

# Civil liability for illegal file-sharing: who faces the music?

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2008

# Civil Liability for Illegal File-sharing: Who Faces the Music?

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For some time music copyright owners and their representatives, e.g. the BPI in the UK, have been pursuing copyright pirates, be they operative in the physical or virtual worlds, through the criminal courts.<sup>1</sup> If successful, these actions usually result in fines and imprisonment of the wrongdoers. Rights owners, however, are also keen on getting compensation for the losses they suffer; naturally, the arenas for this course of action are the civil courts. If these losses occur through illegal file-sharing, the rights holders face the task of establishing who the culprits are. More and more often, they look for assistance from Internet Service Providers (ISPs) to provide the IP addresses and other personal details from alleged illegal file-sharers in order to learn against whom they should actually start civil proceedings.

In England, the British Phonographic Industry (BPI) and rights holders have been reasonably successful in getting information on alleged illegal file-sharers via *Norwich Pharmacal orders*.<sup>2</sup> This type of order requires innocent parties - ISPs regarding civil law illegal file-sharing actions - to provide material about infringement, so that the actual wrongdoer can be identified. A court will not grant these type of orders lightly, and there has to be strong evidence of the alleged infringement.

However, many EU member states deal with civil liability for illegal file-sharing differently, despite some efforts to harmonise copyright law and the enforcement of its rules. Spain, for example, does not provide for details of illegal file-sharers being made available in civil proceedings. Whether this state of affairs is contrary to EU law has recently been examined by the European Court of Justice in *Promusicae v Telefónica de España SAU*.<sup>3</sup> Promusicae is a Spanish organisation that represents producers and publishers of musical and audiovisual works. Telefónica, the Spanish ISP was asked by Promusicae to make available personal details of individuals who had allegedly embarked on illegal file-sharing of copyright works via the peer-to-peer software KaZaA. Promusicae had obtained the IP addresses of the individuals it wanted to launch civil actions against. In compliance with Spanish law, which requires ISPs to store certain data in respect of its users, Telefónica held data which could be used to unmask those individuals. Telefónica, however refused to disclose their identities, arguing that they were only meant to do so for the purposes of criminal proceedings under Spanish law. The domestic court asked the ECJ whether member states were allowed to restrict the duty to disclose data in respect of internet users to criminal proceedings.

The response by the ECJ was, overall, a resounding 'yes'. On the one hand, the E-Commerce Directive 2000/31/EC, the Copyright in the Information Society Directive 2001/29/EC and the Intellectual Property Enforcement Directive 2004/48/EC did not compel member states to enact a law to the effect of disclosing personal data to guarantee effective protection of copyright in civil actions. On the other hand, the ECJ emphasised that member states, in implementing these directives, had to balance the various fundamental rights protected by Community law. The rights, as protected by the European Convention on Human Rights 1950, but also the Charter of Fundamental Rights of the EU, include the right to property (which, in turn includes IP rights) and the right to effective judicial protection of this right, but also the right to privacy and protection of personal data on the other. The ECJ also noted that while the TRIPs Agreement may well prescribe the effective protection of IP rights, it could not be interpreted to mean that the directives include the disclosure of personal data of alleged cyber file-sharers in civil proceedings. In short, the ECJ held that member states may legislate to this effect, but they do not have to. If they choose to do so, they have to strike a fair balance of all fundamental rights involved.

This allows Spain to permit disclosure in criminal cases only, while it also allows the UK to use *Norwich Pharmacal* orders for the purposes of disclosure of personal data in civil cases. As a consequence, disharmony between the various approaches favoured by respective member states exists. Last summer, a German court in the southern town of Offenburg ruled that granting an order to disclose details of alleged individual illegal file-sharers would be disproportionate without showing substantial damage having been caused. In contrast, a Belgian court ruled in *SABAM v Scarlet* that an ISP has to introduce a filtering system to monitor users' activities.<sup>4</sup> Where such activities revolve around illegal file-sharing, these have to be blocked, demanded the court. France has mooted a 'three strikes and you're out' plan, whereby individuals lose their internet access once they have committed illegal file-sharing three times. This plan has been well received both by the BPI and by the UK government, but not, for

example by Carphone Warehouse, who claim that such proposals turn ISPs into an internet police force, require ISPs to impinge upon customers rights and, overall, go too far, in restricting the freedom to use of the internet. This attitude has been met with predictable condemnation by the BPI.<sup>5</sup> While the UK Government urges the industry and ISPs to work out a voluntary agreement it also threatens to legislate if attempts to self-regulate fail. In its strategy paper "Creative Britain: new Talents for the New Economy", the Department for Culture, media and Sport it is stated that there will be a consultation "on legislation that would require ISPs and rights holders to co-operate in taking action on illegal file-sharing – with a view to implementing legislation by April 2009."<sup>6</sup> However, it appears that the "three strikes and you're out" scenario faces a major battle at EU level. In a recent vote on the Guy Bono Report on "The Cultural Industries in Europe" the European Parliament rejected the idea, as it interfered with individuals' civil liberties and human rights.<sup>7</sup> Meanwhile, in Ireland four major record companies have commenced legal action against the ISP Eircom, demanding that the latter take effective action against illegal file-sharers. While the record labels' objective is to make Eircom filter its service for illegal content, the ISP's argument is that Irish law does not oblige it to do so.<sup>8</sup>

All of these instances paint a rather confused picture in respect of disclosure of alleged illegal file-sharers for the purpose of civil action within the EU at the moment. One would expect the European Commission to be the best place to address this issue rather than leave the ball in the member states' court.

Footnotes:

1. For the latest success story in respect of the former see 'Four and a half year sentence handed down to ringleader of £5m CD counterfeiting scam', 2nd April 2008, at <http://www.bpi.co.uk/index.asp>
2. These orders derive their name from the case which established their availability: *Norwich Pharmacal Co and Others v Customs & Excise Commissioners* [1974] AC 133.
3. Case C-275/06, 29 January 2008.
4. Decision No.04/8975/A, Brussels District Court, unreported 29 June 2007.
5. See "Carphone Warehouse and its Talk Talk service" (4 April 2008) <https://www.bpi.co.uk/>; "Carphone Warehouse' irresponsible and unreasonable", says BPI" <http://www.outlaw.com/> page-9024.
6. Commitment 15. See the full document at [http://www.culture.gov.uk/Reference\\_library/Publications/archive\\_2008/cepPub-newtalents.htm](http://www.culture.gov.uk/Reference_library/Publications/archive_2008/cepPub-newtalents.htm).
7. See "Europe rejects anti-piracy plans", BBC News, 11 April 2008 at <http://news.bbc.co.uk/1/hi/technology/7342135.stm>.
8. See "Irish ISP sued over file-sharing by users" OUT-Law.COM, 17 march 2008 at <http://www.out-law.com/page-8944>.