

PRIVACY ISSUES IN ONLINE
SERVICE USERS' DETAILS DISCLOSURE
IN THE RECENT CASE-LAW
ANALYSIS OF CASES YOUTUBE V. VIACOM
AND PROMUSICAE VS. TELEFONICA

by

MICHAL KOŠČÍK*

Personal data of Internet service users can serve as crucial evidence in proceedings against alleged infringers of intellectual property rights. It is therefore not surprising that Internet service providers have to deal with proposals to disclose information about on-line activities of their users. ISPs are often reluctant to disclose such information since it could be used against them or against their customers. Both legislation and case-law still struggle to provide clear legal answers on this problem.

This paper compares the two most discussed recent cases dealing with this problem which are: - the decision of European court of Justice no. C-275/06, which stated that EC directives do not establish an obligation to disclose user data to a third party - ongoing dispute between Youtube vs. Viacom which i.a. deal with the disclosure of user data.

KEYWORDS

Privacy, Youtube, Personal data, Disclosure of personal data, ISP, ISP liability

1. INTRODUCTION – FINDING BALANCE BETWEEN RIGHT FOR PRIVACY AND RIGHT FOR PROPERTY

One of the biggest nightmares of Internet connection or Internet service providers is that they could be asked to disclose data about their customers or users to a third party, which claims to be damaged by their illegal conduct. It seems that in this case providers do not have any good option. They could refuse to cooperate with the damaged party and face a risk of receiving

* Michal Koščík. Masaryk.University. E-mail:
michalkoscik@gmail.com

court order to disclose such data or even being sued for participating in such misconduct. The other option is to disclose information on own clients, what is always problematic from the business ethic point of view, and to risk the loss of customers, damage of reputation and eventually even legal action for violating users' privacy.

Choice between these two options is complicated from both moral and legal point of view and the written law has been struggling to give clear solution of this problem. The reason why is the choice between these two options usually so complicated is that this problem involves clash of fundamental human rights. On the one hand, the party which feels damaged has a right for effective protection of its rights, but on the other hand the users' right for privacy has to be taken into account as well.

Recent legal cases show that this problem is definitely not just a theoretical conception, but an important legal issue which can have a huge impact on the whole industry of Internet services. The purpose of this paper is to analyze and compare two important recent judicial decisions which were addressing this problem. The first decision comes from United States in the form of preliminary order in one billion dollar case *Viacom v. Google*, the second decision is a preliminary ruling of European court of justice in case *Promusicae vs. Telefonica*.

2. VIACOM VS. GOOGLE – AN AMERICAN APPROACH

Recent example of a conflict between the protection of intellectual property and users' right for privacy can be found in a decision of the district court of Southern district of New York in a case *Viacom international INC. v YouTube Inc., YouTube LLC, and Google Inc* from 1st of July 2008. In this case, Viacom, a media conglomerate which operates a music channel MTV, sued Google Inc. for not providing enough protection to content copyrighted by Viacom, which was regularly uploaded to YouTube site by individual users. As a main argument for suing Google instead of those individual users Viacom stated that *YouTube users contribute pirated copyrighted works to YouTube by the thousands, including those owned by Plaintiffs, the videos "deliver[ed]" by YouTube include a vast unauthorized collection of Plaintiffs' copyrighted audiovisual works. YouTube's use of this content directly competes with uses that Plaintiffs have authorized and for which Plaintiffs receive valuable compensation.*¹

Viacom, among other things,² filed a motion against Google to hand over the data from so called Logging database, User databases and Mono databases, so that the plaintiff can calculate the true amount of damages in-

¹ Case 1:07-cv-02103-LLS *Viacom international INC. v. YouTube Inc., YouTube LLC, and Google Inc* – page 2

curred by copyright infringement through YouTube site. These databases contained the IP addresses of YouTube users and exact data of what videos, on what time did certain IP addresses accessed, the video-related comments they have made or when a certain video was flagged as inappropriate. Arguments of the Viacom for issue of such order were related mainly to the effective protection of their intellectual property and stressed the need of comparison between popularity of non-infringing videos and infringing ones. Google tried to counter these arguments by privacy concerns, however its arguments were rather blurred and did not state in what exact way would be privacy of YouTube users breached if it handed over the video-related content. Thus the court dismissed Google's privacy arguments as "speculatory" and even rubbed some salt into Google's wounds by quoting Google public policy blog, where Google expressly stated that it does not consider IP addresses without any other additional information to be a personal data.³ Therefore the court concluded that there is no legal reason which could protect Google from disclosing these information in the proceedings and granted plaintiff's motion "to compel production of all data from the Logging database concerning each time a YouTube video has been viewed on the YouTube website or through embedding on a third-party website".⁴

3. PROMUSICAE VS. TELEFONICA – EUROPEAN EXAMPLE

European Court of Justice had to deal with disclosure of Internet service users' data when asked for a preliminary ruling by Spanish court in a case *Promusicae v Telefónica*.⁵ Promusicae, Spanish music rights-holder group and a plaintiff in this case, requested *Telefónica*, an Internet provider, to disclose personal details on holders of IP addresses which participated in allegedly illegal sharing of music files through P2P network. After *Telefónica*, refused to comply with such request claiming that such data can only be disclosed in a criminal investigation or for the purpose of safeguarding public security and

² The Plaintiff filed a motion to issue protective order relating to six areas, which comprised (1) the disclosure of the search code used by YouTube server, (2) source code of so called Video ID program, which was designed to combat IP infringement on YouTube (3) copies of all videos which were removed from the server (4) access to the Video-related data from the logging database of YouTube, (5) video-related data from so called User and Mono databases and (6) access to the schemas for the Google Advertising and Google Video Content databases.

³ The exact quotation of the court is: „We . . . are strong supporters of the idea that data protection laws should apply to any data that could identify you. The reality is though that in most cases, an IP address without additional information cannot. Google Software Engineer Alma Whitten, *Are IP addresses personal?*, GOOGLE PUBLIC POLICY BLOG (Feb. 22, 2008), <http://googlepublicpolicy.blogspot.com/2008/02/are-ip-addresses-personal.html> (Wilkens Decl. Ex. M).“

⁴ Case 1:07-cv-02103-LLS Viacom international INC. v. YouTube Inc., YouTube LLC, and Google Inc – page 14

⁵ Case C-275/06 Productores de Música de España (Promusicae) v Telefónica de España SAU, available at <http://curia.europa.eu/>

national defense, Promusicae initiated legal proceedings at Spanish national courts.⁶ Spanish second instance court referred for a preliminary ruling a question whether Community law permits member states to limit the duty of ISP providers to disclose traffic data only in the context of criminal investigation, public security and national defense,⁷ and thus exclude the obligation of such disclosure in civil proceedings.

3.1. SECONDARY LEGISLATION CONCERNED

The court addressed this question with reference to the directives 2000/31/EC (directive on electronic commerce), 2001/29/EC (on the harmonization of certain aspects of copyright and related rights in the information society), 2002/58/EC (on privacy and electronic communications) 2004/48 (enforcement of IP rights).

Since there was no doubt that the data required by Promusicae were qualified as a personal data the court first analyzed whether member states are obliged or precluded to enact the obligation to disclose personal data which will enable the copyright holder to bring civil proceedings based on the existence of that right.⁸ To answer such question the court had to interpret article 15(1) of the 2002/58 directive together with the article 13 directive 95/46⁹ to which the first mentioned article directly refers. These two provisions give member states license to enact exceptions from the confidentiality of Internet communication in cases where they deem it is appropriate to protect rights of other parties, such as rights of intellectual property owners. However the court found out that *the wording of Article 15(1) of that directive cannot be interpreted as compelling the Member States, in the situations it sets out, to lay down such an obligation.*¹⁰

After making this finding, the court turned its attention to the legislation concerning protection of intellectual property, namely directive on electronic commerce (2000/31/EC), directive on the harmonization of certain aspects of copyright and related rights in the information society (2001/29/EC) and

⁶ Ibid. Paragraphs.: 29 – 33

⁷ The exact wording of the question is „Does Community law, specifically Articles 15(2) and 18 of Directive [2000/31], Article 8(1) and (2) of Directive [2001/29], Article 8 of Directive [2004/48] and Articles 17(2) and 47 of the Charter ... permit Member States to limit to the context of a criminal investigation or to safeguard public security and national defence, 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?” see paragraph 34 of the ruling

⁸ Ibid. Paragraph 46

⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

¹⁰ Ibid. Paragraph 55

the directive on the enforcement of intellectual property rights (2004/48/EC). The first paragraph of the article 8 of the directive on the enforcement of the IP rights states that:

Member States shall ensure that, in the context of proceedings concerning an infringement of an intellectual property right and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be provided by the infringer and/or any other person who... (b) was found to be using the infringing services on a commercial scale;

However the court noted these provisions, *must be read in conjunction with those of paragraph 3(e) of that article.* The paragraph 3(e) of article 8 sets forth that the quoted paragraph 1 shall apply without prejudice to other statutory provisions which ... govern the protection of confidentiality of information sources or the processing of personal data. The court therefore ruled *that it does not follow from those provisions ... that they require the Member States to lay down, in order to ensure effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings.*¹¹

Moreover, the court did not see any provision which constitutes obligation of the member states to enact an obligation to communicate personal data in the context of civil proceedings for the purpose of ensuring protection of copyright neither in the articles 15(2) and 18 directive 2000/31/EC nor in the directive article Article 8(1) and (2) 2001/29/EC.¹² The court did not provide further explanation to support this opinion, probably because it considered this conclusion rather obvious from the wording of the articles. It has to be said that it is really hard to imagine that these provisions could constitute such obligation of member states.

3.2. FUNDAMENTAL RIGHTS ISSUE

The court also addressed this issue from the fundamental rights' point of view, and weighted the rights for property and for effective remedy which were mentioned by a national court in its order for reference, and added a right for private life¹³ which also has to be taken into account when it comes to analyzing such dispute. However, it appears that if a national court really expected to receive a direct answer in the form of guidelines saying how to

¹¹ Ibid paragraph 58

¹² Ibid. Paragraph 59

¹³ Ibid. Paragraph 63

balance these rights in this case, it must have been disappointed with the ruling.

The court stated that *the mechanisms allowing those different rights and interests to be balanced are contained, first, in Directive 2002/58 itself... Second, they result from the adoption by the Member States of national provisions transposing those directives and their application by the national authorities*¹⁴. The court emphasized that it is the responsibility of member states to find a fair balance of these rights where community law does not give clear answers. The court further added that *when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.*

3.3. RULING

Based on the findings mentioned above, the court ruled that directives referred by national court do not require the Member States to lay down, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. However, the court added that *community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order.* In other words, the ECJ ruled that member states have discretion to regulate this issue however, a national regulation or application of such regulation by the national court which would fail to find “fair balance” between fundamental rights of concerned parties would be against the community law.

What will be the impact and consequences of this decision yet remains to be seen. The fact that ECJ did not make the decision-making of the national courts much easier can not be perceived as a negative thing, since the European Court of Justice can not create law where, according to community law, it is a competence of individual member states. It may appear that the decision has drawn a clear line between community law and national law and unambiguously stated that member states have discretion in this question. The “fundamental rights” part makes, however, the question of disclosure of user data in civil disputes more complicated. It may happen that a party of an eventual dispute would object that member state failed to

¹⁴ Ibid. Paragraph 66

find a fair balance between the fundamental rights of involved parties when using its discretion, and claim that the community law was breached. Therefore it is not impossible that the European court of justice will have to address this question once again.

The fact that member states have free hands in deciding about this issue will necessary lead to a status where copyright infringers will have better position in civil procedures in one member states than the copyright infringers in the other. Some specialists have already raised concerns that IS-P's in certain countries might loose customers to providers settled in countries which will not enable the disclosure of personal data in civil proceedings.¹⁵ However, it does not seem likely, that users from one member state would choose to use services of the internet provider from the other member state, mainly due to technical reasons.

4. COMPARISON INSTEAD OF CONCLUSION

It seems to be hard to make any conclusions from comparison of these two judgments. Even though that both courts were asked to make a ruling in cases where the right for privacy and right for (intellectual) property were in conflict, both of them have avoided direct answer to the question what is a fair and proportionate balance between these conflicting rights. The court in New York 'escaped' that question by not qualifying IP addresses as a personal data while the court in Luxemburg said that Community law does not have answer to this question.

The only conclusion we can make from these two analyses is that this legal question is still not settled on both shores of the Atlantic Ocean and that the development of the case-law still remains very interesting to follow.

¹⁵ See for example the stance of Iain Connor in Out-law: „Countries can choose whether or not to force disclosure of file-sharers“ available at <http://www.out-law.com/page-8836>