dataprotectionlaw&policy

FEATURED ARTICLE
03/08

cecile park publishing

Head Office UK Cecile Park Publishing Limited, 17 The Timber Yard, Drysdale Street, London N1 6ND
tel +44 (0)20 7012 1380 fax +44 (0)20 7729 6093 info@e-comlaw.com
www.e-comlaw.com

Promusicae case: forcing ISPs to disclose personal data

The European Court of Justice has recently ruled that Member States are not required to issue legislation requiring the communication of personal data in the context of civil proceedings. However, the ruling also confirmed that under European law, there is no impediment to such legislation being enacted, as long as it strikes a fair balance between the fundamental rights at stake. Bridget Treacy, a Partner at Hunton & Williams, assess the implications of the Promusicae judgment for rights holders, ISPs and individuals.

Intellectual property rights holders face many challenges in trying to enforce their rights in our online world. The growth in digital downloads and the easy establishment of file sharing networks have made it increasingly difficult for rights holders to monitor and enforce infringement of their rights. Part of the difficulty for them lies in the fact that without the co-operation of Internet Service Providers (ISPs), it is extremely difficult for rights holders to identify the individuals against whom enforcement proceedings may be brought. Understandably, therefore, there has been considerable interest in the recent decision of the European Court of Justice (ECJ) in Promusicae[1], which provided that under European Community law, a Member State has no obligation to require an ISP to disclose information to a rights holder in the context of civil proceedings. Significantly, the ECJ left open the question of whether national courts might impose this obligation in individual circumstances, encouraging national lawmakers to balance the competing interests of rights holders and individuals.

Background

The case was originally brought in Spain[2] following the refusal of the Spanish ISP, Telefónica, to disclose the identities and physical addresses of certain subscribers to Promusicae. Promusicae is an association representing intellectual property rights holders and it held the IP addresses and dates and times of connection of individuals who used a file sharing network to provide access to music in which Promusicae's members owned the exploitation rights. Promusicae wanted to bring civil proceedings against the individuals, alleging unfair competition and infringement of intellectual property rights. Telefónica took the view that it was not legally permitted to disclose the information to Promusicae for use in civil proceedings.

The Spanish Court of first instance ruled in favour of Promusicae, ordering Telefónica to disclose the subscribers' details. Telefónica appealed against the order, following which the Spanish court stayed the proceedings and referred the case to the ECJ. The ECJ was asked to determine whether Community law 'permits Member States to limit to the context of a criminal investigation...thus excluding civil proceedings, the duty of operators of electronic communications networks and services, providers of access to telecommunications networks and providers of data storage services to retain and make available connection and traffic data generated by the communications established during the supply of an information society service'.

The ECJ ruling

The ECJ began by considering the Directive on Privacy and Electronic Communications (EC 2002/58) which, by Article 5(1), requires Member States to ensure the confidentiality of communications transmitted via a public communications network and related traffic data. Further, Article 5(1) prohibits the storage of such data by anyone other than users, unless users have consented. There are specific exemptions from this general obligation of confidentiality, including one which permits Member States to enact legislation to restrict confidentiality in order to safeguard national security, defence, public security and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system (Article 15(1) of Directive 2002/58).

None of the exemptions in Article 15(1) directly relates to the bringing of civil (rather than criminal) proceedings. However, the list of exemptions refers to Article 13(1) of Directive 95/46, the general Data Protection Directive. Article 13 permits Member States to enact laws which restrict the confidentiality of personal data where the restriction 'constitutes a necessary measure to safeguard' the rights and freedoms of others. The confidentiality obligation or, from the perspective of the data subject, the right to anonymity, is not absolute and must be balanced against the rights of others.

In this context, the ECJ considered the interrelationship between directives dealing with the information society and the protection of copyright, noting that the protection of copyright cannot override the requirements of data protection laws. In particular, Member States have an obligation to protect rights holders in the information society, but not at the expense of data protection rights. The ECJ acknowledged the

existence of a number of competing fundamental rights: the right to respect for private life, the right to protection of property and the right to an effective remedy. A fair balance needs to be struck between these rights and they need to be interpreted in accordance with other general principles of Community law, including the principle of proportionality.

The ECJ concluded that there is no positive obligation on Member States to enact legislation requiring the communication of personal data in the context of civil proceedings. Significantly, the ECJ did not indicate that there is an impediment to such legislation being enacted in individual Member States, but cautioned that any such legislation would need to strike a fair balance between the relevant fundamental rights, while having regard to other general principles of Community law, including the principle of proportionality.

Implications for the UK

In the UK, copyright infringement is only a criminal offence if conducted on a commercial scale. In civil cases, a copyright holder may apply to a court seeking an order that an ISP reveal the information required to identify the relevant individual who has breached the holder's rights. These orders, known as Norwich Pharmacal[3] orders, are not easily obtained. The conditions which must be satisfied to obtain such an order were stated by Mr Justice Lightman in Mitsui Limited v Nexen Petroleum UK Limited, in the following terms:

- a wrong must have been carried out or ultimately there must be a wrongdoer;
- there must be a need for an order to enable action to be brought against the wrongdoer; and
- the person against whom the order is sought must (a) be mixed up in the wrongdoings so as to have facilitated it; and (b) be able, or likely to be able, to provide the information necessary to enable the ultimate wrongdoer to be sued.

Article 13 permits Member States to enact laws which restrict the confidentiality of personal data

An order should not be made for the disclosure of the identity of an individual (whether under the Norwich Pharmacal doctrine or otherwise) unless the court has first considered whether the disclosure was justified, having regard to the rights and freedoms or the legitimate interests of the data subject. As the experience of Norwich Pharmacal orders has developed over time, courts sometimes require the third party to disclose documents, provide affidavits, answer questions or attend court to give oral evidence. However, the court can only grant a Norwich Pharmacal order where the documents or information sought by the claimant against the third party are 'necessary' for the claimant to bring its claim against the wrongdoer. If the claimant can obtain the information by another means, or from another source, the court will not grant the order.

In the leading UK case in which rights holders sought access to information held by an ISP, Motley Fool[4], the House of Lords stated that the website operators should be required to disclose the identity of wrongdoers as any other order would, in effect, encourage defamation. Although the court in this case ordered that the relevant information be handed over to the company to identify the author of the defamatory statement, the Court of Appeal recognised that privacy issues do have a role to play and that service providers are not automatically required to hand over personal data. Their Lordships stressed that even if the conditions entitling the right holder to a Norwich Pharmacal order were satisfied, it lies in the court's discretion as to whether to grant the order, and factors such as the strength of the claimant's case and the nature of the infringement will be taken into account in exercising that discretion.

In 2005, a Norwich Pharmacal order was granted against Google UK[5] in circumstances where the holder of copyright in a literary work, due to be published in 2006, discovered that an earlier draft of the work was available for free download on the internet through an advertisement generated by Google UK. The owner of the copyright, Helen Grant, failed to identify of website's owners and asked Google for help in identifying the advertiser. Understandably, Google refused to disclose the information in the absence of an order and the owner applied for a Norwich Pharmacal order to force the disclosure.

Implications for rights holders

The Promusicae case makes it clear that it is for each Member State to decide whether to enact laws permitting or requiring the disclosure of personal data for civil enforcement purposes. For UK rights holders, the fact that the ECJ did not reject the legal basis for such laws will be welcome, despite the fact that the court did not go further and propose a Community-wide solution.

In the UK, the government recently announced its decision to publish plans for a new law forcing ISPs to monitor their networks to detect file sharers and ban them from using their service. Current discussions focus on an ISP being required to email a warning to users who engage in file sharing, a suspension where the file sharing continues and disconnection where the file sharing does not cease. The music and phonographic industries, through the

International Federation of Phonographic Industries (IFPI) and the British Phonographic Industry (BPI), are actively supporting the enactment of such legislation.

Implications for ISPs

For ISPs, the Promusicae case has possibly increased (or, at least, has not reduced) the risks and potential liability to which they are exposed. Currently, the Copyright, Design and Patents Act 1998 protects ISPs from liability for the publication of infringing content unless they 'know or have reason to believe' someone is using their services to infringe copyright (the so called 'safe harbor' defence). If the UK government were to enact legislation requiring ISPs to disclose personal details to rights holders pursuing civil claims, ISPs would be forced to take technological measures to monitor subscribers and to identify and filter infringing content. Simply by taking such measures, ISPs will have actual knowledge of infringement and will lose their safe harbor defence.

ISPs would also need to consider carefully their notice and consent provisions, namely, to what extent would they need to inform their consumers about the nature of the monitoring, the additional purposes for which the data may be processed and the extended retention periods to which their personal data may be subject. Some of these factors (such as extended storage requirements) will have additional commercial implications.

Implications for individuals

The Promusicae decision also has implications for individuals. Under data protection laws, 'users should have the option to access the internet without having to reveal their identity where personal data are not needed to provide a certain service'[6]. This derives from the 'necessity' principle, embodied in the Third Data Protection Principle in the UK, namely that personal data 'shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed'[7]. Proposals for monitoring by ISPs may limit confidentiality.

Further, while data protection laws contemplate the disclosure or other processing of personal data for the purposes of crime prevention or detection, this purpose does not sanction indiscriminate and widespread monitoring for that purpose, nor for routine disclosure to third parties. Care would be needed in formulating an amendment to the law permitting an ISP to disclose personal data to a third party (i.e. rights holders). In this context, there is a risk that these obligations will encourage greater routine use of unique identifiers such as watermarks, web beacons and clear 'gif' files to trace every user.

Conclusion

There may not be any immediate impact from the Promusicae decision in the UK but, in the short term, we can expect to see rights holders continue to press for legislative change governing access to information held by ISPs. It remains to be seen how the conflicting rights of individuals and rights holders will be reconciled in the UK, but it may be that the existing arrangement, whereby rights holders can apply to the Courts for a Norwich Pharmacal order, continues for some time.

Elsewhere in Europe there is growing debate as to what other mechanisms might be used to require ISPs to disclose subscribers' names in the context of civil enforcement by rights holders. France, for example, has already established an independent body responsible for sending out warnings to individuals who share files over the internet illegally. In Denmark, the country's largest ISP was recently ordered to block access to a website that forms a critical part of a file-sharing network. In addition, the EU Parliament has asked EU Member States to criminalise copyright infringement where a profit is made from any infringing material.

The Promusicae judgment makes it clear that it is the responsibility of each Member State to enact legislation permitting the disclosure of personal data for civil enforcement purposes. We may find that this approach creates inconsistencies between the Member States. What is certain is that this issue is not yet resolved.

Bridget Treacy Partner
Hunton & Williams
btreacy@hunton.com

1. C-275/06 Productores de Música de Espana (Promusicae) v Telefónica de Espana SAU.
2. Juzgado de lo Mercantil No 5 de Madrid (Commercial Court No 5, Madrid).
3. The Norwich Pharmacal orders were first seen in the case Norwich Pharmacal Co. v Customs and Excise Commissioners [1974] AC 133.
4. Totalise plc v Motley Fool Ltd and another [2001] EWCA Civ 1897.
5. Helen Grant v Google UK Limited [2005] EWHC 3444 (Ch), 17 May 2005.
6. International Working Group on Data Protection in Telecommunications, 'Common Position on Privacy and Copyright Management', adopted at the 27th meeting of the Working Group on 4-5 May 2000, page 2.
7. Data Protection Act 1998, Schedule 1, Part I.

cecile park publishing

Head Office UK Cecile Park Publishing Limited, 17 The Timber Yard, Drysdale Street, London N1 6ND
tel +44 (0)20 7012 1380 fax +44 (0)20 7729 6093 info@e-comlaw.com
www.e-comlaw.com

Registered number 2676976 Registered address 141 Wardour Street, London W1F 0UT VAT registration 577806103

e-commerce law & policy

Many leading companies, including Amazon, BT, eBay, FSA, Orange, Vodafone, Standard Life, and Microsoft have subscribed to ECLP to aid them in solving the business and legal issues they face online.
ECLP, was nominated in 2000 and again in 2004 for the British & Irish Association of Law Librarian's Legal Publication of the Year.
A twelve month subscription is £420 (overseas £440) for twelve issues and includes single user access to our online database.

e-commerce law reports

You can now find in one place all the key cases, with analysis and comment, that affect online, mobile and interactive business. ECLR tracks cases and regulatory adjudications from around the world.
Leading organisations, including Clifford Chance, Herbert Smith, Baker & McKenzie, Hammonds, Coudert Brothers, Orange and Royal Mail are subscribers.
A twelve month subscription is £420 (overseas £440) for six issues and includes single user access to our online database.

data protection law & policy

You can now find in one place the most practical analysis, and advice, on how to address the many problems - and some opportunities - thrown up by data protection and freedom of information legislation.
DPLP's monthly reports update an online archive, which is an invaluable research tool for all those who are involved in data protection. Data acquisition, SMS marketing, subject access, Freedom of Information, data retention, use of CCTV, data sharing and data transfer abroad are all subjects that have featured recently.
Leading organisations, including the Office of the Information Commissioner, Allen & Overy, Hammonds, Lovells, BT, Orange, West Berkshire Council, McCann Fitzgerald, Devon County Council and Experian are subscribers.
A twelve month subscription is £390 (public sector £285, overseas £410) for twelve issues and includes single user access to our online database.

world online gambling law report

You can now find in one place analysis of the key legal, financial and regulatory issues facing all those involved in online gambling and practical advice on how to address them. The monthly reports update an online archive, which is an invaluable research tool for all those involved in online gambling.
Poker, payment systems, white labelling, jurisdiction, betting exchanges, regulation, testing, interactive TV and mobile gaming are all subjects that have featured in WOGLR recently.
Leading organisations, including Ladbrokes, William Hill, Coral, Sportingbet, BskyB, DCMS, PMU, Orange and Clifford Chance are subscribers.
A twelve month subscription is £520 (overseas £540) for twelve issues and includes single user access to our online database.

world sports law report

WSLR tracks the latest developments from insolvency rules in football, to EU Competition policy on the sale of media rights, to doping and probity. The monthly reports update an online archive, which is an invaluable research tool for all involved in sport.
Database rights, sponsorship, guerilla marketing, the Court of Arbitration in Sport, sports agents, image rights, jurisdiction,domain names,ticketing and privacy are subjects that have featured in WSLR recently.
Leading organisations, including the England & Wales Cricket Board, the British Horse Board, Hammonds, Fladgate Fielder, Clarke Willmott and Skadden Arps Meagre & Flom are subscribers.
A twelve month subscription is £520 (overseas £540) for twelve issues and includes single user access to our online database.

priority order form

FAX +44 (0)20 7729 6093
CALL +44 (0)20 7012 1380
EMAIL dan.towse@e-comlaw.com
ONLINE www.e-comlaw.com
POST Cecile Park Publishing 17 The Timber Yard, Drysdale Street, London N1 6ND

☐ Please enrol me as a subscriber to **e-commerce law & policy** at £420 (overseas £440)
☐ Please enrol me as a subscriber to **e-commerce law reports** at £320 (overseas £440)
☐ Please enrol me as a subscriber to **data protection law & policy** at £390 (public sector £285, overseas £410)
☐ Please enrol me as a subscriber to **world online gambling law report** at £520 (overseas £540)
☐ Please enrol me as a subscriber to **world sports law report** at £520 (overseas £540)

All subscriptions last for one year. You will be contacted at the end of that period to renew your subscription.

Name			
Job Title			
Department		Company	
Address			
Address			
City		State	
Country		Postcode	
Telephone		Fax	
Email			

1
Please **invoice me** Purchase order number
Signature Date

2
I enclose a **cheque** for the amount of
made payable to *'Cecile Park Publishing Limited'*

3
Please debit my **credit card** VISA ☐ MASTERCARD ☐
Card No. Expiry Date
Signature Date
VAT No. (if ordering from an EC country)

Periodically we may allow companies, whose products or services might be of interest, to send you information.
Please tick here if you would like to hear from other companies about products or services that may add value to your subscription. ☐