***Translation by Ana Luiza Araujo – researcher at InternetLab, law and technology research center – São Paulo, Brazil.***

STATE OF ESPÍRITO SANTO
JUDICIARY BRANCH
COURT OF JUSTICE
THIRD CIVIL COURT

INTERLOCUTORY APPEAL Nº 0035186-28.2014.8.08.0024
DATE OF THE SESSION: 7/4/2015
APPELLANT: SECRET INC.
APPELLEE: STATE PROSECUTOR'S OFFICE OF ESPÍRITO SANTO
ACTIVE INTERLOCUTORY PARTY: APPLE COMPUTER BRASIL LTDA.
ACTIVE INTERLOCUTORY PARTY: GOOGLE BRASIL LTDA.
ACTIVE INTERLOCUTORY PARTY: MICROSOFT INFORMÁTICA LTDA.
RAPPORTEUR: APPEALS COURT JUDGE ROBSON LUIZ ALBANEZ

REPORT

APPEALS COURT JUDGE ROBSON LUIZ ALBANEZ (RAPPORTEUR):-

This interlocutory appeal is brought by Secret Inc., in face of the decision on the case of civil action filed by the State Prosecutor's Office, which determined in preliminary injunction, removal of the application named "Secret", by the required Apple Computer Brasil Ltda., and Google Brasil Ltda., as well as the removal of the application "Cryptic" by the Defendant-Appellant Microsoft Informática Ltda., of its official online stores, under penalty of a daily fine set at R $ 20,000.00 (twenty thousand reais).

In his appellate reasons, the Appellant raises the inexistence of the absolute anonymity that justified the contested injunction. It states that the application "Secret" meets the provisions of the *Marco Civil da Internet,* while contested decision affronts it. It claims that the contested decision would be violating the Internet and freedom of expression. Moreover, it adds the inexistence of the propagated anonymity in the application, claiming there are not the proper requirements to grant the requested injunction, fighting, thus, for the granting of the suspensive effect of the appeal, as well as reform of the whiplashed decision.

Appeal received in the suspensive effect.

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In counterarguments, the State Prosecutor adduces that there are the requirements for the authorization of urgent protection as it is granted at the initial, stating that the unavailability of the dispute object software, seeks to prevent the practice of "cyberbullying", permitted by the anonymity that the application provides. It adds that there are difficulties in the identification of the propagator of offenses by the "IP", affirming, yet, the existence of tools to allow the remote access of the smartphones. Finally adduces the unaplicabiliness of article 2 of Law 7.347/85, due to the principle of non-obviation of the jurisdiction.

The report is brief.

**VOTE**

APPEALS COURT JUDGE ROBSON LUIZ ALBANEZ (RAPPORTEUR):-

As reported, this is about the interlocutory appeal result of the demand in which is debated the maintenance of availability to Brazilian users of the applications named "Secret" or "Cryptic", of authorship and property of the Applicant, which takes advantage of the "virtual stores" of the other companies that are part of the defendant party of the original action, to enable the download to users, being determined, in the decision now contested, unavailability of the application in these "shops", aside from imposing the remote access to all smartphones in which the program is installed, in order to remove it.

According to the State Prosecutor's Office, in a brief synthesis, the measure shows itself necessary due to the fact that many users would be using the anonymity allowed by the application, for the practice of offenses to third parties and even for the commitment of crimes of libel and defamation, fact revealed in journalistic news reports of national and local scope in 2014.

First, we must make ground that, even though the Appellant has not been enrolled as part of the origin action, its legal interest is manifested in the case in question, since the contested decision determined to the Required Google, Apple and Microsoft the removal of the application, which is of its authorship and property, of the online stores owned by those companies, which, clearly, is impacting on its sphere of rights.

Well. In place of a summary cognition proper of this ruling, as asserted in the original decision of this resort, it is necessary to ponder that, although the anonymity figures as the very reason to be for the application, I do not think there are any doubts as to the possibility of identifying the user through its IP address, which derives from the Law 12.965/2014 (*Marco Civil da Internet*), which establishes:

***Art. 15. The Internet application provider that is duly incorporated as a legal entity and carry out their activities in an organized, professional and with economic purposes must keep the application access logs, under confidentiality, in a controlled and safe environment, for 6 months, as detailed in regulation.***

It is also necessary to ponder that this same normative system is clear as to the criteria of responsibilization of the application providers, such as the Appellant, when establishing that:

***Art. 19. In order to ensure freedom of expression and prevent censorship, the provider of internet applications can only be subject to civil liability for damages resulting from content generated by third parties if, after an specific court order, it does not take any steps to, within the framework of their service and within the time stated in the order, make unavailable the content that was identified as being unlawful, unless otherwise provided by law.***

Despite this fact, I reckon that the mere removal of the application from the online stores of the companies that make up the defendant's pole of the public civil action, reveals an ineffective measure to the problem presented by the State's Public Prosecutor's Office of Espírito Santo in its exordia, in that it will not have the power to prevent people from unlawfully using these facilities that the modern world offers us for ulterior purposes, the Appellant not being able to bear this onus, neither to see itself impaired in their legal and commercial interests by the levity of a third-party.

I believe that this application does not differ, in essence, from many other devices of the World Wide Web in which its use as an offensive tool is presented viable, under the cloak of apparent anonymity. The use of websites or applications, such as Facebook or Twitter, by people who make use fake "profiles" to give improper destination to such devices is not unusual.

It has to be pondered, yet, that the determinations contained in the contested decision seem to be technically unfeasible, being able to give rise, even before a perfunctory analysis, to the violation of the right to privacy of the users, as it imposes to the Appellant to establish a remote access to the devices of all citizens who have installed the application in their respective smartphones, with the purpose to remove the program from their devices, as said, it is an act of doubtful technical viability and discussable juridicity, even more considering the deadline of 10 days given, under penalty of a substantial fine.

Furthermore, I observe that the new involving the use of the software, recently broadcast on the press, above all on the TV show “Fantástico”, of Rede Globo, that serve as a basis to the original action, does not report facts that occurred in our state, as the State Prosecutor’s Office of Espírito Santo also did not do, which would clash with the provision of article 2 of Law 7.347/85, as the argument of the SPO of Espírito Santo seems to be destituted of technical basis in this point, which holds on to the principle of non-obviation of the jurisdiction.

Therefore, considering the nature of the disputed measure and its repercussion on the factual and legal spheres, I do not see a justifying reason for the maintenance of the contested decision, the motive why **I GIVE PROVISIONING to the appeal, to revoke the imposed preliminary injunction.**

That is how I vote.

REVIEW

APPEALS COURT JUDGE SAMUEL MEIRA BRASIL JÚNIOR:-
Respectfully, I ask for a review of the records.

INTERLOCUTORY APPEAL Nº 0035186-28.2014.8.08.0024
**CONTINUATION OF THE JUDGEMENT: 28/04/2015**

VOTE
(REVIEW REQUEST)

APPEALS COURT JUDGE SAMUEL MEIRA BRASIL JÚNIOR:-

Due to the complexity of the matter involved, as well as the quantity of litigat parts, I asked for a review of the records to analyse the controversy.

Remembering that the three interlocutory appeals (0031238-78.2014.8.08.0024 – 0035186-28.2014.8.08.0024 – 0030918-28.2014.8.08.0024) were interposed against the same decision of the 5th Civil Court of Vitória, for this, I now analyse them together.

SECRET INC. affirms that (i) the anonymity offered by the application is not absolute, as it does not extend to the authorities and does not prevent the identification of users who post improper content; (ii) the application has a tool that allows the quick withdrawn of each and every content reported by users; (iii) the aggravated decision violated the Brazilian *Marco Civil da Internet*, whereas the application fully complies with it; (iv) the aggravated decision violates

the proportionality principle, as it is inadequate, unnecessary and disproportionate; (v) aside from not reaching the goal of preventing that people suffer from damage due to the content posted online, the decision ends up hindering the access of millions of users that have always done a legal use of the application and cannot be impaired by the bad conduct of a minority.

In these terms he argued for the provisioning of the appeal.

The honorable rapporteur gave provisioning to the appeal to revoke the aggravated decision, under the following arguments: (i) although the anonymity figures as the very reason to be for the application, there are not any doubts as to the possibility of identifying the user through its IP address, which derives from the Law 12.965/2014; (ii) the mere removal of the application from the online stores of the companies reveals itself as an ineffective measure, as the Appellant cannot the damaged by the levity of a third-party; (iii) the determinations are technically unfeasible and may give rise to the violation of the users' right to privacy; (iv) there are no reports of damages that happened in Espírito Santo, which goes against the article 2 of the Law 4.347/85.

Well.

It is worth advising that *solely* the requisites for the granting of the preliminary injunction will be the object of this appeal's appreciation, since everything else will be treated on the original demand, without improper instance suppression.

With that, thesis (i) and (ii) of the Appellant are excluded, as the eventual incompetence of the State Justice or even the alleged absence of the collective material right should be the object of examination in the original process, through the judgment on the merits or in an opportune exception of competence.

In any way, it is important to trace the limits of this appeal in order not to have intromissions on the merit of the original demand, as the Justice Court of Espírito Santo has repeatedly pronounced in all of its Civil Courts.

Overcoming this first point, I verify that essentially the controversy limits itself to the **existence of absolute anonymity** while using the apps "Secret" and "Cryptic" as a violation of the seal contained in article 5, item IV, of the Federal Constitution.

Therefore, it is noticeable that the production of evidence on this controverted point is indispensable, because the decision surrounding the maintenance or injunction seal of the availability of the applications ("Secret" and "Cryptic") depends on a criterion of sufficient probability.

According to Cândido Rangel Dinamarco "*probability* is the convergence of elements that reasonably conduct the belief in an affirmation, overcoming the strength of conviction in the diverging elements."

In this case, however, it is not even possible to reach a sufficient probability criterion for, even in summary cognition, deciding for the advance protection on the request of the State Prosecutor's Office.

Therefore, the effectiveness of the process and the procedural technique, communicated by judges such as Dinamarco, Bedaque, Barbosa Moreira, Malatesta, Taruffo and so many others, recommend the minimum risk and a greater degree of probability to decide, after all "when assuming, the risk of making a mistake is measured in the inverted reasoning to the degree of probability that the relation between the occurrence of a fact and another one is always kept. When bigger the probability, smaller the risk; smaller the probability, bigger the risk to take."

In this context, for the analysis of the requested advance protection it is indispensable to realize a diligence on the existence or not of the anonymity of the questioned application users.

In other words, it should be object of proof the possibility of identification of users who have their information on the applications or the existence of absolute anonymity.

I advise that this procedure is to anticipating the merits of the demand.

On the contrary!

On the current outlines of the dispute, based on judgement of probability, it is not possible to grant or not the fought injunction.

At this moment, there is not a minimal convincing that authorizes the judgement of the advance protection, which ever is its content.

By the exposed, I respectfully DIVERGE from the honorable rapporteur, to CONVERT the records into diligence with the production of summary evidence on the controverted point, within the period of 15 days.

Following that, with the basic instruction on this point, the appeal will continue for the judgment on the merits.

This is how I vote.

**CONTINUATION OF THE JUDGEMENT: 2/6/2015**

VOTE

**(REVIEW REQUEST)**

APPEALS COURT JUDGE ROBSON LUIZ ALBANEZ (RAPPORTEUR):-

Mr. President, I will analyse the processes 0030918-28.2014.8.08.0024, 0031238-78.2014.8.08.0024 and 0035186-28.2014.8.08.0024 together, as they are about interlocutory appeals of identical matters, even receiving the same vote in the divergence started by Judge Samuel Meira Brasil Júnior.

I asked for the review of these records exactly due to the interpretative divergence started by the illustrious colleague Judge Samuel, of whom, in this opportunity, I dare to diverge, keeping my inaugural positioning.

It's worth reminding that, in the present case, we are in front of an interlocutory appeal originated in a public civil action managed by the SPO of Espírito Santo, a demand in which the maintenance of the availability to Brazilian users of the applications named "Secret" and "Cryptic" is debated, the Appellants keeping the softwares in their "virtual stores" for the download of users, being determined in the decision now contested the unavailability of the applications, aside from imposing the remote access to all smartphones in which the installed programs are found, with the purpose to remove them.

I remind, yet, in a brief synthesis, that according to the State's Prosecutors Office the measure would be necessary due to the fact that innumerous users would be using the anonymity permitted by the applications for the committing of offenses to third parties and even for the committing of crimes of defamation, facts revealed in news stories of national and local scope broadcasted in 2014.

In my vote, I understood to be correct the decision of reforming the contested decision that imposed the unavailability of the applications, as I was convinced, before a summary cognition, that the anonymity of the users of the softwares communicated by the SPO of Espírito Santo would be easily dismissed by the possibility of identifying the IP (internet protocol), that in simple words, can be understood as the address that each computer or cellphone has to communicate with the Internet, thus, permitting the identification of the user.

But the illustrious Judge Samuel, understanding in a diverse manner, affirmed to not envision conditions to assess if there's viability or not to identify the users, putting that "On the current outlines of the dispute, based on judgement of probability, it is not possible to grant or not the fought injunction.", and then, manifested for the conversion of the judgement from interlocutory appeal to diligence, with the purpose to produce evidence on this controverted topic.

As it was said, I do not share the understanding of my noble colleague on this topic.

The analysis of the reality poured in the original action, and compared in my first vote, reveals that the denial of the pretentious injunction finds basis that go beyond the mere viability of user identification.

As I initially assessed, despite of having the technical possibility of locating the user via IP address, Federal Law 12.965/14 itself, commonly known as *Marco Civil da Internet*, imposes such condition, when proclaiming in its article 15, that:

***Art. 15. The Internet application provider that is duly incorporated as a legal entity and carry out their activities in an organized, professional and with economic purposes must keep the application access logs, under confidentiality, in a controlled and safe environment, for 6 months, as detailed in regulation.***

I assessed yet, that the mere removal of the application from the online stores of the companies that form the defensive pole of the public civil action of origin, Google, Apple and Microsoft, reveals an ineffective measure to the problem presented by the State's Public Prosecutor's Office of Espírito Santo in its exordia, in that it will not have the power to prevent people from unlawfully using these facilities that the modern world offers us for ulterior purposes, the Appellant not being able to bear this onus, neither to see itself impaired in their legal and commercial interests by the levity of a third-party.

Well, those who seek to unlawfully use the pseudo anonymity provided by the Internet will not stop doing it with the simple unavailability of just one application, in front of an enormous and growing array of distinct possibilities that the universe of the Internet makes available to all of us. This is the topic to be highlighted.

This was the question to which I referred to in my vote, when I assessed that these applications "Secret" and "Cryptic" do not differ, in essence, from many other devices of the World Wide Web in which its use as an offensive tool is presented viable, under the cloak of apparent anonymity. The use of websites or applications, such as Facebook or Twitter, by people who make use fake "profiles" to give improper destination to such devices is not unusual.

Thus, it is worth questioning: will we, then, determine that all of these modern tools, that form the so called "social networks", to be "taken off the air", simply because of the improper destinations given to it by a minimal number of users? I do not believe that this is the measure that fits the most inside a minimum parameter of reasonability and justice.

The Judiciary cannot see itself unrelated to the advances that the world provides us and to the new prospects of social life that come with it. The legality has to prevail, without a doubt, but it cannot serve as support for a dangerous generalization, like in this case.

Therefore, the rejection of the preliminary injunction, to my vision, has reasons that go beyond the mere possibility of identifying the users. To me, the measure seems to be ineffective to the proposed ending.

Furthermore, I observe that the news stories that served as basis for the State Prosecutor's Office of Espírito Santo, aside from not reflecting the facts that occurred in our

State, portray an extremely reduced user universe, whose behaviour cannot be extended and taken as a rule, and it is so that, after the exhibition of that story, nothing more was said about the theme. Certainly I do not believe that the improper usage stopped happening, but did not give cause to the repercussion portrayed by the SPO of Espírito Santo in the initial action.

It has to be pondered, yet, that the determinations contained in the appealed decision seem to me to be technically impossible, before a perfunctory analysis, in the measure that it imposes to the Appellants to establish a remote access to the devices of all citizens who have installed the application in their respective smartphones, aiming to remove the program from the devices, an act of doubtful technical viability and discussable juridicity, even more if considering the deadline of 10 days given, under penalty of considerable daily fine.

Lastly, I do not see a technical reason to allow the production of evidence as interlocutory appeal as pretended in the judicious divergent vote. The analysis here is perfunctory, summary, to the contents of the evidence produced in the records up until now. I understand the preoccupation showed by the colleague, but with the due venia, I do not see reason in the production of evidence in this process and in this phase of the conflict. The judgement to be done, although of probability, has to be broad, and cannot see itself reduced to this technical aspect, reality in which I am not permitted to conclude that these applications should pay on their own for the pretentious anonymity that practically all of these "social networks" provide.

In this way, I give the due the respect for the always judicious Judge Samuel and ratify that I understand his concern in this case, but I stand by my initial positioning, as I do not see factual or juridical reason that leads me to an interpretation in accordance to the one manifested in the appealed decision, which leads me to **revoke the imposed preliminary injunctions, GIVING PROVISION TO THE APPEAL.**

This is how I vote.

VOTE

APPEALS COURT JUDGE SAMUEL MEIRA BRASIL JÚNIOR:-

Honorable Appeals Court Judge Robson, on the vote I uttered I rose a question of order to convert the judgement in diligence, for the production of evidence.

Your Honour, now, rejects the question of order and, in the merits, maintains your positioning.

I heard the vote with attention and as to the question of order I was convinced, mainly as this is about an interlocutory appeal that attacks a decision stated in summary cognition. The production of evidence is more appropriate in the final cognition.

With the elements of the records, it seems to me that we have conditions of stating the vote of merit of the appeal, but regarding the advance protection based on urgency, that was the preliminary injunction.

As I did not utter a vote of merits, I only pronounced myself on the preliminary question -- the question of order of conversion of the judgement to diligence -- and even to avoid asking for another review of the records, although I did not bring a written vote, I will say the reasons of my understanding so that we can move forward on the judgement and not cause any delay on the conclusion of the judgement.

The present issue, well debated by Judge Robson Luiz Albanez, is known by all and regards the application "Secret" that allows to "tell secrets preserving the anonymity."

The State Prosecutor's Office filed a civil public action asking for the removal of the applications of *Google Play*; *Apple Store*, that distribute the application and the removal of the smartphones, tablets and respective equipments.

We are judging, I repeat, just an appeal against the decision stated in summary cognition, that is, the preliminary injunction. The final cognition will be reach with the final judgement of the demand.

However, there is a doubt, What to do with this application that promises anonymity to all of those who use it?

The advertisement that was on the Internet stated the following: "you login, receive the promise of never having your name revealed and write posters with feelings and embarrassing revelations."

Accessing once again Secret's page, in English, I verified that the ad was removed and the reason I will explain during my vote.

But there was a promise of anonymity, that is the truth.

Here is the great question: the Brazilian Constitution is clear when it expressly says in its article 5, item IV,: "the expression of thought is free, and anonymity is forbidden".

In this way, how do we live with this application that promises anonymity to the user, if the Federal Constitution forbiddens it? This is the great question.

The Appellants sustain that the anonymity is not absolute, that it is possible to identify the user through their IP address. But the IP address identifies to where the data is being sent, it does not identify the user of the program.

Is someone has the program Secret and access Internet through a cyber cafe, a diner, a restaurant, a bookstore, like we have here in the capital, in the malls, the messages will be forwarded and sent to that address, but not necessarily of the application.

If it is a Facebook page, there is the identification of who used it. So, it doesn't matter if they accessed it remotely or from their home, because they will be identified through their login in their Facebook.

The IP address, with all due respect, seems to be insufficient to identify the user of the program.

The issue is: or Secret keeps a register of the user of the program -- and in this case it is promoting a deceitful advertisement as it states and affirms that no one will never be identified e for that, people can tell the secret they want --, then it allows the identification. Or, on the contrary, the identification is apparent.

Respectfully, with the identification through the IP address, there is the identification of to where the data is being sent and where they come from, but it does not identify the user of the system. So, this identification seems to be insufficient, with the limits of a summary cognition.

The reference made to the *Marco Civil da Internet*, mentions the seal in article 14. But adds "in a controlled environment".

Therefore, the seal is not and cannot be absolute, under penalty of violating the Federal Constitution, when anonymity is forbidden.

This way, it is necessary, with all due respect, to be a little careful when referencing the Secret application, also because the application itself, allows, as it already has, to spread offenses, the exercise of online bullying. There was even the register of a suicide attempt that happened here in the state due to messages disseminated in the application.

Furthermore, to this end -- while the honorable and cult Rapporteur professed his vote, to whom I always make reference for the zeal with which you judge your processes -- in a quick

consultation to the Internet, I realised that not only does Secret allow the posting of offensive messages, under the promise of anonymity, but there is also a Facebook page to "spread the embarrassing secrets on Secret".

So, we have here several "embarrassing secrets of Secret", including the imputation of someone who bought a fake certificate schooling; other posts imputing a woman of practising prostitution, with fowl words, without the identification of who posted it.

It seems quite bold to allow the commercialization of the application.

The reference that the measure is ineffective impressed me a lot as it does not avoid unlawful uses, even if promoted by other social networks.

But in this case, it seems to me that there is a difference between providing applications for social networks with legal purposes and provide a tool that can be used directly to avail the illicit.

The tool enables the anonymity, while the other social networks do not promise it.

In the present case, a doubt arose in the memorial -- in fact, the material elaborated by the cult lawyer Fernanda Ferri, that was delivered to me before the beginning of the session, impressed me a lot for the juridical reasons, for example, when it says there is no difference from fake profiles on Facebook.

With all due respect, it seems to me that there is, indeed, a difference. Facebook does not promise anonymity, the user is the one to do an improper usage of the tool. Secret promises anonymity, but the user does not make an improper use, but the one spread by the application.

Furthermore, the eminent and cult Rapporteur made a very useful reference when he said that there is a minimal number of users in Facebook, with fake profiles. Yes, it is true, but in Secret, all users are anonymous, all use the application with the intention of preserving the anonymity.

In this way, the minimal use of the social networks cannot be equated to the massive use of users of Secret and the application Cryptic.

It seems to me that there is, indeed, this difference between the improper use of the social networks and the use made by Secret.

As for the removal of the product -- in this point, the question is a little more delicate. Some products have already been installed in smartphones.

The question is: can Google and Apple access the device to remove the application? Would this be a data violation? Would it be a doubtful technical viability or not? I confess that i pondered a lot. I admit that I do not have a definite answer, even because we are discussing in summary cognition and not in final cognition.

For that, I repeat, my initial vote was for the diligence in the production of evidence. Is it possible to remove the application from the smartphones? And even if it is possible, is it juridically allowed or not?

It seems to me, with the limitations that I have, that it is possible, yes. Why? Because the upgrades made by the systems, by IOS, remove some applications and upgrade others, they have this remote access for the installation and eventual removal of applications.

The question is now about the juridicity. Is is permitted to access for the removal of the applications or not? The legislation says the removal of data from the devices is forbidden, like in smartphones, tablets and computers. But is Secret a data or an application? And more, is the removal of any data or application forbidden or not?

Let's imagine that someone develops an application to promote pedophilia or to indicate possible victims of kidnap or rape. In other words, to promote the criminal illicit. Let's also

imagine that this application did not originally have this purpose, and with the passing of time this use began through users.

It seems to me that the juridical order would never allow for these applications to remain in smartphones, under the argument that the legislation seals the access for the removal of these applications. The juridical order forbids tools of this nature. Once more I make a clear reference to the Federal Constitution, when it forbids anonymity.

In this point, I make an observation: I am not affirming that Secret is used with this purpose. Now, I also do not want to believe that, even if the application is not used with this purpose, that it is not possible to remove an application that can be used to promote the illicit of the smartphones and tablets.

Lastly, one last argument that made me quite impressed: it was recently announced -- news from April 30th, I am not sure if the date is this or not -- that the anonymous posters application Secret comes to an end, announced by its own creator. That is, the creator of the application announced its removal and said that it would end the exploration of the app.

When trying to access Secret's page on the Internet, I was faced with a thank you note to the users of the application, but the service had been discontinued, immediately. The creator of the service published, yet, on the page -- I apologize for the free translation, as the page is in English, but disclosed that "unfortunately, Secret does not represent the vision that he had when he started the company."

The decision, according to what was published in the news, happened due to a concern from the investors that were worried with eventual juridical demands that could impact the company. For that, the application was discontinued.

There are not any more doubts as to the possibility of damage that this application can cause, even if this was not the intention of its creator.

Here is the big question: if it was discontinued or not, I only have news through what was published on the Internet, which is a source, even if not shown in the final cognition in the process, at least capable of leading to a decision in a summary cognition, in preliminary injunction cognition.

We do not have yet information that, although the application was discontinued, the messages were discontinued or collected.

As I mentioned, there is a Facebook page that publishes the "most embarrassing secrets on Secret", thus allowing the anonymous and virtual bullying.

Therefore, respectfully, I prefer to diverge from the Eminent Rapporteur in this point about the merits of the appeal, to maintain the advance protection granted in first degree and maintained in the interlocutory appeal, when originally received in the court and thus keep the prohibition of commercialization of Secret.

It is true that the removal of the application from the devices on the period of ten days can be very short, but nothing that cannot be solved with a deadline extension, according to a reasonability criterion to be fixed by the first degree judge.

Respectfully, although I recognize the juridicity of the vote of the Eminent and cult Rapporteur to whom I am not tired of honoring, I ask venia to diverge. Specifically with reference to these applications that promote the spreading of data, under the promise of anonymity, I deny provision to the appeal, to maintain the urgency protection given in first degree, in the public civil action moved by the Prosecutor's Office, in a term to be fixed by the first instance.

This is how I vote.

REVIEW

APPEALS COURT JUDGE RONALDO GONÇALVES DE SOUSA:-

Respectfully, I ask for a review of the records.

**CONTINUATION OF THE JUDGEMENT: 21/7/2015**

VOTE

**(REVIEW REQUEST)**

APPEALS COURT JUDGE RONALDO GONÇALVES DE SOUSA:-

Honorable colleagues, after attentively hearing the vote uttered by the Noble Appeals Judge Rapporteur Robson Luiz Albanez and the diverging vote of Noble Appeals Judge Samuel Meira Brasil, I asked for a review of the records for a better analysis of the problematics subordinated to this Eminent Third Civil Court, and, **after analysing and re analysing the what was done, with all due respect to the Noble Appeals Judge Samuel Meira Brasil, I dare to diverge of his understanding to accompany the rapport vote of Noble Appeals Judge Rapporteur Robson Luiz Albanez.**

Remembering the judicial controversy in analysis, the interlocutory appeals nºs 0031238-78.2014.8.08.0024, 0035186-28.2014.8.08.0024 and 0030918-28.2014.8.08.0024 are submitted to common appreciation as they speak rigorously on the same matter on the same judged decision. In this way, the acts are about the claims of interlocutory appeals interposed by **MICROSOFT INFORMÁTICA LTDA and OTHERS** against the decision that, in the records of the public civil action moved by the **STATE PROSECUTOR'S OFFICE,** revoke the preliminary injunction for the removal of the applications Secret and Cryptic of the virtual stores of the Appellants, also determining the removal of both from the smartphones and tablets in which they were already installed, under daily fine of R$ 20.000,00 (twenty-thousand reais).

The Distinguished Rapporteur Appeals Court Judge Robson Luiz Albanez to utter his vote in the sense of giving provision to the appeal revoking the preliminary injunction imposed by the judge *a quo.*

Subsequently, the Honorable Appeals Judge Samuel Meira Brasil brought a question of order, recommending the conversion of the act in diligence for the production of summary evidence on the controverted topic, referring to the possibility of identifying the users of the application as well as the possibility of unistalling them from the smartphones and tablets on the Appellants part.

In face of the divergence initially installed, the The Distinguished Rapporteur Judge rejected the question of order, ratifying the terms of the first vote once the eventual necessity of conversion of the action in diligence would also justify the idea that the decision of the judge *a quo* lacks of unequivocal evidence of likelihood of the allegations.

In a new opportunity, the Honorable Judge Samuel did a disclaimer judgement on the question of order, recognizing that it would be advisable the probationary diligence in final cognition, subsequently pronouncing himself on the appeal merit. However, on the merits, he diverged from the rapporteur vote for recognizing to be sufficiently evidenced in the records the presence of the requisites for the advance protection revoked in first instance.

With all due respect to the diverging positioning, in face of the interpretation to which I dedicate the doctrinal, normative and jurisprudential guidelines, on the matter object of the

appeal, **I consider that the appellant reasons deserve to prosper in favor of the distancing of the effects of the condemnation *a quo*, such as recognized in the rapporteur vote, once I do not verify the presence of the requisites for the original advance protection.** I explain.

**You cannot talk about unequivocal evidence of likelihood of the allegations in the sense that the Secret and Cryptic applications in fact provide unsolvable anonymity of their users, or even that in face of an eventual characterization of anonymity this circumstance, by itself, would be enough to assume offense to the juridical order of this country. On another side, you also cannot talk about a founded concern of irreparable damage or of difficult compensation to the collectiveness before the mere functioning of the applications, as if a significant portion of users would dedicate an illicit purpose to the tool.**

The measure adopted in first instance reveals itself dramatic for a situation usually reproduced in the scope of other applications, or social networks of the same kind, available to all in the Internet universe.

Any purpose (judicial or extrajudicial) that implies in a possible mitigation of freedom of expression, in its various unfoldings, demands a full and unequivocal conviction that the providence is shown indispensable to the preservation of rights and fundamental guarantees, as well as properly compatible with the national constitutional order, compromised with the values of a free, plural and equal society.

*In casu*, on the contrary from the judge of first instance, I do not verify in full (as summary cognition) the referred conviction to the intent of advance protection.

Recently, the Federal Supreme Court (STF), in the judgement of the Direct Unconstitutionality Action 4.815, manifested in unanimous manner in favor of the preponderance of the freedom of communication before eventual threats or risks of threats to the honor and privacy. Aside from the necessity of definitely breaking with a tradition of recurring attacks to the expressive freedom, the STF assessed that without a context of satisfactory viability of the exercise of freedom of speech, it would not even be possible to think on the entirety of all other rights once it is precisely through the communication that we develop culturally and can recognize, search and promote rights, as well as preserve and reaffirm democracy. (STF. ADI 4.815 Rap. Minister Carmen Lúcia. DJ. 10/06/2015).

The prioritization of freedom of speech before possible concrete threats to honor and privacy reveals itself as a tendency of the Federal Supreme Court, as signalized in the many paradigm cases frequently subordinated to the appreciation of the highest court. In this tendency is also common the invocation of the brocard that in a democracy it is important to have space for the multiplicity of perspectives on the various existing subjects.

The constitutionalist Miguel Carbonel teaches that the protection of freedom of expression, as a characteristical premise of a democracy, denotes the possibility of coexistence in the public sphere of debate with completely antagonic manifestations, including of unpopular or predominantly recognized content in the community as of bad taste. That is, in a context of full democracy it must be admitted, in the free market of ideas, event the dissemination of controversial or unpopular manifestations. (CARBONELL, Miguel. El fundamento de la libertad de expresión en la democracia constitucional. In: Sufragio. Revista Especializada en Derecho Electoral. Nº 5 Jun-Nov, p. 20-29. 2010, p. 28-29).

Before these aspects, independently of the unpopular or popular character of a manifestation, I consider good to highlight that the constitutional seal to the anonymous manifestations comprehends the hypothesis that if someone uses anonymity for illicit or even of

criminal order, hindering the personal responsibilization. **However, it does not comprehend the simple anonymity without illicit repercussion.**

In reality, there are many circumstances in which the anonymous manifestations are not only illicit or tolerated, but even recommendable and stimulated. For example, Secret Inc., company responsible for the creation and publishing of the Secret app, used the publicity that the application could propitiate between users the sharing of problems and doubts that eventually are taboos or embarrassing subjects, but of great relevance to the sphere of debate and reflection. For example, doubts about diagnosis and treatment of STDs. The search for comfort and support by the application users was also common, due to psychological traumas of sexual abuse. Obviously, the anonymity in hypothesis similar to the ones here described is not unwanted or offensive to the national fundamental juridical order.

The idea that anonymity makes any manifestation illegal, *per se,* would legitimate absurdities such as, for example, hinder the functioning of support groups that give assistance to depressed or desperate people that do not want to be identified. The legal order does not intend to attribute illegality to someone who wants, for example, anonymously contact the CVV NGO (Center for Valorization of Life) for being on the imminence of suicide. The legal order does not intend to attribute illegality, and therefore censoring, to news stories guided by the seal of source.

I bring all of these exceptional, but not rare, examples for the purpose of alerting on the risks of mitigating or hindering the exercise of expressive freedom with basis on the simple argument that the Federal Constitution seals anonymity or in the argument that an anonymous manifestation could target the privacy or honor of a third party.

That is, the argument used by the judge *a quo* to justify the mitigation of the anonymous expressive manifestation, with good intentions of avoiding a possible offense to honor, intimacy and privacy of a determined individual vulnerable to the sentiment of offense with the manifestations published in the app, in reality ends up also justifying situations juridically, culturally and socially unwanted, in patent offense to the national constitutional order that stimulates the free circulation of ideas, just not admitting the manifestations that surpass the scope of constitutional protection. I explain.

Minister Gilmar Ferreira Mendes teaches, in his prestigious work *(Direitos fundamentais e controle de constitucionalidade: estudos de direito constitucional. São Paulo: Saraiva, 2012)* on the doctrinal and jurisprudential Brazilian context, that the **delimitation of the scope of protection of a fundamental right depends on the systematic interpretation, dedicated to consider the particularities of each case,** in special of each constitutional norm that guarantees rights, with the "identification of the protected juridical goods and the broadness of this protection (*scope of protection of the norm*)" in a first moment and the "verification of the possible contemplated restrictions, expressively, in the Constitution (*express constitutional restriction)*" and identification of the *legal reserves of restrictive character*", subsequently. (MENDES, Gilmar Ferreira. Direitos fundamentais e controle de constitucionalidade: estudos de direito constitucional. São Paulo: Saraiva, 2012, p. 35).

That is, the scope of protection of the norm is comprehended in the scope of protection of a fundamental right -- which includes the protected juridical goods and the reach of this protection -- and the restrictions of constitutional character, that delimitate the right.

In the case of freedom of expression, for example, there is not a way to consider the expressive actions that characterize offensive crimes as part of the scope of constitutional protection of the right. The constitutional right to the expressive freedom does not include the right to offend somebody. In these hypothesis, you cannot talk about offense or unlawful

limitation to the freedom of expression, having in sight that the state acts in the sense of repressing manifestations outside of the delimited scope of constitutional protection.

However, **the mere possibility of publishing anonymous manifestations through a smartphone application does not arise, above all in a summary cognition, the unequivocal conviction that each and every anonymous pronunciation surpasses the scope of the expressive freedom.** Thus, the measure adopted by the first instance judge reveals itself drastic.

Furthermore, the principle that justifies the constitutional seal to anonymity is about the impossibility of making the interlocutor of the manifestation that surpasses the scope of protection of the freedom of expression responsible. What happens is that, in the framed, hypothesis, there is no evidence, in an unequivocal manner, the impossibility of personal responsibilization of the possible users that eventually may surpass the referred scope of constitutional protection through using the application. That is, **there are no previously constituted evidence that the level of anonymity offered to users of the application Secret is in fact insurmountable,** once that in similar situations it is usual, trivial and necessary the existence of a register for the use of applications alike, which surely the administrator company (in this case Secret Inc.) has free and direct access to all registered data. Also there is no unequivocal proof that it is not possible to track the IP of the app users.

Thus, it is necessary the always thoughtful exercise of the ponderation before mitigating the expressive freedom, or even the unequivocal anonymous manifestations (which is not uncontroversial on the framed hypothesis). In this sense the jurisprudence of the Federal Supreme Court:

**[...] The constitutional seal to anonymity, as it is known, aims to hinder the fulfillment of abuses in the exercise of the free manifestation of thought, since, when demanding the identification of whom is using this extraordinary political-juridical prerogative, essential to the very configuration of the democratic State of right, it is aimed, in last analysis, the possibility that eventual excesses, derived from the practice of the right to free expression, are made prone to liability, "a posteriori", both in the civil sphere and the criminal sphere.** [...]With effect, there is, on one side, the constitutional norm that, when sealing anonymity (FC, article 5, item IV), aims to preserve, in the process of free expression of thought, the entirety of the personality rights (such as honor, private life, image and intimacy), seeking to inhibit, this way, abusive anonymous complaints. And there are, on the other side, certain basic postulates, equally consecrated by the text of the Constitution, intended to give real effectiveness to the demand that the functional behaviours of the state agents adjust to the law (FC, article 37, caput). **[...] I understand that the overcoming of existing antagonisms between the constitutional principles has to result from the use, by the Federal Supreme Court, of criteria that permit it to ponder and assess, "hic et nunc", in function of a determined context and under a concrete axiological perspective, whichever is the right to be pondered on the case, considering the situation of occurring conflict, since, however, the usage of the method of pondering goods and interests does not imply in an emptying of the essential content of the fundamental rights, as the magistrate of the doctrine advises** (DANIEL SARMENTO, "A Ponderação de Interesses na Constituição Federal" p. 193/203, "Conclusão", itens ns. 1 e 2, 2000, Lumen Juris; LUÍS ROBERTO BARROSO, "Temas de Direito Constitucional", p. 363/366, 2001, Renovar; JOSÉ CARLOS VIEIRA DE ANDRADE, "Os Direitos Fundamentais na Constituição Portuguesa de 1976", p. 220/224, item n. 2, 1987, Almedina; FÁBIO HENRIQUE PODESTÁ, "Direito à Intimidade. Liberdade de Imprensa. Danos

por Publicação de Notícias", in "Constituição Federal de 1988 - Dez Anos (1988-1998)", p. 230/231, item n. 5, 1999, Editora Juarez de Oliveira; J. J. GOMES CANOTILHO, "Direito Constitucional", p. 661, item n. 3, 5ª ed., 1991, Almedina; EDILSOM PEREIRA DE FARIAS, "Colisão de Direitos", p. 94/101, item n. 8.3, 1996, Fabris Editor; WILSON ANTÔNIO STEINMETZ, "Colisão de Direitos Fundamentais e Princípio da Proporcionalidade", p. 139/172, 2001, Livraria do Advogado Editora; SUZANA DE TOLEDO BARROS, "O Princípio da Proporcionalidade e o Controle de Constitucionalidade das Leis Restritivas de Direitos Fundamentais", p. 216, "Conclusão", 2ª ed., 2000, Brasília Jurídica). **[...]** **This means, in a context of conflicting freedoms, that the resulting clash has to be equated, by this Court, using the method -- which is rational and appropriate -- of the pondering of goods and values,** in such a way that the existence of public interest in the disclosure and clarification of truth, on supposed penal and/or administrative illicit acts that would have been practised by an autarchic federal entity, would be enough, on its own, to attribute, to the claim analysed (although anonymous), a condition that would enable the administrative action adopted by the Court of Auditors, in the defense of the ethical-juridical postulate of the administrative morality, incompatible with any devious conduct from the administrator improbus. . (STF. MS 24.369-DF. Rap. CELSO DE MELLO. DJ. Judgement: 13/11/2003).

In this way, according to what was assessed before, there is not a way to envision the unequivocal evidence of likelihood of the allegations of the **STATE PROSECUTOR'S OFFICE** for the purpose of the originary advance protection accepted in first instance, above all without the hermeneutical exercise of the pondering of interests in final cognition.

Furthermore, **I also do not verify the presence of a founded concern of irreparable damage or of difficult compensation.** To suppose that the mere functioning of the application, by itself, offers a founded concern of irreparable damage or of difficult compensation to the collectiveness, specifically to diffuse and collective interests, is unmeasured and unmoderated, above all before the frequency with which similar manifestations are propitiated in the universe of the Internet.

**I ask.** Would it be the case, under the argument that the Constitution prohibits anonymity, of impairing all social networks that give margin to manifestations that do not propitiate the immediate and instantaneous identification of the interlocutor? It is reasonable to prevent the use in Brazil of social networks like , for example, *Facebook, Youtube, Twitter, Tumblr, Qzone, WhatsApp, WeChat, Line*, under the argument that its users could anonymously make offensive posts to honor and privacy of determined individuals? **Obviously not.** This would be like prohibiting the sale of a knife in virtue of the risk of somebody with bad intentions using it to attempt against someone's life. It would be like prohibiting the sales of automobiles in virtue of the risk of somebody negligent offering risks to the other drivers and to the pedestrians. What I mean to say is that the existence of potential damage of a tool is not enough for the undiscriminated characterization of the founded concern of irreparable damage or of difficult compensation in relation to its use.

In other words, although, at first, the manifestation of the application's users happens in the online and Internet universe as apparently anonymous, this does not mean that the interlocutor remains in fact anonymous in case of abuses, it also does not mean that an eventual manifestation that surpasses the constitutional scope of the protection of the expressive freedom is blinded of repression in front of the application's conditions to function.

It's worth highlighting that the purpose of the Secret application, as idealized, comprehends internal mechanisms of complaint to abuses made in the exercise of freedom of speech of their users.

So I understand, in face of the enunciated reasons, that the reprehended *decisum* does not deserve to prosper. With all due respect to the Honorable Appeals Court Judge Samuel Meira Brasil, I understand that it is the case of accompanying the understanding of the Honorable Appeals Court Judge Rapporteur Robson Luiz Albanez, to give provisioning to the appeal distancing the effects of the decision that conceded the originary advance protection.

Thus, corroborating with the adopted perspective on the vote of the Honorable Appeal Judge Rapporteur, **I ACKNOWLEDGE** the interlocutory appeals interposed by **MICROSOFT INFORMÁTICA LTDA. AND OTHERS** and, in respect to the merits, **I GIVE THEM PROVISIONING** to remove the effects of the fought judicial pronouncing once I do not verify the rigorous fulfillment of the requirements (unequivocal evidence of likelihood of the allegations and founded concern of irreparable or difficult compensation damage) for the advance protection determined in the first instance.

This is how I vote.

DECISION

As it is determined in the records, the decision was: by majority of votes, to give provisioning to the appeal, rejecting the challenged preliminary.