to in Articles 110 and 171 *ter*, subparagraph 2, letter *a-bis*, cit, of the Criminal Code to have been duly shown by the evidence.

By appeal ex Article 324 of the Code of Civil Procedure and subsequent brief, defence counsel for ... requested the annulment of the preventive seizure, on the grounds of lack of jurisdiction, the non-existence of the *fumus delicti*, as well as an incorrect application of Article 321 of the Code of Civil Procedure and Articles 14 and 15 of Legislative Decree no. 70/2003.

2. By injunction of 24 September 2008, the appeals court of Bergamo, upholding the appeal, overturned the order of preventive seizure.

The court upheld the existence of the *fumus delicti* in the light of the evidence of the Guardia di Finanza, showing an extremely great number of traffic to the site in question, as recorded in the territory of the Republic of Italy, involved in the unauthorised downloading of copyright works. It was therefore clear, in point of fact, that the defendants, through the site www.thepiratebay.org, and the use of innovative data transmission technology (i.e., the so-called “peer-to-peer” technology using “torrent” files), were making copyright works available to the public over the Internet, such conduct being assimilable to the offence described under Article 171 *ter*, subparagraph 2, letter *a-bis*), cited above.

The Court furthermore upheld the *periculum*, observing that the very high number of connections led to the conclusion that commission of the offense was both current and ongoing.

The Court also noted that, in law, precautionary measures -- particularly, seizures – are, according to the procedural regulations, *numerus clausus* in nature. Whereas, in consequence, it is not legally possible to issue a preventive order of seizure outside of the designated hypotheses for which the said measure was instituted; whereas preventive seizure is real in nature, being carried out by means of the apposition of an obligation to render the *res* unavailable, withdrawing the said property from the free availability of all persons; whereas, therefore, the range of incidence of the preventive seizure must be restricted to the effective seizure of the property forming the object of the measure.

In contrast, in the case in question, according to the Court, the injunction contested by the

Public Prosecutor's Office was in the nature of an order imposed by the Legal Authority upon subjects (of the State) extraneous to the offense, intended to prevent, through the collaboration of the same parties, any link to the web site in question by third parties. This precautionary measure, although abstractly in compliance with the provisions of Articles 14 and 15 of Legislative Decree no. 70 of 2003, amounted, in effect, to an atypical injunction, having the effect of shifting the area of incidence of the measure from the real area of incidence, i.e., preventive seizure, to a compulsory field of incidence, since the measure was aimed at definite persons or entities (i.e., the server), being enjoined to bring their own conduct into conformity with the order (i.e., to cease supplying their own services), for the purpose of obtaining the ulterior and indirect result of preventing connections to the site in question.

In conclusion, the Court of Bergamo held that the use of the preventive measures referred to in Article 321 of the Code of Civil Procedure, as prohibiting an action, could not be permitted, since it produced the effect of reversing nature and function, in such a way that the seizure should be overturned as illegal.

3. The Prosecutor's Office of the Republic of Italy filed an appeal against the above mentioned injunction of the Court of Bergamo on two grounds:

During the hearing in chambers, defence counsel for, subsequently appointed on 24 April 2009, filed a brief.

GROUND FOR THE DECISION

I. The appeal of the Prosecutor's Office of the Republic before the Court of Bergamo is based on two grounds.

On the first grounds, the appellant argues erroneous application of Article 321 of the Code of Civil Procedure, in the section in which the Appeals Court overturned the injunction of Public Prosecutor's Office ordering the preventive seizure, on the grounds of alleged lack of conformity between the above mentioned measure and the paradigm of preventive seizure, as regulated by Articles 321 ff of the standard code of procedure. It therefore criticises the contested injunction in the section annulling the seizure, terming it an atypical measure, exceeding the applicable procedural boundaries, and as such inadmissible in a criminal matter.

To this end, the appellant notes that it must be admitted that an Internet site may be constitute an object of seizure. Its nature as an immaterial good does not, as a matter of principle, prejudice the applicability of the obligation, it being impossible to deny that a physical nature, or a material and concrete dimension, may be attributed to an Internet site in general (and the site *de quo* in particular).

Furthermore, according to the appellant, it might well be that the Public Prosecutor's Office could order the Internet service suppliers and, particularly, any Internet service suppliers active on the territory of the Republic of Italy, to prevent the respective users, including under Articles 14 and 15 of the Legislative Decree no. 70 of 2003, from accessing the address www.thepiratebay.org, or the related aliases and domain names linking to the same site. The activity prescribed by the order of seizure and overturned by the Court upon appeal does not, in reality, reflect a surreptitious and allegedly atypical activity of "prevention", either with regards to the persons under investigation or with regards to the Internet service

suppliers.

In the second grounds for appeal, the appellant denounces the violation or erroneous application of Articles 14 and 15 of Legislative Decree of 9 April 2003, no. 70. Without prejudice to exemption from liability on the part of Internet service providers for content traceable to third parties, a general obligation of supervision nevertheless exists on the part of the service supplier with regards to the data flows transiting their own systems. According to the appellant, a binding principle of cooperation may also be said to exist between the supplier and the legal authorities in relation to the services provided; the said principle being reflected in an obligation to prevent or terminate any violations committed, at the request of above mentioned authority.

2. As a preliminary matter, the regular nature of service of notice should be noted with regards to today's hearing in chambers.

It must be held that, against the injunction of 1 August 2008 brought by the Public Prosecutor's Office before the Court of Bergamo, the only defendant ..., through his original, client-appointed defence counsel, filed for review, which was then accepted by the Court, by injunction, which was subsequently contested, with a further appeal in cassation by the Prosecutor of the Republic.

Since the defendant's client-appointed defence counsel was not authorised to plead before the present Court, a court-appointed defender was appointed, similar action being likewise taken with regards to all other defendants not having elected to be domiciled in Italy and having no client-appointed defence counsel...

The notice of the hearing in chambers, apart from being notified to the court-appointed defender and other defendants at the domicile of the said court-appointed defender, was also served on the defendant, through his client-appointed defence counsel, during the appeal stage.

It must in fact be considered that the accused ..., who, being resident abroad, had a right to be invited to declare domicile, or elect to be domiciled, in the territory of the State of Italy, under the terms of Article 169, subparagraph 1 of the Code of Civil Procedure, declared himself domiciled abroad, and appointed his own client-appointed defence counsel in Italy, so that, in application of the above mentioned injunction, "notification may be executed by delivery to the defender".

In the case in question, dealing with the contestation of a real preventive action, Article 324 subparagraph 2 of the Code of Civil Procedure has also been found to apply, which, in the case of application for appeal, exonerates a defendant (or, it should be noted, a suspect) not yet having declared or elected domicile and/or not yet having responded to the prior invitation to declare or elect domicile under the terms of Article 161 subparagraph 2 of the Code of Civil Procedure, to indicate the domicile at which he intends to receive notification as set forth under subparagraph 6 of Article 324 of the Code of Civil Procedure in which case, in the absence of such declaration, such notice shall be served by delivery to the defender.

For the purposes of the said measure, a defendant or accused proposing to file a petition for review, but failing to indicate a domicile at which he intends to be notified of the hearing, shall be considered to be domiciled, for such purposes, at his own client-appointed defence

counsel, to whom such notice shall be sent (concretely, in the case in question, the notice referred to under Article 324, subparagraph 6, of the Code of Civil Procedure has been served for the hearing in chambers fixed before the Court of Bergamo).

It may then be held, as a principle of law, that, in such event, i.e., when a defendant is resident in a foreign country, an intended recipient of the invitation to declare or elect domicile in the territory of the State ex Article 169 subparagraph 1, of the Code of Civil Procedure, who, by contrast, has declared himself domiciled in a foreign country, but having appointed defence counsel in Italy, shall, therefore, *ex lege* (Article 324, subparagraph 2, of the Code of Civil Procedure) be considered domiciled at his own client-appointed defence counsel for purposes of service of the notice referred to in Article 324, subparagraph 6, of the Code of Civil Procedure -- the domicile of the defendant at the client-appointed defence counsel shall be deemed to persist, even in the event of appeal for cassation against the injunction having decided upon the petition for review ex Article 324 of the Code of Civil Procedure, is not nullified by the fact that the defence counsel is not authorised to plead before this Court.

Consequently, having appointed the court-appointed defender, since the client-appointed defence counsel is not authorised to plead before this Court, the notice of the hearing -- which, in general, must also be served upon the defendant or accused (Article 613, subparagraph 4 Code of Civil Procedure) at the declared or elected domicile (Cassation, single sec. 6 November 1992 – 22 February 1993, no. 14) -- should be served, in the case mentioned above, upon the accused at the client-appointed defence counsel during the appeal stage.

This prescription, as reconstructed, in guarantee of an accused resident in a foreign country, although initially neglected with regards to the hearing in chambers on 18 February 2009 (see injunction rendered on that date), has been regularly observed for the hearing of today's date, without prejudice to the fact that, by contrast, for the other accused, notice of today's hearing in chambers was correctly served upon the said other defendants at their court-appointed defender.

3. With regards to the appeal, the two grounds for which may be examined jointly insofar as they are related, the said appeal is hereby declared to founded, within the following limits and with the following observations.

4. First of all, it should be stated that the disputed injunction of the Court of Bergamo correctly thought fit, as a precondition of the preventive seizure, to suspend the *fumus commissi delicti*, which consisted in the unauthorised Internet transfer of files of copyright material, in violation of the exclusive right of communication to the public of such works.

The particular data processing technology involved, consisting of the division of the said files between Internet users ("file sharing") and the use of file transfer protocols directly between users (so-called "peer-to-peer") for the on-line dissemination of works covered by copyright, according to the factual inquiry carried out by the judge with substantive jurisdiction, does not exclude the abstract existence of the offense; the said offence is not placed in doubt by the contested judgement precisely renders an account of the important elements of fact in the case, furthermore confirming the reconstruction, in point of fact at all times, performed by the Prosecutor.

It may however be considered in this regard -- as shown by the factual inquiry conducted by

the judge in the case – that the characteristics of the “peer-to-peer” type file sharing and file transmission protocols have the effect centralizing the users (Clients), with regards to whom, as final users, the unauthorised activity of receiving files takes place via the Internet (so-called “downloading”) of the copyright works, as well as the activity of the initial posting of the files on the Internet), i.e., the so-called “uploading” of the said works. Therefore, the unauthorised dissemination of copyright works does not take place from the centre (the website) to the periphery (where the downloads are received), but, rather, from the user (performing the “uploading”) to the user receiving the said work; there is no “centre” with peer-to-peer file transfer, (i.e., there is no web site which possesses the work and transfers it to the periphery, i.e., to users who access the site for the purpose of downloading. On the contrary, the work already exists on the periphery, among the users themselves; hence the file is transferred by the users themselves, and is then disseminated to other users. Therefore, the crime of unauthorised dissemination of copyright work, over the Internet, is committed, first of all, by the persons performing the “uploading”, a crime provided for under the following regulations, respectively: Article 171 subparagraph 1 letter *a-bis*, Law of 22 April 1941, no. 633, if the work is made available over the Internet for any purpose and in any form, not merely for profit; or by Article 171 *ter*, subparagraph 2, letter *a-bis*), if the act involves the communication of the work over the Internet for purposes of profit; the latter crime being, in fact, the offence for which the present proceedings were brought, the judge having recognized the purpose of profit in the receipt of income derived from advertising inserted for payment. The conduct attributed to the defendants is currently described by Article 171, *ter*, subparagraph 3, letter *a-bis*, of Law no. 633/41, introduced by Article 1, subparagraph 2, of Legislative Decree of 22 March 2004, no. 172, and converted, with amendments, by the Law of 21 May 2004, no. 128, and then amended by Article 3.3 *quinquies* of the Legislative Decree of 31 January 2005, no. 7, converted into the Law of 31 March 2005, no. 43, which anchors the criminality of the offence by reference to the hypothesis that the act is committed “for purposes of profit” (cfr Cass, sec. III, 22 November 2006 -- 9 January 2006, no. 149).

5. The problem which arises in the case in question is whether the above described criminal conduct is, or is not, extraneous to the offence, since the owners of a website permitting users to communicate with each other, who then commit the crime through the activity of uploading.

If the website restricted itself to making the communication protocol (such as the peer-to-peer protocol) available for the purpose of permitting the sharing of files containing the copyright works and the transfer of these files between users, the owner of the website itself would, in reality, be extraneous to the offence.

However, if the owner of the website does not restrict himself to the above described actions, but performs additional acts -- such as indexing the information received from users, who are, after all, all potential “uploaders” -- in such a way that the said information (i.e., access keys to peripheral users possessing the work, in whole or in part) -- which is essential at all times, even if reduced to a minimum, permits users to orient themselves when requesting to download one work rather than another, the said information being thus compiled and made available on site -- for example, via a search engine or indexed lists -- the site ceases to be a mere “courier” engaged in the organisation of data transmission. This is a *quid pluris*, since it provides site users with information which is constantly updated, permitting the reception of file content susceptible to transfer. At this point, the file transfer activity is no longer “passive”, but may be characterised as the quasi-active transfer of data containing material covered by copyright. At this point, it is true that, although the file

exchange occurs “peer-to-peer”, the activity of the web site (to which data transfer protocol indexing of essential data must refer) is the sine qua non which permits the said exchange; there is, therefore, a causal contribution to the unlawful conduct which may be well form part of the element of aiding and abetting in the offence ex article 110 of the Criminal Code; Cass., sec. II, 17 June 1992 -- 16 July 1992, no. 8017, according to which the activity of a person assisting in the crime ex article 140 of the Criminal Code may consist of any method of sharing or contribution, whether material or psychological, at all or some of the phases of planning, organisation and execution of the illegal conduct; Cass., sec. I, 14 February 2006 – 2 May 2006, no. 15023, according to which participation in the offence may also consist of a contribution which merely facilitates the unlawful conduct; Cass., sec. IV, 22 May 2007 -- 26 June 2007, no. 24895, according to which even the mere “facilitating contribution” which, if of “minimal importance”, gives rise to the extenuating circumstance mentioned in Article 114 of the Criminal Code, at any permitting the charge of aiding and abetting in the offence; finally, cfr also Cass. sec. VI, 28 June 2008 -- 30 July 2007, no. 30968, on the liability for aiding and abetting of a website manager for publication of an administrative document of a confidential nature.

The fact that the conduct of participation was committed in a foreign country in no way diminishes the jurisdiction of the national judge, where any part of the common conduct occurred in Italy; cfr Cass., sec. V, 9 July 2008 – 20 October 2008, no 39205, according to which, in the event of persons aiding and abetting in the crime, for the purpose of establishing the criminal jurisdiction of the Italian judge and the criminality of all participants, it is sufficient that any activity of aiding and abetting by any participant be performed in the territory of the State. Cfr. also Cass. sec. V, 17 November 2000 – 27 December 2000, no. 4741, which affirmed that an Italian judge is competent to judge defamation committed via the Internet publication of offensive or denigrating phrases and/or images, even when the website is registered in a foreign country, as long as the offence was aided or abetted by users located in Italy.

In other words, the peer-to-peer technology decentralises the “uploading” (the dissemination over the Internet of the work) but does not have the added effect, so to speak, of “decentralising” the illegality of unauthorised dissemination of copyright works. There is still some aiding and abetting between the activity at the centre (or the website manager) and the activity at the periphery (where the computer users download the copyright works by means of information made available over the Internet), a contribution which, in our legal system, constitutes the offence described under the above mentioned Article 171 ter, subparagraph 2, letter a-bis) cit.

6. If we then consider, in particular, more sophisticated technology than file sharing, i.e., technology fragmenting the work in such a way as to involve more users in the “uploading” activity (through the use of so-called “torrent” files) – in reality, this fragmentation is irrelevant from a legal point of view. The unauthorised dissemination of copyright works still occurs user-to-user, by means of more sophisticated peer-to-peer protocols which fragment the uploading and produce the effect of accelerating and evading the “waiting codes” when such activity is performed by a single user. This possible fragmentation of the uploading activity implies that the publication of the work on the Internet is no longer traceable to a single user, but, rather, to a plurality of users, all actively participating in the unauthorised dissemination of copyright works. Taking this fragmentation to an extreme, we may hypothesize that the individual user disseminates a fragment of the work which, in itself, is not even sufficiently significant from a strictly legal point of view to be considered covered by copyright. But any reconstruction of the fragments according to the tracing

instructions which appear on the website results in the transfer of the entire work (or parts of it), the dissemination of which is then attributable, above all, to the individual users. While the indexing and tracing activity essential so that the users may perform the transfer of the work (which in this case ranges from a plurality of uploader-users to a potential plurality of download-recipient users) is attributable to the website owner; therefore the criminal liability persists under the heading of “aiding and abetting in the offense” referred to in Article 171 *ter*, subparagraph 2, letter *a-bis*), cit.

It would be possible to predicate the extraneous nature of the website -- or more precisely, of the website owner -- in the dissemination of the work only in extreme cases, in which the activity of the said holder was completely passive -- for example, if the indexing of the essential data was also decentralized to the periphery. In this case, there would simply be a community of users (a “social network”) sharing a data transfer protocol enabling all users to index the same data and receive the essential information. In this case, the material pooled and made available for transfer might vary enormously (whether or not covered by copyright), but criminal liability would attach only to users performing the uploading, in addition, first of all, to the data indexing.

7. All these things considered, in general, as to the abstract existence of the crime referred to in Article 171 *ter*, subparagraph 2, letter *a-bis*), cit, it must be noted, with reference to the case in question, that the contested injunction states that the “keys” to access the archives of the users possessing any particular copyright work are made available on the website www.thepiratebay.org; both the indexing activity and indexing results (the so-called “file tracing”) are therefore on site.

From the point of view of the *fumus*, this consideration enables the Court to reject the argument relating to any alleged decentralized indexing, which is essential to dissemination of the copyright work, and to hold, by contrast, that the subsistence of conduct assimilable to that occurring on the web – more precisely, committed by the current defendants, as owners and managers of the same – is of importance in a criminal sense, constituting the offence of aiding and abetting in the offense referred to in Article 171 *ter*, subparagraph 2, letter *a-bis*, cit.

The contested injunction of the review court, like the injunction of the Public Prosecutor’s Office, upholds the subsistence of the *periculum* of the preventive measure of preventive seizure; the implied valuation is not in fact under censure, and is not censured by this court.

Therefore, in summary, for the reasons examined so far, the abstract existence of the offense mentioned under Article 171 *ter* subparagraph 2, letter *a-bis*, cit., are both present and are both verifiable in terms of the criminality of the of the acts, which is a question of law, forming the object of the general provisions of Article 129 of the Code of Civil Procedure, as well as the *periculum*, which is not an object of censure.

8. Continuing an examination of the necessary preconditions for the preventive seizure ordered by the Public Prosecutor’s Office but overturned by the review court, we must considered that the fact that the website hardware is not located in Italy does not preclude jurisdiction on the part of the national criminal judge by reason of the provisions of Article 6 of the Criminal Code. In fact, the offense of unauthorised dissemination of copyright works over the Internet is committed by making the said work available to the end user. If we consider that users in the State of Italy access the site www.thepiratebay.org through the provider, and then download copyright material from other users at unknown locations, it is

still certain that the criminally unlawful conduct of making the said work available over the Internet is committed when the user in Italy receives the file, or files, containing the said work. Therefore, although the Internet data transmission activity is global and supranational, in the case in question, a criminally important share of the activity nevertheless occurs in the Republic of Italy, thus enabling us to hold that the crime of unauthorised dissemination of copyright work has been committed in the State of Italy, at least insofar as users in Italy are concerned.

As to the possibility of preventive seizure of property in foreign countries, see Cass. sec. II, 22 November 2005 – 16 January 2006, no. 1573, holding that preventive seizure may be ordered, without (in reality, prior to) the activation of international letters rogatory, with reference to property located in a foreign country, but that a distinction must be made between the decision-making moment of the measure, which falls beneath the competence of the internal legal authority under the national regulations, and the executive moment of the measure, according to which control is the exclusive competence of the foreign authority according to the national legislation of that country.

9. The contested injunction of the Court of Bergamo held that the preventive measure adopted by the Prosecutor before the Court of Bergamo was unlawful, since was not a typical seizure, but constituted, in substance, an inadmissible preventive measure, comparable to a civil precautionary measure, thus violating the principle of the typicality of preventive measures in criminal proceedings, in contrast to civil proceedings, which are not, in particular, typical of emergency preventive measures. The criticism of the Public Prosecutor's Office is directed against this point in particular, in which regard the appeal is upheld.

10. It must, first of all, be considered that the measure of the Public Prosecutor is complex in nature, because, on the one hand, it is intended seized the website in question, while, on the other hand, it orders the service provider to prohibit access to the site; this duplicate nature of the preventive measure converges towards the objective of prohibiting the criminally relevant activity, i.e., the illegal dissemination of copyright works to users in Italy. This procedure was overturned by the Court of Bergamo, which held that the "censured decree amounts to an order imposed by the legal authority to persons ... extraneous to the offense" (the Internet service provider); it would, therefore, involve only a mere preventive measure *sub specie* of preventive seizure.

In reality, this is not so, first of all, because the seizure of the website, as shown, first of all, by the injunction sought by the Prosecutor, which states "the organisational structure, in truth, appears organised and realised entirely in foreign countries, since the computer devices of the server as shown by the public domain information retrievable over the Internet have been materially located, first of all in Sweden, then Holland".

The fact that the hardware was located in foreign countries is not, therefore, an impediment to adoption of the measure, as long as the jurisdiction of the national judge is upheld, as affirmed above.

11. It should then be noted that preventive seizure in question is real in nature, in the sense that it has as its object the seizure of a *res*, although not necessarily "material" in the strict sense (cfr Cass. sec. III, 27 September 2007 – 24 October 2007, no. 39354, on the preventive seizure of a web site bearing obscene messages and contents; Cass. sec. III, 4 July 2006 – 10 October 2006, no. 33945, on the admissibility of the preventive seizure of a web

portal; Cass., sec. V, 4 June 2002 – 3 July 2002, no. 25489, on the admissibility of the seizure of a business as a complex of material and immaterial goods; Cass. sec. I, 22 September 1997 – 14 October 1997, no. 5148, on the admissibility of the seizure of a telephone subscription; Cass., sec. V, 21 April 1997 – 22 May 1997, no. 1933, on the admissibility of a right of credit where the property seized is likely to be serve as “property pertinent to the offence”; Cass., sec. IV, 24 March 1992 – 8 May 1992, no. 979, on the admissibility of the seizure of the social shares of a limited liability company), or in the hypothetical event that the said property is connected with the offence (cfr C. Cost. N. 48 of 1994 which speaks of a “link of possible pertinence to the offence”), because it may aggravate or protract the consequences of the offence or facilitate the commission of other crimes, so as to permit qualification of the property as “property pertinent to the offence”, in the event that confiscation is possible. “Preventive seizure of an activity”, however, is impossible, Cfr. Cass., sec. II, 9 March 2006 - 24 March 2006, no. 10437, and Cass., sec. VI, 14 December 1998 – 2 February 1999, no. 4016, according to which the preventive seizure may have as its object solely the results of an activity, and not the activity in itself, so that the function of prevention of behaviour is extraneous to the seizure.

This limitation of the scope of preventive seizure should, however, be clarified; we need only consider that the Report on the Preliminary Draft of the Standard Code of Procedure, in referring to the binding obligations created to the property by means of the preventive seizure, specified that seizure did not simply aim at depriving the person holding the property of the availability of the said property when the same is pertinent to the crime, but “is rather intended to prevent certain activities [...] which might be realized through the property, by the person being the object of the preventive measure”.

Apart from the possibility of confiscation of the property, the “obligation of possible pertinence to the offence” is a necessary and sufficient condition to predication of the real character of the measure, and is not negated by the fact that it is not possible, as a result of the seizure, to continue on any activity involving the seized property. Preventive seizures always involve an element of “preventive activity” by virtue of the mere fact that the precautionary measure precludes any activities requiring the availability of the property. But this other facet of preventive seizure does not transform a precautionary measure into a mere “prevention of activity”; since a “prevention of activity” is, by contrast, specified as a mere injunction to act, or to cease and desist, this type of order is not likely to take the form of “preventive seizure”, due to the absence of the real character typical of preventive seizure.

The subsequent and delicate problem also arises in this context -- which does not however arise in the present case -- of the connection between the criminal jurisdiction and the normal exercise of civil jurisdiction or administrative activity, while preventive seizure (particularly of acts and documents) has the essential effect of an (inadmissible) inhibition of both the one and the other (cases examined in Cass., sec. II 9 March 2006 – 24 March 2006, no. 10437, and Cass., sec. VI, 14 December 1998 – 2 February 1999, no. 4016, moreover cit.) respectively.

In the case in question -- which involves, by contrast, as the object of seizure, a website participating, for the considerations set forth above, in the activity of unauthorised dissemination of copyright works over the Internet (cfr, in particular, Cass., sec. III, 4 July 2006 -- 10 October 2006, no. 33945, cit) -- no doubt an implication of the preventive measure may be regarded as an injunction against the continuation of such criminally illegal activity. But it remains within the realm of preventive seizure, indirectly affecting the

availability of the website, and having the further effect of preventing an activity as a mere consequence.

The real nature of the preventive seizure subsists from this point of view, and does not, therefore, violate the principle of the typical characteristics of preventive seizure as a criminal precautionary seizure.

12. The original measure of the Public Prosecutor, overturned by the court of review, enjoined the Internet service providers, including the Internet provider active on the territory of the Republic of Italy, to prevent their respective users from accessing the address of the website designated www.thepiratebay.org or any related aliases and domain names referring to the said site.

In the case in question, the preventive seizure of the website in question is accompanied by a true and proper inhibitory injunction, which is, indeed, not “real” in nature; but this does not invalidate the legality of the precautionary measure as a whole, since the principle of the typical characteristics and legality are nevertheless satisfied.

There is in fact a need to consider, in this regard, that, in this specific matter (that of the circulation of data over the Internet) a special inhibitory power is assigned to the judicial authority under Articles 14-16 of Legislative Decree of 9 April 2003 no. 70, implementing Directive 2003/31/EC relating to the services of the information society. This special regulations, in providing, in general, for the free circulation, but within the limits of copyright compliance of such services according to Article 4, subparagraph 1, letter a) of such services, such as those offered by Internet access providers, also contemplates, as a derogation from the same principle, that the free circulation of a given service may be restricted by order of the legal authorities on grounds relating to the need to prevent, investigate, identify and prosecute criminal offences. In particular, Articles 14, subparagraph 3, and 16, subparagraph 3, provide that the legal authorities may, in emergencies, demand that the service provider prevent or terminate any violations committed; these provisions should be read together with the subsequent article 17; which does, indeed, exclude a general obligation of supervision in the sense that the service provider is not required to verify that the data he transmits concretizes an illegal activity, particularly with regards to violation of copyright; but, together with the obligation to report the illegal activity, it does provide that the legal authority may require the service provider in question to prevent access to any illegal content (Article 17, subparagraph 3).

The joint reading of such provisions permits the affirmation that there is an inhibitory power of the criminal legal authority taking the form of an order to the provider of the above mentioned services to prevent Internet access for the sole purpose of preventing the continued commission of the crime referred in Article 171 *ter*, subparagraph 2, letter *a-bis*), *cit*.

Such inhibitory action must, moreover, respect the principle of proportionality (article 5, subparagraph 2, letter b, Legislative Decree no. 70/2003, *cit*), i.e., the limitation of access with respect to the objective of identification and prosecution of the crimes, since the circulation of information over the Internet is a form of expression and the dissemination of ideas, and is thus covered by the Constitutional guarantee mentioned in Article 21, first subparagraph of the Constitution (*cfr* precisely, Cass. sec. III, 11 December 2008 – 10

March 2009, no 10535; the latter, with reference to “blogs” published on the Internet, makes a distinction between “freedom of expression” and “freedom of the press”) -- a point without any real importance, however, in the case in question, so that the appeal in question only relates to the abstract existence or non-existence of an inhibitory action, preventing access to an Internet web site, as a measure taken by the criminal judge as a preliminary step towards preventive seizure of the site itself. Such inhibitory action may also be taken “in emergencies” as expressly provided for in Article 14, subparagraph 3; Article 15, subparagraph 3; and Article 16, subparagraph 3, so that, reading such provisions together with Article 321 of the Code of Civil Procedure, it is possible that the criminal judge, in ordering the preventive seizure of the web site -- which, as already noted, constitutes a precautionary measure which is real in nature -- may simultaneously require the Internet provider to prevent access to the site for the limited purpose, in the case in question, of precluding the illegal activity of unauthorised dissemination of copyright works; thus, fulfilling a reinforcement of the precautionary measure which is thus expanded, from merely eliminating the availability of a piece of property -- which is typical of preventive seizures -- to the inclusion of a true and proper inhibitory action against activity as well, in compliance, at all times, in the particular case in question, with the principle of both typicality and legality, as a result of reference to express and specific regulatory provisions.

Therefore, the inquiry into the law, as set forth above, finds an affirmative response in the provision mentioned above, in the sense of the subsistence of the elements of the offence referred to in Article 171 *ter*, subparagraph 2, letter *a-bis*, *cit.*, i.e., the judge may order the preventive seizure of a website when the owner thereof participates in the criminally illegal activity of unauthorised dissemination of copyright works over the Internet, and may simultaneously require the Internet connection service provider to prevent access to the site for the limited purpose of preventing the said illegal activity of unauthorised dissemination of copyright works.

13. The appeal is therefore upheld, with the consequent return of the case to the Court of Bergamo.

ON THESE GROUNDS

The Court overturns the disputed injunction and returns the case to the court of Bergamo.

Thus decided in Bergamo, 29 September 2009

The Reporting Judge

The President

[signatures]

[stamps]

[FILED WITH THE COURT

On 23 DEC. 2009

THE CLERK OF THE COURT]

[SUPREME COURT OF CASSATION]