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INTERLOCUTORY APPEAL Nº 488.184-4/3

DISTRICT: SÃO PAULO

APPELLANT: RENATO AUFIERO MALZONI FILHO

APPELLEE: YOUTUBE INC.

View.

1. I learnt about the block of the website Youtube, to comply with a decision of my authorship.

I observe that I really granted active effect to the interlocutory appeal interposed by Renato Aufiero Malzoni Filho, in the sense of adopting providences that prohibit the access of Brazilian Internet users to the video with images of the authors of the action [Renato and Daniela Cicarelli Lemos] on the beach of Cádiz, in Spain.

Such determination comes from the power given to the judge to use indirect means of coercion [article 461, paragraph 5, of the Code of Civil Procedure] in the sense of effectively fulfilling the judicial decisions. In the case, there is a Court Judgement of the Court of Justice of São Paulo [Int.App. 472.738-4], denying the advance injunction to ban each and every activity, on the Internet, of exploitation of the image of the authors, for the evidence of offense to the rights to personality.

2. It is necessary to dispose that the question is not about Cicarelli's video anymore, as the matter is known, because what is in analysis is the respectability of a judicial decision. Youtube does not comply with the sentence, which constitutes an offense to article 5, XXXV, of the Federal Constitution, a threat to the juridical system. The sentences are given to be executed.

3. The block of the website is generating a series of comments, which is natural in virtue of being a pioneer question, without legislative support. The incident served to confirm that Justice will be able to determine restrictive measures, with success, against national and international companies that disrespect the judicial decisions. In this context, the result was positive.

4. However, it is forceful to recognize that the blocking of the signal of the Youtube website was not determined. This determination, which can be taken in preventive character, as clarifies the Portuguese jurist JÓNATAS E. M. MACHADO [Liberdade de expressão: dimensões constitucionais da esfera pública no sistema privado, Universidade de Coimbra, 2002, p. 1123], should be released with clear grounding and with full transparency on the right to freedom of expression and information, which does not support censoring [article 220, paragraph 1, of the Federal Constitution]. To hinder the dissemination of fake, offensive news, does not constitute judicial censoring. Although the interdiction of a website can stimulate speculations in this sense, in face of a proportionality principle, that is, the reasonability of banning a website, with thousands of uses and access of millions of people, in virtue of a couple's video.

5. The rapporteur thanks the effort that the companies took upon the receipt of the orders of the First Instance Judge for the compliance with the decision. It is believed that the complete signal shutdown happened due to technical difficulties for the creation of a filter that stops the access to the couple's video. But this was not the determination, since what was ordered was the use of mechanisms that blocked the access to electronic addresses that published the video, whose prohibition was determined by judicial decision. There is not a reference for the cutting of signal in the hypothesis of the determined providence being impossible to execute.

6. For the occurrence of an execution without mistakes, the rapporteur determines that an official letter is sent to the dignified Judge for the reestablishment of the signal of the website Youtube, soliciting that the operators reestablish the access and inform the Court of the technical reasons of the supposed impossibility of blocking the electronic addresses.

7. It is registered that the imposition by the Collegiate Judges is not excluded of drastic measures, like the preventive block, for thirty days or more, until Youtube provides a software with the power to moderate the images whose circulation has been prohibited. However, this is a decision of competence of the Collegiate Judges and can be taken in the next vote conference session of the Appeals Court Judges. Furthermore, the definitive decision will depend on technical responses of the notified operators.

8. The official letter is to be urgently issued so that the Judge can transmit the counter-order, by rapid communication system, in a way to concretize the unblocking of the Youtube website, keeping the determination for the taking of measures that block the access to the video with images of the couple, since it is possible in the technical field, without blocking the whole website.

Summon.

São Paulo, January 4th 2007.

ÊNIO
Rapporteur

SANTARELLI

ZULIANI