websites after the viewer clicks, and automatic (or "inline") links which cause images to be displayed on the third-party website as soon as the website is accessed, involving no action by the user. In the Advocate General's view, automatic links, from a technical and functional point of view, amount to an act of communication to the public of copyright works not taken into account by the copyright holder when the works would have initially been made available. The CJEU deals with framing, whether by means of a clickable link or an inline link, as a single concept which appears to have been dealt with in *Svensson* and *BestWater*.

True Vision Productions Ltd v Information Commissioner—Unfair Processing of Sensitive Personal Data Obtained During the Making of a Channel 4 Documentary

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LT Adequate relevant and not excessive data; CCTV; Fair and lawful processing; Journalism; Monetary penalty notices; Special purposes exemption; Television

On 8 January 2021, Jacobs J, sitting in the First-Tier Tribunal, reduced from £120,000 to £20,000 the monetary penalty notice imposed by the UK Information Commissioner (the ICO) on TV production company, True Vision Productions (TVP). The judge held that issuing a notice was appropriate to penalise TVP for the unfair processing of sensitive personal data obtained during the making of its Channel 4 documentary on stillbirths.[1] The judge further held that while the special purposes exemption for journalism under the Data Protection Act 1998 (the DPA 1998) s.32 applied to exempt TVP from the requirement to get explicit consent from the mothers, he agreed with the Commissioner that it did not apply to the processing of data. It was not reasonable, he said, for TVP to believe that collecting the data required could only be achieved in a way that was incompatible with the data protection principle of fairness. Hand-held cameras could reasonably have been used instead of CCTV and would have prevented recording taking place without the mothers being aware of it.

Background

The television production company, TVP, and Brian Woods, one of the directors, have a track record of investigating and making sensitive films about social justice issues. They have won various awards testifying to their quality and reputation.

In April 2019, however, TVP was issued with a monetary penalty notice by the ICO imposing a fine of £120,000 in relation to audio and video recording, using CCTV cameras and microphones, in the maternity clinic at Addenbrooke's Hospital between 24 July 2017 and 29 November 2017. The recording at the clinic was undertaken in preparation for the making of a Channel 4 observational documentary called *Child of Mine*, following the experience and aftermath of stillbirths with the aim of raising awareness of stillbirths. The principal, if not the sole, purpose of the recording was to "capture the moment of diagnosis when the mother learned that her baby had died".

Three of the four examination rooms in the clinic were fitted with CCTV cameras and microphones. However, there was no facility to switch the recording on and off. The one examination room not fitted with cameras, was available for any patient who noticed the recording and objected to its use. The clinicians insisted that they would not be involved in handing out notices about the recording taking place or otherwise informing the patients, therefore the only means by which patients could be alerted to the fact they would be filmed in the examination rooms, were by various notices which were displayed around the hospital.

There were three types of notice relating to the filming in the hospital:

- notices about filming, which related specifically to hand-held cameras;
- a general letter which was available in the clinic waiting room and elsewhere, but which was written before the final decisions were made about filming in the examination rooms; and
- notices placed next to the CCTV cameras in the examination rooms.

Once a recording was made, no one had access to it without the patient's consent. Any recording that was not accessed was automatically deleted after 72 hours.

Circumstances of the filming

Basing his findings on probabilities rather than direct evidence, the judge considered that anyone in the mental state of the women attending the clinic would pay little attention to CCTV cameras, which are "so ubiquitous

[1] *True Vision Productions Ltd v Information Commissioner* EA/2019/0170 (12 January 2021).

nowadays". While the notices were obvious, the judge considered that mothers would most likely associate the cameras with safety and security and would have little interest in reading the letters and notices, particularly as "the thought that would be uppermost in their minds would be the safety of their unborn child". Further, the judge considered that anyone who did read all the notices, written at different times, for different purposes, would probably have been more confused than enlightened. As such, he considered the notices, individually and collectively, were insufficient to allow him to find that the mothers were sufficiently alerted to what was happening such that they could be taken as consenting.

Jacobs J also observed that, while Mr Woods was concerned throughout with the mothers' privacy in a general sense and with their welfare, he did not understand that the making of the recordings, their retention and finally their erasure were all acts of processing data that had to comply with the DPA 1998.

Decision

How s.32 applies

The question was whether, in these circumstances, the personal data processed by TVP was exempt under the journalism exception in the DPA 1998 s.32.

The contents of the recordings were both personal data and sensitive personal data and such data was processed insofar as it was recorded in the first place, then retained, and finally erased. The judge accepted that *Child of Mine* constituted journalistic material and, acknowledging that it is not the function of the tribunal to "act as an arbiter of good taste", accepted that s.32 applied to data collected to capture the moment of diagnosis. The exemption only applies, however, if the data controller reasonably believes that publication would be in the public interest (s.32(1)(b)) and reasonably believes that, in all the circumstances, compliance with the data protection principles, for example complying with the principle of fair and transparent processing (amongst others), is incompatible with the special purpose of journalism (s.32(1)(c)).

On the question of public interest, the judge accepted that Mr Woods actually believed that broadcasting *Child of Mine* was in the public interest and stated that it was "self-evident, and not in dispute, that that belief was reasonably held".

The judge also accepted that Mr Woods formed a belief for the purposes of s.32(1)(c) since he had privacy in mind and, having addressed his mind to the correct issues, considered it impossible to comply with the data protection principles without referring to, or hinting at, the real purpose of the recording. However, the conclusion the judge reached in relation to whether that belief was reasonable is less clear cut.

In relation to obtaining consent, explicit or otherwise, to the data processing, the judge considered that the belief Mr Woods formed for the purposes of s.32(1)(c) was reasonable, as for practical purposes TVP was up against an "insuperable problem". It was impossible to provide a mother, in compliance with data protection principles, with the necessary information for her to give consent without hinting at the real purpose of the recording and alerting her to the possibility of a stillbirth. The judge said that the more general the information given, the less informative it would have been for the mothers, while the more specific the information, the more misleading it would have become by omitting the purpose of the recording. This was backed up by advice from the clinicians, which supported TVP's belief that it was in the best interests of the mothers for TVP not to obtain consent for filming as it would make them aware that they were having a stillbirth.

However, the judge considered that the belief was not reasonable in relation to the requirement that data be processed fairly by reference to the method of data collection. He considered that for the purposes of s.32(1)(c), it was unreasonable for TVP to believe that its journalistic purposes in relation to data processing, could not be met in compliance with the data protection provisions. Taking care not to override TVP's editorial judgment in relation to the data sought for the programme, the judge considered that the use of hand-held cameras would at least have made every mother aware that she was being filmed and her voice recorded. The judge considered that this was a modest, practical and reasonable alternative, which would have prevented the collection and retention of data without a mother being aware that it was taking place. The judge clearly recognised the need to allow production companies such as TVP the freedom to define the subject and contents of the programme and to decide what data to collect and the method of collection. However, this did not stop him from reaching the conclusion that the use of CCTV cameras in the examination rooms was incompatible with the principle of fairness and a breach of data protection law.

It was a mistake, he said, to concentrate on the data that would be used in the programme without also taking into account the comparatively much larger amount of data that would never be used. This, he said, was where Mr Woods' thinking went wrong—he did not realise that he was processing data that would not be used: "he saw that data as incidental. He was right that it was incidental to his project, but it was not incidental to the Data Protection Act".

Monetary penalty

Having found, like the ICO, that there was a breach of the DPA 1998, the judge also agreed with the ICO that the breach was significant. It demonstrated a failure by Mr Woods and TVP to appreciate that what they were doing was governed by legislation, although Mr Woods

"knew it existed". It also involved intimate data about women that was collected and retained when they were distracted and in a vulnerable state.

Urged by TVP's counsel to take into account the company's financial position and the effects of the pandemic, the judge fixed the penalty at £20,000 based on the serious nature of the breach and mitigating factors. He also took into account the fact that Mr Woods never realised that data protection legislation applied to what he was doing. That, however, was a doubled-edged sword in that while the breach was not deliberate, Mr Woods should have been aware of those responsibilities, particularly as he has made numerous documentaries while the DPA 1998 had been in force. The judge also acknowledged that Mr Woods acted at all times in what he believed to be the best interests of the mothers and that he took steps, albeit ineffective, to alert them to the filming.

Comment

In this case, Jacobs J had the unenviable task of striking a balance between recognising the need for production companies to have editorial freedom to make the programmes they want to make, while not allowing them to do so in a way that breaches data protection law principles. The judge intended the penalty to have a "salutary effect in the industry to raise awareness of the full scope of data protection law". The decision is likely to do just that, as it provides a clear warning to production companies: ignorance of data protection law and relying on the journalism exemption will not absolve you of your basic responsibilities under, now, the DPA 2018, no matter how high the level of public interest in the "publication" of the journalistic material. These responsibilities include, processing only data that is necessary for the particular purpose and doing so in the fairest manner reasonably possible. Furthermore, the judge's criticism of Mr Woods' blinkered focus on the data that would actually end up being used in *Child of Mine*, and his failure to take into account the "overwhelming majority" of data that would never be used, provides a cautionary tale to production companies. Such companies need to be aware that data protection law applies to all of the data collected with a view to publication, not just the comparatively small portion of data that typically ends up actually being used in the programmes they create.

Despite considering the exemption under the DPA 1998, the analysis set out in this judgment remains of significance as the provisions have largely been replicated in the DPA 2018 Sch.2 Pt 5 para.26. Jacobs J was, however, careful to make clear that this decision is binding only on the parties to this particular case and reiterated that it is not within the tribunal's remit to provide guidance on legal issues. In summary, production companies should take note of this judgment as there is a clear message: rely on the special purposes exemption for journalism with care—it is not, he said, a "get-out-of-jail-free card". When undertaking a project of such sensitivity, production companies should seek advice on the fairness and transparency of the proposed method of collecting personal data to avoid falling foul of data protection principles.

Music Piracy Blocking Cases Tackle Cyberlockers and Stream Ripping Services

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Applications software; Blocking injunctions; Copyright works; Internet service providers; Music industry; Online infringement; Streaming media

Major and independent record company members of BPI (British Recorded Music Industry) Ltd and Phonographic Performance Ltd (PPL) have obtained two further blocking injunctions requiring the six major UK internet service providers (ISPs) to impede access to services that promote and enable music piracy.[1] The orders were granted pursuant to the Copyright, Designs and Patents Act 1988 (CDPA) s.97A and the Senior Courts Act 1981 (SCA) s.37(1).

These orders further exemplify how intermediary injunctions can be developed to address a range of services operating in the piracy ecosystem. In particular, the decisions confirm that cyberlockers and stream ripping services can be susceptible to blocking by ISPs based on principles that are now well-established under UK law. The court was prepared to grant the orders notwithstanding the Advocate General's Opinion in *YouTube/Cyando*[2] and the pending CJEU judgment in that case.

Background

The applications issued by the record companies targeted a major cyberlocker, "Nitroflare" (in *Capitol Records*) and a number of stream ripping sites, including two of the largest, "FLVto" and "2Conv" (in *Young Turks Recordings*). The choice of targets is reflective of the piracy services that currently most threaten the music industry. As noted by BPI:

> "Stream ripping and cyberlockers are the music industry's current biggest piracy threats. They are responsible for part of the £200 million a year that

[1] *Capitol Records v British Telecommunications Plc* [2021] EWHC 409 (Ch); *Young Turks Recordings Ltd v British Telecommunications Plc* [2021] EWHC 410 (Ch).
[2] *Peterson v Google LLC and Elsevier Inc v Cyando AG* (C-682/18 and C-693/18) EU:C:2020:586; [2020] E.C.D.R. 16.