

BizLawCentral: IP law: disclosing visitor logs

If you join up the dots, the internet just became a place where the US no longer fears to tread. And does a recent decision negate other countries' laws on data protection and rules of evidence?

US internet service providers, or ISPs, are required to maintain logs of all of those who visit sites hosted on their servers. Of course, this information is not only gathered because the law says so, it's gathered because the customers of those hosts want information about how many people visit, how they route through the site and which pages they visit most often.

Google is so big that its servers are larger and more powerful than the vast majority of ISPs. And the data they collect about their users is considerable.

YouTube is part of Google, and it is one of the world's most visited websites. We, for example are just outside the top one million sites, according to Alexa. YouTube and Google are each rarely out of the top five.

YouTube, for the three people on the planet who have never visited it, is a kind of bulletin board for video. The vast majority of its content is ego-driven rubbish or the modern equivalent of an Amsterdam night-window display or, and this is where the problems lie, clips from or in some cases entire films, TV programmes or other material in which someone other than the poster has intellectual property rights.

The media companies that own the material that is posted without authority are told that YouTube does not condone or sanction the publication on its site of material which is subject to third party rights. But, YouTube says, it is impossible for it to identify all possible infringements.

YouTube does remove offending material when rights are pointed out. One of the most interesting items on YouTube was a documentary produced by the UK's Channel 4 showing the difficulties facing the Colombian Attorney General's assistant who ran their anti-drug money laundering unit, and which demonstrated the deep inroads the drugs gangs and paramilitaries (which are largely the same) have made into the fabric of society and the hold it has over them. That programme, which someone split into six parts, has now been removed. The IP rights of its producers were clearly infringed. But if it was not for YouTube, the film would have received scant attention

outside one of the UK's secondary TV channels and PBS in the USA.

Producers are therefore in the same sort of dilemma as manufacturers of branded goods. In much of South East Asia, Von Dutch was an almost unknown brand until it started to appear in markets specialising in counterfeit goods. Then bags and shirts with the brand started to pop up everywhere. Within a very short time, the brand has become established with shops in for example Ocean Centre, Hong Kong specialising in their products. The counterfeit products established a brand faster than advertising and the traditional profile-building via counters in department stores could have done. And it did it without the company paying for it. Now, however, the company says it needs to clamp down on counterfeit product.

YouTube is similar: it is an excellent vehicle for promoting new things.

Basically, what the copyright holders want is simple: they want to control which of their output is on YouTube, and then they can place it into a "cool" environment - and do it at YouTube's expense. In short, a promotional channel that they don't have to pay for. PR to the max.

The US Courts don't look this far into the issue because there is no reason for them to do so.

YouTube's arguments are essentially the same as Google's in relation to content: the company argues, in essence, that it has a right to reproduce anything on the web unless the copyright holder expressly takes steps to prevent it. That turns copyright law on its head - but the US Courts, as always driven by the interests of big business, have so far agreed.

But in relation to film, tv and music rights, the established media has bigger muscle than upstarts Google. The result of this is simple: decisions are likely to swing in favour of the IP rights holder.

So yesterday saw a decision that moves in that direction - but in the cross-fire catches people who have committed no offence and have done nothing wrong.

In a case brought by Viacom, owners of MTV and Paramount, the Court has ordered that the complete log of every user who has ever watched any video on YouTube and, in particular, the

registration details of anyone who is a YouTube member.

Anyone with the necessary software installed on their computer (and that's most computer users) can watch YouTube videos without registration. But YouTube is populated with "members" who sign up in order to upload videos and to write comments. But since YouTube's purchase by Google, members of Google's sign-up services are also members of YouTube, even if they have never visited the site. The opposite side of that coin is that Viacom will also get details of Google users even if they have only logged on to YouTube and watched videos that do not infringe any third part of copyright.

This may be a curiously US decision - US courts do make some puzzling decisions. In other countries, Courts may reject an application for such broad information as a "fishing expedition" and one has a suspicion that the principles of discovery have been stretched because of the favour shown to the media industry.

But it has international repercussions: the order requires YouTube to release details of users - wherever in the world they are. Remembering that the US has virtually useless data protection laws, there is nothing to prevent Viacom transferring the data obtained outside the USA. And that opens the opportunity for cases to be brought all over the world. How non-US courts will view the admissibility of evidence produced as a result of a US Court Order will prove interesting. Will they look behind the making of the Order and decide whether it would be made in their own country?

In short, this decision may have the effect of producing a further globalisation of US law, and in particular undermining the rules of evidence and even data protection laws around the world.