

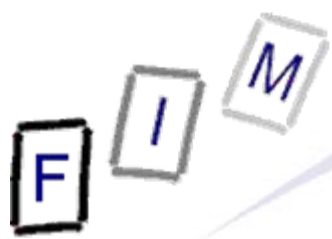


# Exemplary Privacy Cases

## Computer forensics

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# Agenda

- EU privacy cases
  - Bodil Lindqvist
  - Promusicae
- What to do:
  - General presentation
  - Discussion
  - Read decision



- Miss Lindqvist works as a cleaning lady and in a church
- After a computer course she installed a homepage to inform all the church members on current events
  - She initiated a link from Swedish church homepage to hers
- Content of the homepage
  - » About her and 18 work colleagues from the parish
  - Complete name or only christian name
  - Employment or hobbies
  - Sometimes the family situation (married, ...)
  - Partly the telephone number
  - For some persons further information
  - One co-worker: She hurt her leg and is partially on sick leave
- There is no consent by these persons
  - After some complaints the pages were removed immediately



- The public prosecutor started proceedings because of
  - Automated processing of personal data without previous notification of the "Datainspektion"
    - » Datainspektion = The Swedish privacy commission
  - Processing sensible data without prior permission
    - » Collecting and putting it in the webpage, publishing the webpage on a webserver
  - Export of personal data to third countries without permission
    - » I.e., publishing on the Internet (accessible from everywhere)
- First instance: Penalty of  $\approx$  € 450,-



- What the Swedish supreme court asked the ECJ:
  - Is mentioning the name of a person on a webpage a privacy matter? Is this "automated processing of personal data"?
  - Is mentioning a leg injury/sick leave medical (=sensible)data?
  - Is publishing on the Internet a transmission abroad?
    - Swedish person put Swedish data on a Swedish server
      - » Is it important whether some foreign person accessed it?
      - » Is it important where the server is located?
  - Are the directive restrictions compatible with the ECHR?
  - Can a country institute more stringent protection laws?
- Note:
  - The facts are undisputed
  - What is at issue is solely their legal evaluation!



- What exactly is personal data?
  - Where is the delineation to anonymous data?
  - What of the data listed is "personal data"?
- What about purely personal data processing?
  - What is it? Is it applicable here?
- When is data processing "automated"?
- What is data "concerning health"?
  - Is this to be seen narrowly or extensively?
- When a web server is accessed from other countries, how does this happen technically?
  - How technically exports the data?
  - What is a physical comparison to this?



# Bodil Lindqvist: Aspects to consider

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- The EU is not (yet) member of the ECHR
  - What about those rules? Are they applicable?
- What is "harmonization"?
  - Does this mean that all countries must do the same?
  - What's the difference between "directive" and "regulation"?
  - Define the scope of the directive with regard to national laws!



- Promusicae is a non-profit organisation of producers and publishers of musical and audiovisual recordings
- Applied for preliminary measures against Telefonica
  - **Telefonica: Huge telecom company, also an ISP**
- They asked for the identities and physical addresses of persons they provided Internet access to
  - **Only IP address and date/time of connection were known**
  - **Allegedly these persons used the KaZaA file exchange program and provided access to music where Promusicae owns the exploitation rights**
- The typical filesharing case: IP address is known, and identity needs to be obtained from the ISP for further civil legal proceedings against them





- Promusicae claims, these persons engage in unfair competition and infringe intellectual property rights
- Telefonica was unwilling to provide the information:
  - Authorisation for disclosure only in criminal proceedings
  - Privacy protection of their users
- Note: Telefonica does have the information and could provide it, if ordered to do so
  - They just think, that under Spanish law they are actually forbidden to provide it!
- Spanish law (Art. 12 para 3 Ley 34/2002 11.7.2002)

The data shall be retained for use in the context of a criminal investigation or to safeguard public security and national defence, and shall be made available to the courts or the public prosecutor at their request. Communication of the data to the forces of order shall be effected in accordance with the provisions of the rules on personal data protection.



- Does the community law because of [several IP directives] permit member states to limit the disclosure duty of traffic data to criminal proceedings?
  - I.e., **must** there be a possibility to obtain the identity of a person from an ISP for a **civil** case?
- Whether the storage of the information is in compliance with EC law (→ Telecom privacy directive!) is **not** an issue!
- Note: **All three** IP directives listed **explicitly** do **not affect** any privacy requirements!
  - There is no explicit requirement for civil proceedings
  - States must ensure "effective protection"
    - » How they do this is (in a wide range) their own decision!

**Actual question: Disclosure vs. privacy!**



# Promusicae: Aspects to consider

- "Privacy" is a fundamental right
  - But so is "property" (including intellectual one),
  - and also "effective judicial protection"!
- What to do when several fundamental rights collide?
  - Laws (directives) might provide guidance
  - What is the role of EC law in this area?
- If a directive leaves an area open → What must states do?
  - Can they do everything?
  - Can they do nothing?
  - How is their freedom curtailed?
- What does Art. 47 of TRIPS really say?
  - Promusicae explicitly relies on it!
  - How does this "act" come in and what is its legal value?



# Promusicae: Aspects to consider

- Providing personal data to a third party: Isn't this what Promusicae wants?
  - What are legal requirements for this?
  - Do they match (or what provision would match best)?
    - » Is there place for this in the light of Spanish law?
- What are the exceptions for processing traffic data in the telecommunications privacy directive?
  - What are the exceptions in Art 15 of the directive?
  - How do they compare with the general privacy directive?
  - What conclusion can be drawn from the difference?
  - Who could receive data then?
    - » Why is this?



- Very few court decisions on privacy on European level
  - More on national level, but also not too numerous
- Bodil Linqvist:
  - The Internet may be international, but putting data on it is no export → This can be problematic!
    - » Note: Publication rights are still required!
  - Personal data is to be seen extensively and in favour of the data subject in all aspects
- Promusicae:
  - Disclosure of personal data to third parties is severely restricted, but much more lenient towards the state
  - States can "modify" privacy, by providing rights on data
    - » But they need not → This is their own decision

F I M

# Questions?

Thank you for your attention!