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Data Protection:

Has it gotten better or even worse in the fight against piracy?

September 4, 2020
Conférence "Stop Piracy", Neuchâtel
David Rosenthal, Partner, VISCHER

Version 1.01

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Urteilskopf

136 II 508

47. Auszug aus dem Urteil der I. öffentlich-rechtlichen Abteilung i.S. Eidgenössischer Da
und Öffentlichkeitsbeauftragter (EDÖB) gegen Logistep AG (Beschwerde in öffentlich-rec
Angelegenheiten)
1C_285/2009 vom 8. Septembe

Regeste

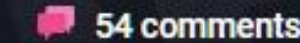
Art. 82 ff. BGG, Art. 3 lit. a, Art.
Persönlichkeitsverletzung durch d
Eine Empfehlung des EDÖB im
rechtliche Angelegenheit im Sinne
Voraussetzungen, unter denen I
qualifizieren sind (E. 3).
Ist das Sammeln von Daten übe
die Grundsätze der Zweckbindung
Trotz ihres Wortlauts sind in der
Rechtfertigungsgründe nicht ausg
Zurückhaltung (E. 5).
Die von der Beschwerdegegneri
kann nicht durch überwiegende p

Bundesgerichtse
Logistep AG

(Letzte Änderung 08.09.2010)

Bern, 08.09.2010 - Der EDÖB begrü
Sachen Logistep. Das Bundesgerich
praktisch vollumfänglich gefolgt und setzt damit ein Zeichen gegen die auch in anderen Bereichen erkennbare Tendenz von Privaten, Aufgaben an sich zu ziehen, die klar dem Rechtsstaat obliegen.

How an Anti-Piracy Firm Became Banned In Its Own Country

September 9, 2010 by **Andy Maxwell**  **54 comments**

HOME > ALL >

A notorious Switzerland-based anti-piracy tracking company has to stop harvesting the IP addresses of citizens using P2P networks. The Swiss High Court ruled that IP addresses constitute personal information and when Logistep collected them without the owner's knowledge, that amounted to a breach of privacy laws. From its eDonkey Razorback beginnings, via France through to yesterday's conclusion, here is the full story.

The road to curtailing the Swiss activities of Logistep has been a long one and although it ended in Switzerland, the complaints began in France.

Sources: bger.ch, admin.ch, torrentfreak.com

The Problem

- Online pirates were **tracked down** by recording their IP address
  - IP addresses were passed to the prosecutor to identify the subscriber by using the act on lawful interception (BÜPF)
  - By not tracking the data subjects transparently (i.e. they could not notice that they were tracked and for which purpose), their personality was violated
  - According to the Federal Tribunal, the violation was not justified; the interest of the copyright holder was not considered overriding
- Given that the recording of the IP address was **unlawful under the Swiss Data Protection Act** ("DPA"), the information could not be relied on for the criminal procedure
- In my view: a clear **misjudgement** (cf. Jusletter, September 27, 2010)

A Primer on Swiss Data Protection

- Unlike under the GDPR, there is **no obligation to have consent** or a legal basis for processing personal data in the private sector
- **Key rules:** Fairness, transparency, purpose of use limitations, proportionality, correctness, data security, keep exports safe
- Data subjects may **object** to the processing ("opt-out")
- If the principles are breached, a data subject objects or sensitive data is passed to a third party **a justification is required**
  - Consent, overriding private/public interest, a basis in Swiss law
- **Revision of DPA:** Basic concept remains, additional measures
  - Inventory of processing, stricter information requirements, data breach notifications, impact assessment, processor contracts
  - Data subject rights: Access, correction, objection, portability (new)

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Copyright Act **231.1**

Title 5*a*[102]
Processing of Personal Data for the purpose of Filing a Criminal Complaint or Reporting a Criminal Offence

Art. 77*i*

[1] The rights holders whose copyright or related rights are infringed may process personal data insofar as this is essential for the purpose of filing a criminal complaint or reporting a criminal offence and they may lawfully access the data. They are also permitted to use this data for asserting civil claims to be joined to the criminal proceedings, or for asserting claims after the conclusion of criminal proceedings.

[2] They must disclose the purpose of the data processing, the type of data processed and the scope of the data processing.

[3] They may not link the personal data under paragraph 1 with data collected for other purposes.

Problem solved?

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The Swiss Solution

- With the revision of the Copyright Act ("CA"), the **new article 77i** was introduced on April 1, 2020
- It provides a "legal basis" for processing personal data about copyright infringers, subject to four conditions being met:
  - The personal data is processed **by the rights holders** affected
  - The processing and personal data has to be **necessary** for pursuing a criminal procedure
  - They have accessed the personal data **lawfully**
  - Purpose/scope of processing and categories of data are **disclosed**
- Data may be used also for pursuing civil claims as part of a criminal procedure or thereafter
- Data may not be linked with data collected for other purposes

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Questions & Answers

- Is this a **"lex specialis"** that leaves no room for other grounds of justification pursuant to the DPA?
  - **No!**
  - Art. 77i CA is (just) **an additional legal basis** for processing data
    - Pursuing copyright claims was found not be an overriding private interest in the Logistep case
    - The provision was meant to "clarify" the situation following Logistep, but the "processing of personal data is governed by the rules of the DPA"
  - Hence, if the prerequisites of art. 77i CA are met, the processing is justified "by law" pursuant to art. 13 para. 1 DPA
    - No balancing of interest is necessary anymore (≠ art. 13 para. 2 DPA)
  - Resorting to an overriding private or public interest pursuant to art. 13 para. 1 DPA is not excluded by art. 77i CA
    - Thus, art. 77i CA **does not prohibit the processing** of personal data

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Questions & Answers

- What does **"lawfully"** mean? Is this a circular reference to the DPA?
  - **No!**
  - Data may not be obtained in breach of other Swiss law
    - E.g., art. 143bis Swiss Criminal Code ("Hacking")
  - Same concept as in art. 4 para. 1 DPA
    - "Personal data may be processed only lawfully."
    - Refers to provisions of Swiss law (other than the DPA) that directly or indirectly intend to protect the personality of data subjects (DFAT A-3548/2018, 5.4.4)
  - Hence, scanning the Internet is permissible

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Questions & Answers

- Can **only rights holders** rely on the new provision?
  - **Yes**, in principle
  - A rights holder may delegate the processing to a third party processor (art. 10a DPA/art. 8 revDPA)
  - But does art. 77i CA also cover transfers to other controllers?
    - A service provider is no longer considered a processors but a controller if it, alone or with its customer, decides on the purpose or essential means of the data processing
    - Lawyers are typically considered (joint-)controllers with their clients
    - It is clear that lawyers must be covered by the provision
  - Hence, the provision will likely be **interpreted broadly**
    - Transfers to other controllers are likely to be permitted as long as they process the personal data *only for the purposes* of rights holders as per art. 77i CA

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Questions & Answers

- How are the **disclosure obligations** to be complied with?
  - This requirement seems to make no sense: Had Logistep complied with para. 2, there would have been no problem in the first place
  - Hence, it has to be **interpreted broadly** – putting a notice on the rights holder's website appears to be sufficient according to the Federal Council …
    - In reality, the requirement will depend on the practical ability to inform
  - Under the revised DPA, a new and broader information obligation will be introduced (art. 17 revDPA)
    - However, due on an exception (art. 18 para. 1 let. b revDPA), no additional information will be required within the scope of art. 77i CA
    - In all other cases: Holding back information is also permitted insofar informing defeats the purpose (art. 18 para. 3 let. b revDPA)

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Questions & Answers

- What is **"necessary"** for the purpose of filing for a criminal action?
  - The provision only applies to personal data that is provided to the criminal authorities, not other data collected during the investigation
    - Such other data may eventually not cause any problem because it (i) may not be personal data, (ii) its processing may not require justification or (iii) its processing may be justified on other grounds
  - Can it be reasonably argued that providing the data is necessary to **convince** them to take action or **enable** them to do so?
    - Not relevant: Whether the criminal authorities ultimately rely on it
    - Comparable to art. 6 para. 2 let. d DPA (the wording of which is stricter!)
    - Personal data may relate to third parties, not only the perpetrator
  - The provision only applies to **processing activities** insofar the occur for the purposes of para. 1 (criminal action, civil claims)

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Questions & Answers

- What is the meaning of the "prohibition" to **link with other data** collected?
  - Not a prerequisite for relying on art. 77i CA
    - If it were a prerequisite, it would only be effective until the data were handed to the criminal authorities, which makes no sense
  - It **limits the scope** of the justification provided for by art. 77i CA
    - Limited to purposes in para. 1: criminal proceedings, related civil claims
    - Given that there is no remedy, this is the reasonable interpretation
    - It is accepted that different purposes may rely on different justifications
    - It does not prohibit collecting, linking and otherwise processing the same and additional personal data on the basis of *other* justifications
    - The Federal Council's example on market research is misguided: Art. 13 para. 2 let. e DPA says that research provides for an overriding interest ...
    - Of course, right holders can continue filing criminal complaints without relying on art. 77i CA

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Problem solved?

- **Partly**, because art. 77i CA does provide additional leeway in collecting personal data covertly for anti-piracy purposes
  - The provision does not only apply to the Internet/"Logistep"
    - It can be relied on for any type of collection or processing of personal data that may otherwise represent a problem under the DPA
    - E.g., surveillance by a private detective, "right to be forgotten"
  - Transparency is still required, but a website notice seems to be sufficient at least according to the Federal Council …
    - We will see whether the revised DPA provides a similar level of comfort
- It does not solve the problem that the "Logistep" use case has become **largely irrelevant** …
  - P2P networks have been superseded by portals and sharehosters
  - It is getting increasingly difficult to identify actors due to Whois restrictions and anonymization services

A proposal for discussion ...

- Boost the intelligence by creating a **joint database** about the relevant players the piracy scene
  - International consumer goods companies already do so to identify and combat counterfeiters of their products
  - Efforts to identify the individuals behind known nicknames using social media sources, etc. exist, but are not coordinated and pooled
- Consolidate the information in a central database **operated in Switzerland under Swiss law**
  - Controlled by an association in Switzerland, with full transparency
  - Operated only for right holders whose rights are infringed (→ art. 77i CA)
  - Task of identifying individuals that actively share pirated content online solely for the purpose of filing for criminal action (→ art. 77i CA)
  - The DPA may allow for such a database even without relying on art. 77i CA
  - The GDPR may also be applicable (Art. 3 para. 2 let. b), but the database will likely be protected against cross-border enforcement from the EEA

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Thank you!

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