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THE RIGHT TO PRIVACY AND THE RIGHT TO INTELLECTUAL PROPERTY IN INTERNET: THE PROMUSICAE CASE, A SIGNIFICANT JUDGEMENT OF THE EUROPEAN COURT OF JUSTICE

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Abstract: *The difficult conciliation between the protection of the right to respect for private life, specially the confidentiality of personal data, and the rights to protection of copyright and to an effective remedy is the key issue decided by the Judgment of the Court of Justice in Case C-275/06, Promusicae. In order to safeguard other persons' rights, the Court approves of limits to the privacy and these limits are sanctioned to damage the confidentiality of personal data, generated by the traffic in the electronic communications. In our opinion, in spite of the Court's praiseworthy efforts to balancing the rights concerned, the judgement creates an instrument that entails a danger for freedom.*

Key words: *information society, rights to protection of copyright, right to respect for private life, confidentiality of personal data, right to an effective remedy.*

Living in the information society brings into the daily life of every citizen features and services that incorporate a new perspective in the protection of fundamental rights.

The new technology, the massive access of population to the worldwide system of communications, the use of formats and supports different from the traditional ones and subject to constant changes, are some of the elements that make up that new perspective, the one of the virtual world, for whose treatment the habitual legal mechanisms, those that are used in the real world are not effective.

Community law is not alien to this recent problematic that concerns the settings needed for the accomplishment, without obstacles and on equal conditions, of the inner market in electronic communications sector. In this new scenario, there are two fundamental rights especially involved, often opposite, the right to private life or to privacy, and the right to intellectual property.

Therefore, when dealing with those settings, Community rules, and thus national rules, must pay attention to some aspects related to the protection of the fundamental rights that can be affected in a significant way by using the electronic communication networks and services.

The right to privacy, whose basic status was already defined by Warren and Brandeis in 1899, protects «*the sacred precincts of private and domestic life*» [1], and, in their perspective, provides to every person «*the right to be let alone*».

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Nevertheless, the potential attempts to private life, and specifically to personal data, issued from the technological progress, have added an active perspective to enable an individual to control all management and processing data which could concern him or her. As a result, many States guarantee the right to be informed when personal data was processed, the right to know the reason for this processing, the right to access the data and if required, the right to have the data amended or deleted. [2] But these legislations are not always coincident and, in the European Union, the differences could raise some troubles to the flow of information among States. On the other hand, copyright holders can see their legitimate expectations frustrated because of a fraudulent use of telecommunications system.

One of the conflictive situations brought about by the information society gives rise to the sentence of the European Court of Justice (hereafter, ECJ), C-275/06, of January, 29, 2008, the *Promusicae case*.[3] That is the problem derived from the hard conciliation between the respect to personal privacy with the protection due to intellectual property and particularly, to copyright. The infringements of copyright using the network of internet are at the origin of the lawsuit before the national judge, although the consequences of the ECJ conclusions could be applicable, beyond this illegal use of the network, to other situations developed through the telecommunications system. The Court approves of limits to the privacy to safeguard other persons' rights, and these limits are sanctioned to damage the confidentiality of personal data, generated by the traffic in the electronic communications. In spite of the Court's praiseworthy efforts to balancing the rights concerned, the judgement creates an instrument that entails a danger for freedom. The task was not easy for the ECJ and so the judgement is long, complex, with a cautious approach to the problem, finally leaving the decision to the Member States.

Productores de Música de España, (hereafter, *Promusicae*), is a Spanish non-profit- making organisation, acting on behalf of its members, copyright holders and holders of related rights (producers and publishers of musical and audio-visual recordings). It applied, in November 2005, to the *Juzgado núm. 5 de lo Mercantil de Madrid* against *Telefónica*, an internet services provider, for preliminary measures to oblige the latter to disclose personal data of peer to peer users, in order to start civil procedures. *Promusicae* alleged that these persons, whose direction «IP», dates and hours of internet connection were known, made use of KaZaA file exchange software to store and exchange music files which *Promusicae* members were copyright holders. The Spanish judge, at first, acceded and ordered *Telefónica* to disclose the personal data required, but *Telefónica* opposed and argued that Spanish law authorized the communication of these data only in a criminal investigation or for the purpose of safeguarding public security and national defence, not in civil proceedings or as a preliminary measure relating to civil proceedings. *Promusicae* replied by arguing the interpretation of Spanish law accordingly to Directives 2000/31, 2001/29 and 2004/48 and with Articles 17.2 and 47 of the Charter of Fundamental Rights of the European Union (hereafter, the Charter), provisions which would not allow Member States to limit solely to the purposes expressly mentioned in that law the obligation to communicate the data in question. [4] The Judge stayed the proceedings and consulted the ECJ for a preliminary ruling, submitting the following question: «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?»

In her opinion, the Advocate General, Julianne Kokott, considering the rights implied in the case, found it was necessary to extend the parameters of Community law that would serve like interpretative canon of the national norm that provokes the preliminary ruling. Consequently, five Directives would form the judgment Community law framework. Three of these are the Directives mentioned by the national judge, 2000/31, 2001/29 and 2004/48 [5] (hereafter, the three together as Directives on E-commerce and intellectual property). The other two norms, that the ECJ will also count on, are the Directive 95/46, on the protection of individuals with regard to the processing of personal data and on the free movement of such data; and Directive 2002/58 [6], a specific regulation concerning the processing of personal data and the protection of privacy in the electronic communications sector (hereafter, these both together, as Data protection Directives).

However, despite this common initial criterion of analysis, the Advocate General proposed a thesis that is not assumed by the ECJ. A well contrived discourse leads the Advocate General to declare compatible with Community law the national regulation that denies the possibility to disclose personal traffic data to private persons to be used in civil procedures. The Data protection Directives (95/46 and 2002/58) would act as a framework and would take precedence over the E-commerce and intellectual property Directives (2000/31, 2001/29 and 2004/48), although that does not mean primacy of Data protection Directives but necessity to find a suitable balance. Besides, she stresses the link between data protection and fundamental rights, particularly the right to private life, included in the Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (hereafter, the ECHR), confirmed by the Charter that includes specifically the data protection in Article 8. From these norms derives the exigency of legal foreseeability that, for data protection, expresses «*in the criterion – expressly mentioned in Article 8 (2) of the Charter – of purpose limitation*». Personal data may only be collected and processed (Article 6(1)(b) of Directive 95/46), for specified, explicit and legitimate purposes and «*not further processed in a way incompatible with those purposes*». Only a pressing social need can justify an interference measure into private life that must always be proportioned to the purpose. Certainly, the fundamental rights to property and to an effective judicial protection of holders of copyrights may be considered as a legitimate purpose, deserving of protection. Nevertheless, the Advocate General does not find, among the exceptions to the protection of private life stated in Data protection Directives, the possibility to compel internet service providers to disclose personal traffic data and to provide them to private persons in order to pursuit in civil proceedings the infringements of copyright. Nor in the Directive 95/46, neither in the Directive 2002/58 is there a legitimate cause to interfere in private life in the way *Promusicae* applied. She, particularly, analyses the relation between Article 13 Directive 95/46 and Article 15 Directive 2002/58 (both articles containing the list of exceptions referred to the protection of personal data) to conclude that this one, as the specific data protection law in telecommunications sector has chosen the exceptions applicable in this field and has not included the protection of rights and freedoms of others as one of these exceptions. This is the major point of

disagreement with the ECJ statement, even if there is a basic coincidence to declare that «*the authorities and courts of the Member States are not only required to interpret their national law in conformity with the Data Protection Directives, but also to ensure that they do not act on the basis of an interpretation of those directives which conflicts with the fundamental rights protected by the Community legal order or the other general principles of Community law*».[7]

In its judgement, the ECJ found that the communication of the names and addresses of users of KaZaA involves the transmission of personal data [8] and constitutes the processing of personal data within the meaning of the first paragraph of Article 2 of Directive 2002/58, read in conjunction with Article 2(b) of Directive 95/46. So, first of all, the ECJ determines if the legal framework formed by the Data protection Directives and the Directives on E-commerce and intellectual property compels Member States to enforce the duty to disclose personal data in civil proceedings to warranty the effective protection of intellectual property. Its analysis of secondary legislation on data protection concludes that the Member States are not precluded from laying down an obligation to disclose personal data in the context of civil proceedings, though they are not compelled to lay down such an obligation.[9] In second place, the ECJ infers from the E-commerce and intellectual property Directives that they do not contain an obligation for the member States to lay down an obligation to disclose personal data to be used in civil proceedings to protect the rights of holders of copyright.[10] Thirdly, it considers the exigencies issued from the articles 17.2 and 47 of the Charter that the national Judge alleged. Since the fundamental right to property, that includes the right to copyright, and the fundamental right to effective judicial protection have been declared general principles of Community law, the ECJ examines if they would be violated by an interpretation of the Directives on E-commerce and intellectual property, that would not oblige the Member States to lay down the obligation to communicate personal data to ensure the protection of the right to copyright in civil proceedings. Doing so, the ECJ comes to the essential question in the national process, this is, the conflict between the fundamental rights and the necessary conciliation of the different interests protected. As the ECJ remembers, it is necessary to take care of, not only the right to property and the right to effective judicial protection, but also the right to data protection, as part of the fundamental right to privacy. The Directive 2002/58 is the specific norm that protects the privacy in the telecommunications sector, directly related to the articles 7 and 8 of the Charter which recognises the right to privacy and the right to data protection, being Article 8 of the Charter a transcript of article 8 of the ECHR. But the way to make possible the conciliation of both protected spheres is the Gordian knot that must be cut to solve the problem raised by the national judge. According to the ECJ, the mechanisms to find the fair balance are contained, first, in the Directive 2002/58, the specific protective norm of private life in the field of electronic communications, and also in the E-commerce and intellectual property Directives. Secondly, these mechanisms are contained in the measures for implementation and application adopted by the Member States that must respect the rights protected by the Community law and the other general principles of Community law, such as the principle of proportionality.

The *Promusicae* judgement confirms the relevance to Community law of the fundamental rights, whose balancing becomes a singular principle of interpreting European and national law. These balancing requirements, together with the other principles of European Law, such as the principle of proportionality, are clearly and strongly stated in the *Promusicae* case.[11] Member States must take special care to protect this balance

when adopting national rules to implement Community law, as well as measures to carry out their related obligations, but further more there are no concrete recommendations from the ECJ to accomplish this difficult task. The *Promusicae* judgement goes on with the ECJ traditional case-law about the fundamental rights at the European Union and reaffirms their enhanced force, lack of a binding real catalogue. Nevertheless, admitting the possibility of attempts to personal data and thus, to private life, the ECJ brings into existence an instrument whose danger we can not ignore. The legitimate cause for these attempts would be the rights of others but the limits for these interventions or the kind of rights that would give way to these interferences are not defined by the ECJ. We could consider that only other fundamental rights can justify the attempt to personal data but the ECJ dose not specify or concretise.[12] As a result, an uncertainty remains that could be avoided by the reference made to the principle of proportionality which links to the rich ECJ case-law in the field of fundamental rights.[13] However, it doesn't lighten the immanent difficulty for every measure channelled to give satisfaction to a conflict of rights. The ECJ does not give precisions to illustrate how Member States must reach, in the practice, a fair balance between the right to copyright and the right to privacy, specifically the right to protection of personal data. If it meant that Member States should have included additional exceptions to the Directive 2002/58 to allow the eventual communication of personal data in civil proceedings, there is no indication about it or about the situation of States, like Spain, that have made a literal transposition of this Directive.[14] Finally, it must be considered that the exigency of foreseeability of any limits to the fundamental rights is fixed for data protection in the criterion of purpose limitation. The data can only be collected for the specified and legitimate purposes,[15] and loyally processed in a way compatible with those purposes. This exigency prevents from processing personal data to attain any other objective.

References

1. Samuel-D. WARREN, Louis-D. BRANDEIS, *The right to Privacy*, HLR, 1890, n 4.
2. Antonio PEREZ LUÑO, *Derechos humanos, Estado de Derecho y Constitución*, Tecnos, 6ª ed. Madrid, 1999.
3. Christopher KUNER, «Data Protection and Rights. Protection on the Internet: The Promusicae Judgment of the European Court of Justice», *European Intellectual Property Review*, Issue 5, 2008, Thomson/Sweet & Maxwell Limited, London.
4. Carlos RUIZ MIGUEL, *La configuración constitucional del derecho a la intimidad*, España, Universidad Complutense de Madrid, 2005.
5. Anthony DAWES, «Droit de la propriété intellectuelle ("Promusicae"). Arrêt du 29 janvier 2008, affaire C275/06», *Revue du droit de l'Union Européenne*, nº 2, 2008.

Notes

1. Samuel-D. WARREN, Louis-D. BRANDEIS, *The right to Privacy*, HLR, 1890, n 4, p. 195. These authors are considered to have set the «*bases técnico-jurídicas de la noción de privacy*» which is configured as a right to loneliness or «*to be let alone*», though the roots of this individual private sphere claim date back to the emergence of bourgeoisie, as an aspiration of this new social class to accede to a noblesse privilege. Antonio PEREZ LUÑO, *Derechos humanos, Estado de Derecho y Constitución*, Tecnos, 6ª ed. Madrid, 1999, pp. 321-323.
2. In Spain, for instance, the Organic Law 15/1999 of 13 December, on the

Protection of Personal Data states in Article 6. «Consent of the data subject*:* 1. Processing of personal data shall require the unambiguous consent of the data subject, unless laid down otherwise by law». The Charter of Fundamental Rights of the European Union enshrines the right to the protection of personal data: «Article 7 Respect for private and family life. Everyone has the right to respect for his or her private and family life, home and communications. Article 8. Protection of personal data 1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority.»

3. European Court of Justice, *C-275/06* , *Promusicae vs. Telefónica* , 29 January 2008, *Official Journal C* 64, 08.03.2008, p.9.
4. Paragraphs 29-34 of the English version of the Judgement.
5. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market («Directive on electronic commerce») O.J. nº L 178 of 17.7.2000. Directive 2001/29 of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *O.J.* L 167/10, of 22.06.2001. Directive 2004/48 of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, *O.J.* L 157/45, of 30.04.2004. Hereafter, we will refer together as the E-commerce and intellectual property Directives.
6. 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, O. J. L 281/31 of 23.11.95. Directive 2002/58/EC of the European Parliament and of the Council, of 12 July 2002, concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), O.J. nº L 201/37, of 31.07.2002. We will call them together the Data protection Directives.
7. Paragraph 56 of the Opinion of Advocate General. The ECJ use almost the same wording «*…the Member States must, when transposing the directives mentioned above, take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, 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 (see, to that effect, Lindqvist, paragraph 87, and Case C-305/05 Ordre des barreaux francophones et germanophone and Others [2007] ECR I-0000, paragraph 28).»* Paragraph 68 of the English version of the Judgement.
8. This is, «*information relating to identified or identifiable natural*

persons, in accordance with the definition in Article 2(a) of Directive 95/46» as was already defined in Case C-101/01 *Lindqvist* [2003] ECR I-12971, (paragraph 24). Paragraph 45 of the English version of the Judgement.

9. Paragraphs 53 and 54 of the English version of the Judgement.
10. This obligation can not either be based on the Agreement on Trade-Related Aspects Of Intellectual Property Rights (TRIPS), Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, in the light of which must be interpreted Community law «as far as possible» if it regulates a field where TRIPS are applicable. Paragraph 60 of the English version of the Judgement.
11. Christopher KUNER, «Data Protection and Rights. Protection on the Internet: The Promusicae Judgment of the European Court of Justice», *European Intellectual Property Review*, Issue 5, 2008, Thomson/Sweet & Maxwell Limited, London p. 201
12. We refer to the possibility to apply in the telecommunications sector of article 13, 1. g) of Directive 95/46, this is, the exception that admits the attempts to the privacy in order to protect the rights and freedoms of other persons. The phrasing of article 13.1.g) is very similar to article 8.2 of the ECHR that admits the interferences in private and family life for the protection of the rights and freedoms of others. As a limit let to the appreciation of States, and without an insurmountable limit in the case-law of the European Court of Human Rights, it could be acceptable to think about interferences in any aspect of private life, if the States argue serious reasons. Carlos RUIZ MIGUEL, *La configuración constitucional del derecho a la intimidad*, España, Universidad Complutense de Madrid, 2005, p. 142.
13. ECJ Allué II, joined cases C259/91, C-331/91 and C-332/91, 2.08.1993 [1993] ECR I-4309; Baumbast, C-413/99, 17.09.2002 [2002] E.C.R. I-7091; Oteiza Olazábal, C-100/01, 26.11.2002 [2002] ECR I-10981. The measures must be necessary (inexistence of other measures less serious for the fundamental rights), appropriated to attain the objective pursued and not to go beyond what is necessary to attain this objective (this is what some authors call proportionality itself and it means that the sacrifice of fundamental rights must not be excessive with regard to the seriousness of facts and the existing suspicions). These are the requirements to be used to judge «*la finalidad de la intervención estatal y su repercusión sobre los intereses tutelados por el Derecho comunitario*», BARNES, J., «Introducción al principio de proporcionalidad en el derecho comparado y comunitario», *Revista de Administración Pública*, núm. 135, septiembre – diciembre 1994, pp. 495-535, especially, pp. 516-529.
14. Anthony DAWES, «Droit de la propriété intellectuelle ("Promusicae"). Arrêt du 29 janvier 2008, affaire C275/06», *Revue du droit de l'Union Européenne*, nº 2, 2008, p. 377. See also L. GONZALEZ VAQUE, «El TJCE se pronuncia sobre la obligación de comunicar datos personales a fin de garantizar la protección de los derechos de autor en un procedimiento civil: la sentencia "Promusicae"», *Unión Europea Aranzadi*, vol. 35, nº 5, 2008, pp. 5-14. The author emphasizes that the ways to give form to this «… equilibrio inestable pueden ser problemáticas… y desarmonizadas».
15. That is what stresses the article 8.2 of the Charter.