Balancing of rights on the internet: some thoughts prompted by the Promusicae case

Diane Rowland
Department of Law and Criminology, Aberystwyth University
Email: Diane.Rowland@aber.ac.uk

Introduction

The purpose of this paper is to reflect on some of the issues highlighted by ongoing litigation in a number of European jurisdictions relating to file-sharing. In some these cases, music companies and associations representing copyright holders have attempted either to require ISPs to block or filter infringing material (see for example SABAM v Scarlet Extended Belgium 07 and the expected litigation between Eircom and EMI et al in Ireland) but more especially the focus will be on cases in which actions have been brought requiring ISPs to reveal personal details of their users who are believed to be infringing copyright via the use of P2P networks. Examples in the latter category include SCPP v Anthony G France 2005, KPN v Brein District court of the Hague 2007, Peppermint Jam v Telecom Italia litigation Rome 2006/7 and finally Productores de Musica de Espana v Telefonica de Espana (Promusicae) Spain 2006, judgment given by ECJ 2008.

The facts of Promusicae were not unusual. Promusicae, a non-profit making association seeking to uphold the intellectual property rights of its members was contesting the refusal of the ISP, Telefonica, to disclose names and addresses of certain of its customers. Promusicae was in possession of known IP addresses, data and patterns of use which suggested file-sharing using Kazaa but did not have specific names and contact details. Questions were referred to the ECJ from the court in Madrid concerning the clash between and the required balance of intellectual property rights, specifically copyright, and the fundamental right to privacy in the form of data protection rights. Anyone reading this case will be struck not so much by the factual matrix or even the outcome but by the increasing complexity of the relevant regulatory regime in Europe since, in responding to the questions posed to the court, A-G Kokott and the ECJ itself considered the application of 5 directives as well as the relevant provisions of the Charter of Fundamental Rights of the European Union together with article 47 of the TRIPS agreement – more than 20 separate provisions in total.
The purpose of this paper is not specifically to provide an analysis of the Promusicae case, as such, – indeed both the Advocate General’s Opinion and especially the judgement of the ECJ provide little in the way of detailed legal discussion, the majority of both being concerned with a rehearsal of the applicable legal provisions. Rather the focus will be on some of the underlying issues common to all of these cases, the tensions which are revealed, how they have been addressed and some thoughts on the most appropriate way forward.

The diagram illustrates a variety of factors which feed into the problem at the heart of which is the apparently simple question for the application of data protection law namely ‘can data be acquired without consent if it is needed to trace an intellectual property law violation?’ In the early stages of the long running saga of Peppermint Jam v Telecom Italia, this question was answered in the affirmative on the grounds that data protection law was not applicable. But the later decision of the court of Rome held that personal data could only be processed without consent to establish or defend a legal claim if the information was already in the right-holder’s possession and had been collected lawfully.
In relation to copyright the reasoning in *Peppermint Jam* focused on Directive 2004/58 on the enforcement of IPRs. At first instance it was said that this directive *had* to be applicable against ISPs otherwise there would have been no need for such a directive as the actual user could always be pursued. In France in 2005, the Tribunal de Grande Instance de Paris held file-sharing to be legal based on an exception for private use. Following this decision there has been other relevant activity in France including a bill aimed at allowing suit against ISPs who allow or encourage infringement and also an agreement signed by French ISPs and music companies to facilitate cooperation against major infringers.

In the Netherlands, the District Court of the Hague required the ISP, KPN, to hand over the personal data of one of its subscribers, a website operator allowing P2P networks to Brein, a Dutch copyright organisation. Does this suggest that copyright trumps data protection? Similarly the court of first instance in *Peppermint jam* reasoned that Dir 2004/48 had to take precedence over data protection directives because it superceded them. The judge argued not only that Dir 2004.48 should be construed as limiting and prevailing over data protection laws but that ISPs also had a duty to cooperate under Dir 2000/31. However at a later hearing, the court interpreted Dir 2004/48 as being expressly subject to data protection and proceeded to find that this placed data protection at a higher constitutional level – this could be taken to suggest an implicit hierarchy. Arguably however, data protection law was stressed more in *Peppermint Jam* and the Garante argued forcefully on the side of the users because of the aggressive approach of the music company in demanding money from isers as payment for infringement. It may be that if it had sought to enforce its rights in a different way, the court might have been more sympathetic [Add something here about the political pressures and the tension between judges, legislature, complainants, industry, users etc – could this provide a better framework for regulation than the ‘market’ model – see later]

At a later date, the Court of Rome stressed that economic interests are not sufficient to limit a user’s freedom and privacy of communication and emphasised as a general principle the priority of data protection over intellectual property rights.

In France, after the decision of *SCPP v Anthony G*, a number of authors’ and producers’ associations applied for permission to CNIL (French Data Protection Office) to collect the private records of infringers. This application was rejected by CNIL but that decision was later overruled by the Conseil d’Etat on the grounds that providing such information was not disproportionate given that it was only sought for certain users and given the extent of the piracy problem in France.

Coming then to *Promusicae*, Advocate General Kokott spelt out the link between fundamental rights and data protection (paras 51-3) pointing out that data protection was based on the fundamental right to private life and that communication of personal data to a third party, whatever its subsequent use,
is an interference with the rights guaranteed under Article 8 ECHR unless that use is proportionate to legitimate aims and pressing social need. But the Advocate General also pointed out that the protection of copyright is also an interest of society the importance of which has been repeatedly emphasised by the Community (para 105) – so even though the interests of right-holders are private rather than public, they can still be categorised as a fundamental interest of society. However, the Advocate General was not certain that the private file sharing which was at issue in the case sufficiently threatens copyright protection that it should take precedence over data protection (para 106).

The ECJ judgment raises the need to reconcile what it calls different ‘fundamental rights’ (i.e. privacy in this context) with property rights (para 65) but is very vague as to how this balance should be struck or whether it is in any way recognising a natural hierarchy. Indeed having set out the overarching principle of reconciliation then leaves the matter for the national court to ensure that implementation of the relevant directives allows a fair balance to be struck. The ECJ provides no guidance even implicitly on how that should or could be done and there have already been a number of different approaches in different Member States, even when the final outcome has been similar. In this particular case, both the Advocate General and the ECJ found that the combination of the respective provisions did not require personal data to be divulged when the illegal act being pursued did not attract criminal sanctions in the home State. This can be contrasted with the approach of courts in cases involving allegations of defamation for instance where the balance of rights has fallen away from the right of privacy and towards that of reputation. [ADD MORE HERE]

It is evident that this area has received a lot of regulatory intervention in Europe – has this produced the expected/desired outcome? Is indeed the desired outcome clearly articulated? The answer to this might be ‘yes’ for individual elements but ‘no’ for the bigger picture [explain further].

There are various approaches to regulating complex situations both within and without cyberspace – responsive regulation, smart regulation, decentralised regulation. The Lessigian approach of code is law has a number of devotees but has been criticised by Murray as being too static an approach for a dynamic medium like cyberspace. His suggestion instead is to use a regulatory matrix for modelling regulation for such a complex environment. Applying this approach in a number of case studies he concludes that a market led settlement will produce the most effective regulatory effect. Can the market really cater for fundamental rights? Does it not have a natural or automatic preference for proprietary and economic rights? What is the effect/influence of the nature of the market? However a vital feature for successful application of the regulatory matrix and successful regulatory design is continuous monitoring and feedback until the steady state is achieved.