Stanford – Vienna
Transatlantic Technology Law Forum

A joint initiative of
Stanford Law School and the University of Vienna School of Law

Transatlantic Antitrust and IPR Developments

Bimonthly Newsletter

Issue No. 4-5/2017 (October 15, 2017)

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Antitrust

United States

U.S. District Court Grants a Preliminary Injunction Allowing Data Harvesting on LinkedIn's Public Profiles

By Valerio Cosimo Romano

On 14 August 2017, the U.S. District Court for the Northern District of California ("Court") granted a motion for a preliminary injunction against the professional social networking site LinkedIn ("Defendant"), enjoining the company from preventing access, copying, and use of public profiles on LinkedIn's website and from blocking access to such member public profiles.

Background

HiQ Labs ("Plaintiff") is a company which sells information to its clients about their workforces. This information is gathered by analyzing data collected on LinkedIn users' publicly available profiles, which are automatically harvested by Plaintiff. HiQ is entirely dependent from LinkedIn's data.

Plaintiff resorted to this legal action after Defendant attempted to terminate the Plaintiff's ability to access the publicly available information on profiles of Linkedin users (after years of apparently tolerating hiQ's access and use of its data). Plaintiff contends that Defendant's actions constitute unfair business practices, common law tort and contractual liability, as well as a violation of free speech under the California Constitution.

Irreparable harm and the balance of hardships

First, the Court evaluated the existence of a potential irreparable harm for the parties. The Court concluded that, without temporary relief, hiQ would go out of business and that LinkedIn does not have a strong interest to keep the privacy of its users, who made their respective profiles publicly available on purpose. Therefore, the court recognized that the balance of hardships weighs in hiQ's favor.

Likeliness to prevail on the merits

The Court went on to establish the parties' respective likeness to prevail on the merits. It considered four claims.

Computer Fraud and Abuse Act ("CFAA")

LinkedIn argued that all of hiQ's claims failed because hiQ's unauthorized access to LinkedIn violates the CFAA. The CFAA establishes civil and criminal liability for any person who intentionally accesses a computer without authorization or exceeds authorized access and thereby obtains information from any protected computer. Defendant explicitly revoked the Plaintiff's permission to acquire data on its systems. According to Defendant, the CFAA is violated when permission has been explicitly revoked by the data's provider. Plaintiff contended that applying the CFAA to the access of public websites would expand its scope well beyond what was intended by the Congress at the time it enacted the statute since, under Defendant's interpretation, the CFAA would not leave any room for the consideration of either a website owner's reasons for denying authorization or an individual's possible justification for ignoring such a denial.

The Court sided with hiQ, asserting that the CFAA is not intended to police traffic to publicly available websites. According to the Court, a broad reading of the Act would set aside the legal evolution of the balance between open access to information and privacy. Given that the CFAA was enacted well before the advent of the internet, the Court refused to interpret the statute in that manner. The Court further clarified that this does not impair the possibility for a website to employ measures aimed at preventing harmful intrusions or attacks on its servers.

California Constitution

According to Plaintiff, LinkedIn also violated California's constitutional provisions on free speech, which confer broader rights than those provided by the First Amendment. In *Pruneyard Shopping Center v. Robbins*, the California Supreme Court held that the state free speech right prohibited private owners from excluding people from their property when their property is an arena where constitutionally valuable actions take place, like engaging in political speech or sharing fundamental parts of a community's life. The internet, hiQ contends, can be therefore interpreted as a "public space", and thus be subject to such doctrine.

However, The Court found that no court had expressly extended *Pruneyard* to the internet. Thus, it concluded that no serious question had actually been raised with regard to constitutional rights under the California Constitution.

Unfair competition law

HiQ also argued that Defendant's actions had the anticompetitive purpose of monetizing the data with LinkedIn's competing product and that this conduct amounted to unfair competition under California's unfair competition law, which broadly prohibits "*unlawful, unfair or fraudulent*" practices, including those practices that do not explicitly violate antitrust laws, but threaten the spirit of such laws.

According to Plaintiff, Linkedin is violating the spirit of antitrust laws in two ways: first, it is leveraging its power in the professional networking market to secure advantage in the data analytics market. Secondly, it is violating the essential facilities doctrine, which precludes a monopolist or attempted monopolist from denying access to a facility it controls that is essential to its competitors, by precluding them to enter the market.

The Court concluded that Plaintiff had presented some evidence supporting its assertions, but also remarked that during the proceedings LinkedIn may well be able to prove that its actions were not motivated by anticompetitive purposes.

Promissory estoppel

The Court did not recognize any basis for a further common law promissory estoppel claim based on an alleged promise made by Defendant to make the data as public as possible and even available to third parties.

According to the court, there was no proof of such a promise and Plaintiff did not cite any authority applying promissory estoppel made to someone other than the party asserting that claim.

Public Interest

Lastly, the Court considered the public interest. Plaintiff argued that a private party should not have the unilateral authority to restrict other private parties from accessing information that is otherwise available freely to all. Defendant, in contrast, argued that if the users knew that this data was freely available to unrestricted collection and analysis by third parties for any purposes, they would be far less likely to make the information available online.

The Court concluded that granting blanket authority to platform owners to block access to information publicly available on their websites may pose a serious threat to the free and fair flow of information on the Internet and that the questions related to antitrust enforcement leaned further in favor of granting the motion for the preliminary injunction.

U.S. Appeals Court for the Ninth Circuit Finds *Per Se* Treatment Inapplicable to Tying Arrangement in the Premium Cable Services Market

By Valerio Cosimo Romano

On 19 September 2017, the U.S. Court of Appeals for the Tenth Circuit ("Appeals Court") affirmed with a split decision the tossing by the U.S. District Court For the Western District of Oklahoma of a jury verdict in a suit alleging that a telecommunications company had illegally tied the rental of set-top boxes to its premium interactive cable services.

Parties and procedural history of the case

Cox Communications, Inc. ("Defendant") operates as a broadband communications and entertainment company for residences and businesses in the United States. Its subscribers cannot access premium cable services unless they also rent a set-top box from Cox. A class of subscribers in Oklahoma City ("Plaintiffs") sued Defendant under antitrust law, alleging that Defendant had illegally tied cable services to set-top-box rentals in violation of § 1 of the Sherman Act, which prohibits illegal restraints of trade.

The jury found that Plaintiffs had proven the necessary elements to establish a tying arrangement. However, the District Court disagreed, and determined that Plaintiffs had offered insufficient evidence for a jury to find that Cox's tying arrangement had foreclosed a substantial volume of commerce in Oklahoma City to other sellers or potential sellers of set-top boxes in the market for set- top boxes. The District Court also concluded that Plaintiffs had failed to show anticompetitive injury.

Tying theory

A tie exists when a seller exploits its control in one product market to force buyers in a second market into purchasing a tied product that the buyer either didn't want or wanted to purchase elsewhere. Usually, courts apply a *per se* rule to tying claims, under which plaintiffs can prevail just by proving that a tie exists. In this case, there is no need for further market analysis.

The Supreme Court determined that tying two products together disrupted the natural functioning of the markets and violated antitrust law *per se*. However, the Supreme Court has declared that the *per se* rule for tying arrangements demands a showing that the tie creates a substantial potential for impact on competition.

On the basis of Supreme Court's precedents, lower courts have defined the elements needed to prove *per se* tying claims. In particular, in the Tenth Circuit, a plaintiff must show that (1) two separate products are involved; (2) the sale or agreement to sell one product is conditioned on the purchase of the other; (3) the seller has sufficient economic power in the tying product market to enable it to restrain trade in the tied product market; and (4) a 'not insubstantial' amount of interstate commerce in the tied product is affected. If a plaintiff fails to prove an element, the court will not apply the *per se* rule to the tie, but then may choose to analyze the merits of the claim under the rule of reason.

Legal precedents

According to the Appeals Court, legal precedents (*Eastman Kodak*, *Microsoft*) show that in some industries a *per se* treatment might be inappropriate.

In this regard, the Court cited a recent case from Second Circuit (*Kaufman*), concerning the same kind of tie by a different cable company. In *Kaufman*, the court thoroughly explained the reasons why the tying arrangement at issue didn't trigger the application of the *per se* rule.

To start, the court explained that cable providers sell their subscribers the right to view certain contents. The contents' producers, however, require the cable companies to prevent viewers from stealing their content. This problem is solved by set-top boxes, which enable cable providers to code their signals. However, providers do not share their codes with cable box manufacturers. Therefore, to be useful to a consumer, a cable box must be cable-provider specific.

After explaining the function of set-top boxes, the Second Circuit turned to the regulatory environment and the history of the cable industry's use of set-top boxes. The court described the Federal Communication Commission's ("FCC") attempts to disaggregate set-top boxes from the delivery of premium cable, and stated that the FCC's failure is at least partly attributable to shortcomings in the new technologies designed to make premium cable available without set-top boxes. The court also pointed out that one FCC regulation actually caps the price that cable providers can charge customers who rent set-top boxes. Under the regulation, cable companies must calculate the cost of making such set-top boxes functional and available for consumers, and must charge customers according to those costs, including only a reasonable profit in their leasing rates.

On this basis, the Second Circuit concluded that the plaintiffs' factual allegations because they didn't trigger the application of the *per se* tying rule.

Analysis

In our case, the discussion relates to the fourth element (affection of a 'not insubstantial' amount of interstate commerce in the tied product). Plaintiffs claim that this element only requires consideration of the gross volume of commerce affected by the tie, and that they met this requirement presenting undisputed evidence that Cox obtained over $200 million in revenues from renting set-top boxes during the class period. On the other side, Defendant maintains that this element requires a showing that the tie actually foreclosed some amount of commerce, or some current or potential competitor, in the market for set-top boxes.

According to the Appeals Court, recent developments in tying law validate the district court's order and support Cox's interpretation of tying law's foreclosure element. Based on the Supreme Court's tying cases and other precedents, the Appeals Court therefore concluded that Plaintiffs had failed to show that the tie has a substantial potential to foreclose competition.

The Appeals Court's reasoning is based on four points. First, Cox does not manufacture the set-top boxes that it rents to customers. Rather, it acts as an intermediary between the set-top-box manufacturers and the consumers that use them. This means that what it does with the boxes has little or no effect on competition between set-top-box manufacturers in the set-top-box market, as they must continue to innovate and compete with each other to maintain their status as the preferred manufacturer for as many cable companies as possible. Second, because set-top-box manufacturers choose not to sell set-top boxes at retail or directly to consumers, no rival in the tied market could be foreclosed by Cox's tie, and therefore the alleged tie does not fall within the realm of contracts in restraint of trade or commerce proscribed by § 1 of the Sherman Act. Third, all cable companies rent set-top boxes to consumers. This suggests that tying set-top-box rentals to premium cable is simply more efficient than offering them separately. Fourth, the regulatory environment of the cable industry precludes the possibility that Cox could harm competition with its tie, as the regulatory price control on the tied product makes the plaintiffs' tying claim implausible as a whole.

The Appeals Court also argued that it does not have to apply the rule of reason unless Plaintiffs also argued that the tie was unlawful under a rule of reason analysis. However, as Plaintiffs had expressly argued that tying arrangements must be analyzed under the *per se* rule, the court did not address whether Defendant's tie would be illegal under a rule of reason analysis.

Final outcome

The Appeals Court therefore agreed with the District Court that Plaintiffs had failed to show that Defendant's tying arrangement foreclosed a substantial volume of commerce in the tied-product market, and therefore the tie did not merit *per se* condemnation. Thus, the Appeals Court affirmed the district court's order.

Antitrust

United States

U.S. President Vetoes the Acquisition of an U.S. Chipmaker by a Chinese Company

By Valerio Cosimo Romano

On 13 September 2017, the President of the Unites States, Donald Trump, issued an executive order ("Order") prohibiting the acquisition of Lattice Semiconductor Corporation ("Lattice") by Canyon Bridge Capital Partners, Inc. ("Canyon"). This Order is in line with a recommendation previously issued by the Committee on Foreign Investment in the United States ("CFIUS").

The parties and the proposed transaction

Canyon is a private equity fund headquartered in Silicon Valley, backed by the Chinese state-owned entities that manages industrial investments and venture capital. Lattice is an Oregon-based tech company which manufactures computer chips with both commercial and military applications. In November 2016 Canyon announced the entry into a definitive agreement to acquire Lattice for a deal value of $1.3 billion.

Regulatory background

CFIUS is an interagency committee which assists the President in evaluating the national security implications of foreign direct investment in the American economy. Although CFIUS is not authorized to block deals, it can impose a wide range of mitigation measures where it determines such requirements can effectively address national security issues. Where CFIUS determines that national security concerns cannot be overcome with mitigation measures, it typically recommends that parties formally commit to abandoning the transaction. In the vast majority of cases, the parties agree to terminate the transaction (or to divest, if the transaction has already been completed).

CFIUS's negative recommendation

That has not been the case for the acquisition of Lattice, where the parties went forward, hoping that the President would approve the transaction despite CFIUS's objections. In early September 2017, CFIUS recommended that President Trump block the transaction because of potential risks to national security which could not have been addressed through mitigation. Indeed, in a statement released on September 13, 2017, CFIUS clarified that the national security risk linked to the acquisition related to the "potential transfer of intellectual property to the foreign acquirer, the Chinese government's role in supporting this transaction, the importance of semiconductor supply chain integrity to the U.S. government, and use of Lattice products by the U.S. government."

The strategic relevance of semiconductors' industry

CFIUS's statement builds on an earlier report (here and here) commissioned by the Department of Defense. Reportedly, the document concluded that China is engaging in a long-term strategy to transfer technological know-how from the U.S. to China by increasing its investments in prospectively key technologies (robotics, virtual reality, artificial intelligence), many of which require semiconductors. The Report identified the CFIUS as one of the key regulatory tools available to prevent such intellectual property transfers, and concluded that it should be given additional authority to prevent potentially harmful deals.

Final outcome

As we have just seen, notwithstanding the negative recommendation by CFIUS, Canyon and Lattice deferred the decision to the President, asserting that all the risks for national security could have been addressed by "*comprehensive mitigation measures*". Despite this pleading, President Trump nixed the acquisition.

This is the fourth time in the American history that a President has blocked the acquisition of a US company, and the second time in a row that a deal has been blocked in the semi-conductor industry. Previously, President Obama halted the acquisition of a German semi-conductor equipment maker by a Chinese-backed company. President Obama also blocked a U.S.-based company owned by two Chinese nationals from acquiring four Oregon wind farm companies close to a naval base. Similarly, President George W. Bush prohibited a Chinese entity from buying an aerospace and aircraft parts manufacturer.

There is reason to believe that, during the current presidential mandate, the U.S. administration will increase the scrutiny of commercial transactions in areas which might prove strategic to national interests. Technology is certainly one of the chief areas of concern.

Antitrust
European Union

ECJ Rules on Excessive Licensing Fees for Copyrights

By Martin Miernicki

On 14 September 2017 the Court of Justice of the European Union ("ECJ") handed down its decision in *AKKA/LAA v. Konkurences padome* (C-177/16). The case originated in a fine imposed on the Latvian collective management organization (CMO) AKKA/LAA – which possesses a legal monopoly in Latvia – by the national competition authority. The authority asserted that the CMO had abused its dominant position by charging excessively high license rates. In the following, the Latvian Supreme Court made a reference for a preliminary ruling, asking the ECJ, *inter alia*,[1]

1. whether it is appropriate to compare the rates charged by a national CMO to those rates charged by CMOs in neighboring and other member states, adjusted in accordance with the purchasing power parity index (PPP index);

2. whether that comparison must be made for each segment of users or the average level of fees;

3. above which threshold the differences between the compared fees indicate abusive conduct; and

4. how a CMO can demonstrate that its license fees are not excessive.

Background

Article 102(a) of the TFEU declares the imposition of "unfair purchase or selling prices" as an abuse of a dominant position. The seminal case for the interpretation of this provision is *United Brands v. Commission* (case 27/76). Furthermore, the ECJ has repeatedly been asked to gives its opinion on this matter in the context of copyright management services. Relevant case law includes *Ministère public v. Tournier* (case 395/87), *Kanal 5 v. STIM* (C-52/07) and *OSA v.* Léčebné lázně Mariánské Lázně (C-351/12). In contrast, U.S. antitrust doctrine does not, as a principle, recognize excessive pricing as an antitrust violation.

Decision of the court

The ECJ largely referred to the opinion of the Advocate General and confirmed that a comparison of fees charged in other member states, relying on the PPP index, may be used to substantiate the excessive nature of license rates charged by a CMO. However, the reference member states must be selected according to "objective, appropriate and verifiable" criteria (*e.g.*, consumption habits, economic factors and cultural background) and the comparison must be made on a consistent basis (*e.g.*,

[1] Focus is put here on the most important aspects of the decision.

similar calculation methods). For this purpose, it is, in principle, permissible to refer to a specific segment of users if indicated by the circumstances of the individual case (paras 31-51). With regard to the level license fees, the ECJ ruled that there is no minimum threshold above which a license fee can be considered abusive; yet, the differences between the compared fees must be both significant (not a minor deviation) and persistent (not a temporary deviation). CMOs can justify their rates by reference to objective dissimilarities between the compared member states, such as differing national regulatory regimes (para 52-61).

Implications of the decision

The court reconfirmed its approach taken in the former decisions which introduced the comparison of fees charged in different member states as well as the "appreciably higher" standard. In the case at hand, the court further elaborated on this general concept by providing new criteria for the analysis which should assist competition authorities and courts in assessing excessive pricing under the EU competition rules. Clearly, however, it will still be challenging to apply those guidelines in practice. Furthermore, it seems that the ECJ does not consider the method of comparing license fees in other member states to be the only method for the purposes of Article 102(a) of the TFEU (*see also* paras 43-45 of the AG's opinion); this might be of special relevance in cases not related to CMOs. In this connection, it is noteworthy that the ECJ expressly permitted authorities to consider the relation between the level of the fee and the amount actually paid to the right holders (hence, the CMO's administrative costs) (paras 58-60).

Lastly – although the finding of abusive pricing appears to be the exception rather than the rule in European competition law practice – the decision supplements the case law on CMOs which is especially important since the rules of the Collective Management Directive 2014/26/EU (CMD) are relatively sparse in relation to users. Nevertheless, it should be noted that said directive contains additional standards for the CMOs' fee policies. Article 16(2) states that tariffs shall be "reasonable", *inter alia*, in relation to the economic value of the use of the licensed rights in trade and the economic value of the service provided by CMOs. These standards may be, however, overseen by national authorities (CMD article 36) which are not necessarily competition authorities. A coordinated application of the different standards by the competent authorities would be desirable in order to ensure the coherence of the regulatory regime.

Antitrust

European Union

Standards and FRAND Terms in the Post *Huawei* World

By Giuseppe Colangelo

The judgment of the European Court of Justice (CJEU) in *Huawei/ZTE* (Case C-170/13) marked a milestone in the patent war which has characterized standardization activities in the last decade. The CJEU identified the precise steps which standard essential patents (SEPs) owners and users have to follow in negotiating fair reasonable and non-discriminatory (FRAND) royalties. Compliance with this code of conduct will shield IPRs holders from the scrutiny of competition law and, at the same time, will protect implementers from the threat of an injunction and the consequent disruptive effect on sales and production.

In primis, the patent holder must inform the SEPs user about the alleged infringement and make a specific and written FRAND offer, provided the latter has shown willingness to obtain a license on fair and reasonable terms. The exact amount of the royalty and the way in which it has been calculated should be specified in the offer. In case of refusal, the implementer must promptly propose a counter-offer that complies with FRAND requirements. If such counter-offer is also rejected, the alleged infringer must provide appropriate security to continue using the patents, either by providing a bank guarantee or by placing the requisite amount on deposit. In addition, the parties have the option to request that the royalty level be set by an independent third party decision without delay. Patent owners will instead be granted an injunction if the implementer, while continuing to use the patent in question, have not diligently responded to the first licensing offer, in accordance with recognized commercial practices in the field and in good faith, which is a matter that must be established on the basis of objective factors and which implies that there are no delaying tactics. Furthermore, with regard to liability for past acts of use, the CJEU also explained that Article 102 TFEU does not prohibit the SEPs owner from bringing an action for the award of damages or the rendering of accounts. The above requirements and considerations do not, however, deprive the potential licensee of the right to challenge the validity and essentiality of the patent at issue.

Despite the CJEU's efforts, many shadows still loom on the horizon of the EU standard-setting community. In such a complex context, the recent activity by certain national courts in filling the gaps left by the CJEU and shedding light on some of the thorniest questions is undoubtedly welcome, and deserves the utmost consideration. Among these decisions, the UK judgement *Unwired Planet v. Huawei*[2] recently delivered by Mr. Justice Birss is of utmost importance.

[2] [2017] E.W.H.C. 711 (Pat).

The UK dispute *Unwired Planet v. Huawei*

Unwired Planet, a U.S. based patent assertion entity that holds a worldwide patent portfolio which includes numerous SEPs to various telecommunications standards, claimed that Huawei was an unwilling licensee. Huawei counterclaimed that Unwired Planet was abusing its dominant position by offering to license its entire global portfolio (SEPs and non-SEPs) and by demanding royalty rates higher than FRAND ones.

On 5 April 2017, the High Court of England and Wales delivered its judgement.

Justice Birss addressed several important topics. First, Birss stated that only one set of licensing terms can be ultimately considered FRAND in a given set of circumstances. From this perspective, the judge disregarded the view of those authors, U.S. judges (e.g. Robart in *Microsoft v. Motorola*) and perhaps even the CJEU in *Huawei,* according to whom FRAND may well comprise a range of terms. Indeed, although the *Huawei* case did not deal with FRAND pricing, yet it acknowledged that parties can make divergent FRAND offers and counter-offers, thereby confirming that there is no unambiguous FRAND point and that several distributional FRAND prices exist.

Furthermore, as a consequence of the single FRAND rate, Birss found that, during the negotiation, the parties could make offers that would not be FRAND. An obligation focused only on making FRAND offers is considered unrealistic since a process of fair negotiation will usually involve some compromise between the parties' rival offers: if the standard setting organization demands that offers made by a patentee must themselves consist of FRAND terms, then that would condemn patentees to always end up with negotiated rates below a FRAND rate. Therefore, according to the UK Court, it makes much more sense to interpret the FRAND obligation as applicable primarily to the finally agreed terms rather than to the offers.

It seems that Birss aimed to reduce the relevance of the *Huawei* decision (and of the competition law, in general) also relatively to another point. After recalling the purpose of a FRAND commitment and its alleged contractual nature, the UK judgment concluded that the contractual commitments submitted to the standard setting organization (ETSI) are stricter than antitrust provisions. Indeed, since competition law fines only excessive prices, a rate can be in line with antitrust rules even if it is higher than the FRAND benchmark. In sum, according to the English Court, FRAND commitments can be enforced under contract law without recourse to competition law.

Turning to the process of negotiating FRAND licenses, with respect to the type of behavior that can be considered FRAND, the Court stated that making extreme offers and taking an intransigent approach is not FRAND. In this regard, Huawei was considered unwilling because it insisted on having an offer for just a UK license (instead of a worldwide one).

Moreover, Birss provided useful insights about the determination of FRAND rates. An appropriate way to establish the FRAND royalty would be to determine a benchmark rate governed by the value of the patentee's portfolio: counting patents and making reference to existing comparable licenses are key steps of the determination process. In the High Court's words, a patentee who refuses to accept those terms would be in breach of its FRAND undertaking. With respect to the non-discrimination element, the Court rejected a "hard-edged" approach capable of applying to reduce a royalty rate (or adjust any license term in any way) which would otherwise have been regarded as FRAND. On the contrary, the Court endorsed a "general" approach, which requires that rates cannot differ based on the licensee but only on the value of the portfolio licensed.

The UK judgement demonstrates that after *Huawei* there are still several pending questions. It is not surprising that the European Commission has recently intervened to announce a Communication in order to fill the gaps by complementing existing jurisprudence through best practice recommendations.[3]

[3] European Commission, Roadmap towards a Communication on 'Standard Essential Patents for a European digitalised economy', 2017, 2, available at https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-1906931_en.

Antitrust

European Union

The Italian Competition Authority Authorizes the Acquisition of Two Data Center and Cloud Computing Services Companies

By Valerio Cosimo Romano

With the decision No. 46741, published on 2 October 2017, the Italian Competition Authority ("ICA") authorized the acquisition of Infracom Italia S.p.A. ("Infracom") and MC-Link S.p.A. ("MC-Link") by F2i SGR S.p.A. ("F2i").

The Parties

F2i is an asset management company, owned by institutional investors, which controls two closed-end investment funds and mainly invests in Italian infrastructures. Infracom is a company which provides (i) data center and cloud computing services, which are part of the broader ICT market; (ii) telecommunication services, both wholesale and retail; and (iii) enterprise resource planning services. MC-Link is a publicly listed company which mainly offers data center services (*inter alia* housing, co-location and server renting).

The transaction was structured as follows: 2i Fiber, a newly incorporated company whose 80% of shares are owned by one of two of F2i's funds, acquired the exclusive control of Infracom (and, consequently, indirect control of its subsidiaries Softher S.à.r.l. and Multilink Friuli S.r.l., and 89% of MC-Link), and of MC-Link.

Relevant markets

The transaction involves the information and communications technology ("ICT") sector. Coherently with the European Commission's precedents, the Authority determined that the ICT services market shall be considered individually, without further segmentation. The market separation in smaller divisions, for example co-location provided by data centers, would be unjustified, given the differentiation within the ICT offer itself. Indeed, the ICT offer is usually tailored upon very specific needs of the market base and therefore may change and spread to other markets very easily. The ICA specified that even by 'unbundling' the relevant market in smaller segments, there would be no dominance by the new entity.

The ICA further added that, under a geographical point of view, data center and cloud computing services have specific economic characteristics confined to a local market, generally defined by a metropolitan city, given that the client base tends to demand these services within 50 kilometers from its activity. This is due to the fact customers need a signal latency not exceeding certain thresholds, and this is why companies operating in this sector tend to position their facilities in the proximity of urban areas.

According to the ICA, the transaction also involves marginal effects on two other markets: i) wholesale access to fixed public telephone network services; and ii) retail telecommunication on fixed network services, where Infracom owns marginal quotas. However, such markets are generally characterized by the presence of an incumbent operator (Telecom Italia S.p.A.) holding a preeminent position.

ICA's conclusions

ICA concluded that the transaction will not have an impact on competition in the markets of telecommunications and ICT services, with reference to data center and cloud computing services. The Italian Authority for Communications Guarantees (AGCOM) concurred with ICA's opinion. The transaction was therefore authorized.

Intellectual property

United States

U.S. Appeals Court for the Ninth Circuit Affirms a Preliminary Injunction against Movie Filtering Service on Copyright Grounds

By Valerio Cosimo Romano

On 24 August 2017, the U.S. Court of Appeals for the Ninth Circuit ("Appeals Court") affirmed a preliminary injunction from the U.S. District Court for the Central District of California ("District Court") against the defendant in an action under the Copyright Act and the Digital Millennium Copyright Act ("DMCA").

The parties

Disney Enterprises, LucasFilm Limited, Twentieth Century Fox Film Corporation, and Warner Brothers Entertainment ("Studios" or "Plaintiffs") produce and distribute copyrighted motion pictures and television shows through several distribution channels. The Studios employ technological protection measures ("TPMs") to protect against unauthorized access to and copying of their works.

VidAngel, Inc. ("VidAngel" or "Defendant") operates an online streaming service that removes objectionable content from movies and television shows. It purchases physical discs containing copyrighted movies and television shows, rips a digital copy and streams to its customers a filtered version of the work.

The lawsuit

The Studios filed suit against VidAngel, alleging copyright infringement and circumvention of technological measures controlling access to copyrighted works in violation of the DMCA. At the moment of filing suit, Defendant offered more than eighty copyrighted works, which it was not licensed or otherwise authorized to copy, perform, or access. VidAngel denied the statutory violations and raised affirmative defenses of fair use and legal authorization by the Family Movie Act of 2005 ("FMA").

The Studios moved for a preliminary injunction, and the District Court granted the motion, enjoining Defendant from copying and streaming, transmitting, or otherwise publicly performing or displaying any of Plaintiff's copyrighted works, circumventing technological measures protecting Plaintiff's copyrighted works or engaging in any other activity that violates, directly or indirectly.

The District Court found that Defendant had circumvented the technological measures controlling access to the Studios' works and violated the Studios' exclusive right to reproduce and publicly perform their works. The District Court rejected instead Defendant's FMA defense, holding that the service did not comply with FMA (which requires a filtered transmission to “come from an ‘authorized copy’ of the motion picture) and (ii) that Defendant was not likely to succeed on its fair use defense.

VidAngel appealed, claiming that FMA exempts VidAngel from liability for copyright infringement and that anti-circumvention provision of the DMCA does not cover the plaintiffs' technological protection measures.

Merits of the case

First, the Appeals Court found that the District Court had not abused its discretion in concluding that Defendant’s copying infringed the Studios' exclusive reproduction right, because lawful owners of a copy of the copyrighted work are only entitled to sell or otherwise dispose of the possession of that copy, and not to reproduce it.

The Appeals Court also found that the District Court had not abused its discretion in finding that the Studios are likely to succeed on their DMCA claim because VidAngel had offered no evidence that the Studios had either explicitly or implicitly authorized DVD buyers to circumvent encryption technology to access the digital contents of their discs.

The Appeals Court then moved to VidAngel’s defenses. It found that The FMA exempts compliant filtered performances, rather than the processes that make such performances possible. Moreover, the Court found that FMA has been created to provide for the protection of intellectual property rights, which would not be preserved by VidAngel's interpretation of the statute. Indeed, VidAngel does not stream from an authorized copy of the Studios' motion pictures: it streams from the “master file” copy it created by ripping the movies from discs after circumventing their TPMs. Therefore, the District Court had not abused its discretion in concluding that VidAngel is unlikely to succeed on the merits of its FMA defense to the Studios' copyright infringement claims.

In order to exclude infringement on copyright, Defendant also relied on the fair use theory. In determining whether the use of a copyrighted work is fair, the Appeals Court considered again: (i) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (ii) the nature of the copyrighted work; (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (iv) the effect of the use upon the potential market for or value of the copyrighted work. The Appeals Court sided again with the District Court, affirming that VidAngel's service simply omits portions that viewers find objectionable, and transmits them for the same intrinsic entertainment value as the originals.

Therefore, VidAngel's use is not transformative (and thus it cannot be protected by fair use).

VidAngel also raised a defense related to the economic effects of its business. It argued that its service actually benefits the Studios because it purchases discs and expands the audience for the copyrighted works to viewers who would not watch without filtering. However, the Appeals Court confirmed the District Court's view that VidAngel's service is an effective substitute for Plaintiff's unfiltered works and that neither the fact that VidAngel purchases the discs excuses its infringement, because any allegedly positive impact of Defendant's activities on Plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted works. Thus, and a market harm caused by the infringing activity can be presumed.

Irreparable harm and balance of equities

As for irreparable harm, the Appeals Court sided with the District Court in determining that VidAngel's service undermines the value of the Studios' copyrighted works, their business model, their goodwill and negotiating leverage with licensees and that the loss of goodwill, negotiating leverage, and that non-monetary terms in the Studios' licenses cannot readily be remedied with damages. The Appeals court therefore concluded that the eventual financial hardship deriving from discontinuance of infringing activities does not outweigh the irreparable harm likely to befall the Studios without an injunction.

For these reasons, the Appeals Court affirmed the preliminary injunction from the District Court.

Intellectual property
United States

U.S. Company Pursues International Investment Arbitration against Panama over Trademarks

By Gabriel M. Lentner

The U.S.-based Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. lodged a claim against Panama over trademarks at the International Centre for Settlement of Investment Disputes (ICSID).

The claim relates to a decision rendered by the Supreme Court of Panama concerning Bridgestone's trademarks in Panama and is based on the Panama-US Trade Promotion Agreement (TPA). The arbitral tribunal is currently dealing with "Expedited Objections".

A key issue in this dispute is whether the ownership of the FIRESTONE trademark and rights to sell, market and distribute BRIDGESTONE and FIRESTONE branded products in Panama constitute "investments" under Art 10.29 of the TPA, as argued by the claimants. Under this provision the term "investment" is defined as "means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: … (f) intellectual property rights; (g) licenses, … and similar rights conferred pursuant to domestic law" In a footnote it is clarified that "Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law."

Bridgestone argues *inter alia* that its licenses are to be considered intellectual property rights and therefore covered investments. In addition, they contend that these licenses create rights protected under Panamanian law, since they concern trademarks registered in Panama.

Panama on the other hand challenges these arguments stating that Bridgestone does not have an "investment" within the meaning of the ICSID Convention (Art 25) and the TPA. Rather, Panama views the activities of Bridgestone as ordinary commercial transactions outside the scope of investment arbitration. More specifically responding to the Claimant's argument, Panama disputes that the three licenses at issue do have the characteristics of an investment as they do not create any rights protected under Panamanian law.

Still pending, this case as it adds to the growing number of international investment disputes involving intellectual property rights (see cases of *Philip Morris v Australia* and *Philip Morris v Uruguay*, Eli

Lilly v Canada). There is still a lot of uncertainty in this area of law and hence it will be interesting to see the final outcome and the reasoning of the tribunal dealing with the issue of investment and IP.

Intellectual property

United States

The Battle for CRISPR Technology: Who really Owns It?

By Bart Kolodziejczyk

The face of genetic engineering is being revolutionized with the emergence of the CRISPR/Cas9 technology. You have probably heard of it, but if you haven't, here you go: CRISPR stands for Clustered Regularly Interspaced Short Palindromic Repeats, and it is a group of bacterial DNA sequences into which pieces of viral DNA were plugged into while the bacterium was being attacked. The CRISPR/Cas9 is a genome editing technology that can be used to alter genes in living organisms permanently.

In July 2017, a research team in the U.S proved that they could alter the DNA of human embryos using CRISPR/Cas9 technology. However, there have been controversies surrounding this technology, mainly because of ethical and biosafety concerns. Importantly, the question of who owns the patent to this technology is also undecided, which brings up the question of who can use the technology for commercial purposes.

The CRISPR battle is being spearheaded by the University of California (UC) against the Broad Institute in Cambridge, Massachusetts, and its associates. UC claims that it has a patent that covers the uses of CSISPR in every type of cell, but the Broad Institute claims that they should own the patent that covers the use of the technology in eukaryotes, which is the focal point for the development of human medicines using the CRISPR technology,

The group of litigants led by the UC argue that the U.S. Patent Trial and Appeal Board (PTAB) ruled wrongly in February in favor of the the Broad Institute in Cambridge, Massachusetts, and two associates — Harvard University and the Massachusetts Institute of Technology in Cambridge — in a judgement that said the Broad group invented the use of CRISPR usage in eukaryotic cells. In order to overturn the ruling, the UC filed an appeal based on the argument that the U.S. Patent Trial and Appeal Board (PTAB) "*ignored key evidence*" and "made multiple errors." This argument was contained in a brief sent to the U.S Court of Appeals on July 25.

However, the battle for ownership of CRISPR took a dramatic turn when Millipore Sigma, a subsidiary of Merck KGaA, a German pharmaceutical company entered into the fray. In a claim filed by Millipore Sigma, they claim that they have the right to merge genetic information into eukaryotic cells using CRISPR and that "*the method does not comprise a process for modifying the germ line genetic identity of a human being.*" The battle seems far from coming to an end as a statement credited to the European Patent Office (EPO) shows that it intends to grant a patent to Millipore Sigma to own the use of CRISPR in this manner. There are other similar patents being submitted, and some have been granted, for example in Australia.

Therefore, even though the CRISPR technology has ushered in new frontiers in genetic engineering, the subject of who owns what looks like it might be the topic of controversial discussions for a while.

Intellectual property

European Union

CJEU: Online Sharing Platforms like "The Pirate Bay" May Constitute Copyright Infringement by Indexing BitTorrent Files

By Katharina Erler

The Second Camber of the Court of Justice of the European Union (CJEU) ruled on 14 of June 2017 that the making available and management of a sharing platform on which user-generated BitTorrent files related to copyright protected works are indexed may constitute copyright infringement. In particular, the concept of Article 3 (1) EU InfoSoc Directive (2001/29/EC) "communication to the public" must be interpreted as covering situations, where the protected works are not hosted by the sharing website operators themselves, but by users through a peer-to-peer network, given that the operators of the sharing platform play an essential role in making those works available. The case is Stichting Brein v. Ziggo and XS4ALL Internet BV, C-610/15.

Stichting Brein, a Netherlands foundation which safeguards the interests of copyright holders, has initiated proceedings before the courts in the Netherlands requesting that the internet access provider Ziggo and XS4ALL shall be ordered to block the domain names and IP addresses of the online sharing platform "The Pirate Bay". A significant number of the subscribers of Ziggo and XS4ALL use the online platform The Pirate Bay.

The Pirate Bay is a website, which allows its users to share music and video files, much of which, according to the opinion of Advocate General Szpunar of 8 February 2017 90 % to 95 %, contain protected works distributed without the consent of the authors. Since Pirate Bay is a website that offers the possibility for content-sharing in the context of a peer-to-peer network based on a BitTorrent protocol, the shared files are generated by its users and downloaded, divided into segments, from several peer computers in a decentralized way. In order to generate and share these files, users must first download a specific software called "BitTorrent Client", which is not provided by Pirate Bay. Pirate Bay allows its users to find other users ("peers") available to share the desired file by indexing torrent files related to the video or audio files on its website. The works to which those torrent files refer may be downloaded onto the users' computers in segments through their "BitTorrent Client" software.

The Court of first instance upheld Stichting Breins request. However, the internet access providers filed an appeal against this decision. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) noting that in the present case it has been established that (1) the actions of Pirate Bay make protected works available to the public without the authors consent and that (2) subscribers to Ziggo and XS4ALL, through Pirate Bay, make protected works available without the consent of the authors and thus infringe the copyright of those right holders.

The Hoge Raad, however, referred two questions to the CJEU: (1) whether Pirate Bay itself "communicates" works to the public within the meaning of Article 3 (1) of EU InfoSoc Directive (2001/29/EC) and if question (1) is answered in negatively, (2) whether Article 8 (3) of EU Directive 2001/29 and Article 11 of EU Directive 2004/48 offer any scope for obtaining an injunction against an intermediary, of that intermediary facilitates the infringing acts of third parties in the way referred to in question (1).

Legal context

Recital (23) of of EU InfoSoc Directive 2001/29/EC of the European Parliament and of the Council on the harmonization of certain aspects of copyright and related rights in the information society (InfoSoc Directive) states expressly, that author's right of communication to the public should be understood in a broad sense and should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.

Recital (27) of EU InfoSoc Directive (2001/29/EC) states that the mere provision of physical facilities for enabling or making a communication is not covered by communication within the meaning of this Directive.

Article 3 (1) ("Right of communication to the public of works and right of making available to the public other subject matter") of EU InfoSoc Directive (2001/29/EC) stipulates that Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

Consideration of the questions referred to the CJEU

Of two questions referred to the CJEU by the Hoge Raad der Nederlanden, the CJEU only explicitly addressed the question whether there is a "communication to the public" within the meaning of Article 3 (1) of the EU InfoSoc Directive by the operator of a website, if no protected works are available on that website, but a system exists by means of which metadata on protected works which are present on the users' computers are indexed and categorised for users, so that the user can trace and upload and download the protected work by the basis thereof.

In essence, the CJEU answered the question, whether the operators of an online sharing platform themselves commit copyright infringment by managing and indexing BitTorrent files, thereby allowing users to share user-generated and user-stored files containing protected works.

First and in view of its past case-law, the CJEU emphasized, as a general rule, that any act by which a user, with full knowledge of the relevant facts, provides its clients with access to protected works is an "act of communication" for the purposes of Article 3 (1). To determine this general rule for user-liability, the CJEU explicitly referred to its recent series of decisions on copyright infringement via links (CJEU, GS Media, C-160/15) and/or add-ons (CJEU, Fimspeler, C-527/15), which refer to protected works.

With regard to the liability of Pirate Bay - the core question in the case at hand - the CJEU - in line with the opinion of Advocate General Szpunar - noted that it is common knowledge that copyright-protected works are made available through Pirate Bay in such a way that users may access those works from wherever and whenever.

Most importantly the CJEU highlighted, although video or audio files have not been placed online by the platform operators themselves but by its users, the operators of Pirate Bay play an essential role in making those works available. The CJEU hold that by making available and managing an online platform the Pirate Bay operators intervene with full knowledge of the consequences of their conduct, to provide access to protected works, especially by indexing on that platform torrent files, which allow users to locate and share those works.

It is worth mentioning that in line with its *Filmspeler* decision, the CJEU in this case further broadened the scope of the copyright holders' right of communication to the public. According to the CJEU "full knowledge" of the communication party with regard to "the consequences of their conduct", is sufficient to hold the operators themselves liable.

By referring to the opinion of Advocate General Szpunar, the CJEU additionally found, as a main criterion for finding the operators of a sharing platform themselves liable for copyright infringement, that without making such a platform available and managing it, the works could not be shared by the users or, at the very least, sharing them would prove to be more complex.

In that context, the CJEU emphasized that the website "The Pirate Bay" cannot be considered to be making a "mere provision" of physical facilities for enabling or making a communication within the meaning of recital 27 EU InfoSoc Directive (2001/29/EC). According to the CJEU, this is not only true because the platform indexes the torrent files in such a way that the works may be shared easily, but also because the platform offers an index classifying the works in different categories based on i.a. the genre. Moreover, the operators of Pirate Bay delete obsolete or faulty torrent files and actively filter the user-hosted content.

As to the question of whether the protected works were communicated to the public, the CJEU on one hand referred to the order of reference, which reveals that a large number of Ziggo and XS4ALL subscribers have downloaded media files through Pirate Bay. On the other hand, the CJEU noted that the operators on their sharing platform, explicitly claimed to have several dozens of million users ("peers"). This large number of users can potentially and at any time access the protected works, which are shared through Pirate Bay.

As a core matter, the CJEU discussed whether the Pirate Bay operators communicated to a "new" public, which is a public that was not taken into account by the copyright holders when they authorized the initial communication. This raises the decisive question of whether the operators were aware of the missing authorization of the copyright holders. In contrast to the opinion of Advocate General, the CJEU held that the operators of Pirate Bay may simply be found liable because they: (1) were informed that this platform, which they make available to users and manage, provides access to works published without authorization of the copyright holder and (2) were aware that the operators display, on blogs and forums available on their website, their purpose of making protected works available and encouraging their users to make copies of that works. In fact, the CJEU found that, if the operators are aware of the possibility of infringing copyrights through their own conduct, managing their website, they may be found liable of infringement themselves. Under this ruling a concrete knowledge of the illegality of an individual shared work is no longer required to justify the liability for platform operators.

Furthermore, the CJEU noted, that there can be no dispute that the online sharing platform is carried out with the purpose of obtaining profit therefrom, which is clear from the considerable advertising revenues generated by Pirate Bay.

For these reasons, the Court held that the concept of "communication to the public" must be interpreted as covering the making available and managing of a sharing platform. The Pirate Bay, which by indexing of BitTorrent files and providing a search engine, allows its users to locate and share protected works in the context of a peer-to-peer network without the consent of the copyright holders. In the light of the answer to this first referred question, the CJEU saw no need to answer the second question.

It is, however, worth mentioning that the CJEU just answered the referred preliminary question of whether the managing of the website Pirate Bay is covered by the concept of "communication to the public" and therefore may constitute copyright infringement. It did not take position as to Stichting Breins' principle request in the main proceedings that in consequence of these considerations the internet access provider Ziggo and XS4ALL be ordered to block the IP addresses and domain name of The Pirate Bay.

Other developments

European Union

Pro Bono by Algorithms: Rethinking Accessibility of Law in the Chatbot Era

By Irene Ng (Huang Ying)

At the recent ChatbotConf 2017 hosted in Vienna, Austria on October 2-3, distinguished speakers from leading technology companies convened to discuss an up-and-coming tech – none other than *the chatbot*. The speakers discussed a range of topics, such as "Competing with character", "turn(ing) conversations into relationships", and "building conversational experiences", and other topics, which is viewable at the ChatbotConf website.

If you thought that the above topics were describing human relations, the fact is, you were not exactly wrong – the focus is actually about developing a human character for chatbots. For some of us, the chatbot might be a piece of tech that we are acquainted with. We may have interacted with these bots on social media platforms such as Facebook Messenger, or used bots on Twitter to track down Pokémon to catch on the famous assisted virtual reality game, Pokémon Go. In some cases, these chatbots are designed to provide customer support or service to the target audience. In other cases, such chatbots are built to provide simple, updated information to users, such as the TyranitarBot on Twitter, or Poncho, a bot that is designed to send "fun, personalized weather forecasts every morning".

This growing prevalence and use of chatbots by businesses or organizations on various platforms is not something to be ignored. Within the legal industry, several companies have created "legal bots" that are designed to either direct users to the right place (e.g. what kind of lawyer they should be seeking), or perform an easy, repetitive service that can be easily automated and resolved. A famous case displaying the potential of chatbots in the legal industry is that of DoNotPay, a chatbot that has reportedly helped "overturn 120,000 parking tickets in New York and London" by challenging parking tickets. Besides DoNotPay, there are other bots in the legal industry such as LegalPundits that helps to determine what kind of legal advice the potential client needs, to "match [the client] with the resources that [the client] needs".

As users become more comfortable with interacting with chatbots and using chatbots to help them solve their customer queries, an interesting avenue to explore is the use of chatbots for institutions providing pro bono services. Institutions that provide pro bono services, in particular those that run free legal clinics, can benefit from the use of chatbots in various ways. Firstly, these institutions can use chatbots as a screening tool to filter out whether the said applicant has met the means test to qualify for the free pro bono services. Means tests usually require applicants to fulfill a fixed set of criteria, and if such criteria are generally inflexible (e.g. applicant's income must be less than USD$1,000.00, anything above this amount will be rejected), then the chatbot can be deployed to interact with these applicants to determine whether the applicant has, at the first screening, met the basic criteria for free pro bono services.

Similarly, institutions can use these chatbots to direct applicants or callers to the right ministry or non-profit organization that may be able to assist them further in the specific legal query that they have. For example, an institution providing pro bono services may often get inquirers making simples requests, such as "where can I repeal my parking ticket", or "how do I get a divorce". For the latter scenario, the chatbot can be trained to provide a response, indicating that the inquirer ought to seek a divorce lawyer, point the inquirer to a set of easily digestible information on divorces, followed by a list of divorce lawyers that the inquirer may contact.

Granted, there may – or will – be pitfalls in using chatbots to deal with legal pro bono queries. Applicants or inquirers that approach institutions providing pro bono services may become emotional when discussing their legal problems, and having a human touch attending to such a person's legal needs may seem to be preferable than a machine. Furthermore, while chatbots can be trained to fulfill certain functions such as determining whether an applicant meets the means test, borderline cases may not be adequately attended to. Using the means test example provided earlier, where applicants must have an income of less than USD $1,000.00, an applicant who declares that she earns USD $1,001.00 may be rejected by the chatbot automatically if the developer did not train the chatbot to consider such borderline cases.

However, despite these concerns, there is still much room for chatbots to grow and help serve a public service function by providing greater accessibility to law. A good chatbot can help pro bono institutions make better use of their resources. By implementing a chatbot to help with simple tasks such as diverting inquirers to the right pages, or assisting volunteers to sift out genuine applicants that fulfill the means test, these pro bono institutions can divert resources or manpower, which would otherwise be used to tackle these relatively simple and repetitive tasks, to other areas, thereby increasing efficiency with the same limited budget that such institutions providing pro bono services have.

While there has been much chatter in the chatbot scene to develop an emotional intelligence for chatbots, ultimately, providing legal aid is a form of public service – and as with all types of service, it is unavoidable that humans may still want to converse with a real human being. As we move forward to explore new avenues of providing legal aid through different platforms in a more efficient and cost-effective manner, we should never forget nor neglect to still provide a physical helping hand to those who need legal aid –

and not assume that a chatbot can take our place and release us from our social duty as lawyers to help the needy.

Other developments

European Union

Processing of Personal Data – ECJ on Directive 95/46/EC in the Case “Peter Puškár”

By Maria E. Sturm

On 27 September 2017 the ECJ issued its preliminary ruling on the case Peter Puškár vs. Finančné riaditeľstvo Slovenskej republiky, Kriminálny úrad finančnej správy (C-73/16) which gives helpful guidelines on the lawfulness of the processing of personal data by public authorities.

I. Case

The financial authorities of Slovakia have drawn up a list of persons which are considered to be front men for several companies. In detail, the list contains the names of the persons, their tax identification number, their national identification number, and the companies they are associated with. Peter Puškár is one of those persons and wanted to be deleted from this list. The case has several facets, touching questions regarding Data Protection Directive 95/46/EC, but also the Charter of Fundamental Rights of the EU. Therefore, the Supreme Court of the Slovak Republic requested a preliminary ruling of the ECJ under Article 267 TFEU.

II. Questions

The Supreme Court of the Slovak Republic posed four questions:

- The first question is a procedural one, asking if an obligatory pre-trial proceeding is admissible in cases concerning the procession of personal data.
- The second question, also of procedural nature, covers the problem of the admissibility of the list as evidence.
- The third question finally asks, if such a list is a legal form of processing personal data.
- The fourth question refers to the relation between the European Court of Human Rights and the Court of Justice in cases of differences between the case-laws. However, the ECJ regarded this questions as inadmissible because of its hypothetical nature. Therefore, it will not be further covered in this article.

III. Ruling

1. On Question n°1

Question n° 1 refers to Art. 22 of directive 95/46/EC. This articles requires Member States to provide a judicial remedy for any breach of the rights guaranteed with regard to the processing of data. So the question is: does an obligatory pre-trial proceeding harm this right to judicial remedies, as it makes the whole process more complex and more expensive? The Slovak administrative authorities argued, that a pre-trial proceeding offers the chance for a quick resolution, if the administration follows the argument of the complainant. Furthermore, unexpected lawsuits can be avoided and the ensuing lawsuit will be more efficient, because arguments of both parties are already documented. ECJ ruled, that if the pre-trial is not too long and not too expensive and there is no obvious discrepancy between the advantages and disadvantages of the pre-trial proceeding, it does not harm Art. 22.

2. On Question n° 2

The Slovak financial authorities claimed, that the list cannot be admitted as evidence, because it is confidential and for internal use only. This could be a restriction of the right to an effective remedy according to Art. 47 of the Charter of Fundamental Rights of the EU. Such a restriction can only be legal, if it is regulated by law, respects the essential content of the right, is proportionate and conforms to accepted aims of the common welfare of the EU. This is highly questionable in this case, as Art. 12 of directive 95/46/EC guarantees every data subject the right of access to the processed data and Art. 10 and 11 guarantee that information about processed data is provided to data subjects. Therefore, Mr. Puškár must have access to the list, which fulfills the definition of personal data according to Art. 2a) of the directive, and the financial authorities have no reason to withhold it during the lawsuit.

3. On Question n° 3

The third question finally refers to the substance of the directive and requires a definition of the legality of processing personal data in such a list. Being part of this list can harm the reputation of the person as well as the presumption of innocence. Furthermore, it can harm the entrepreneurial freedom of the companies related to this person. On the other hand, according to Art. 7e) of the directive, data can be processed, if it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority. The goal intended by setting up this list was to ensure tax collection and to avoid tax fraud, both legal public tasks. Furthermore, the list has been set up by those authorities who are in charge of these tasks. This is important, as Art. 6 I b) requires the explicit connection between the aim and the task. However, taking into account the disadvantages for the affected persons, the list is only admissible, if there is sufficient indication for the suspicion.

It is now up to the Slovak courts to re-examine the case and see if the financial authorities worked within these guidelines set up by the ECJ.

VI. Relevance

Directive 95/46/EC has been replaced by the General Data Protection Regulation (Reg 2016/679; see also TTLF Newsletter of February 3, 2017) which applies from May 25, 2018 on. However, the articles in question in this verdict all form part of the new regulation with regard to content:

- Remedies required in Art. 22 Directive 95/46/EC, are now required by Art. 79 I Reg 2016/679.
- The right of access and information according to Art. 10, 11, 12 Directive 95/46/EC can now be found in Art. 13, 14, 15 Reg 2016/679.
- Art 6I b) Directive 95/46/EC is now Art. 5 I b) Reg 2016/679, and Art. 7e) Directive 95/46/EC is now Art. 6 I e) Reg 2016/679.

Therefore, the guidelines for interpreting the directive, set up by the ECJ in this verdict will still be applicable to the new regulation, which enters into force in 2018.