

Know Your Enemy

In the new world of Web 2.0 amid the exponential growth of user-generated content, it has never been easier for disgruntled employees, investors or others with some sort of axe to grind to target the object of their disaffection by publishing damaging allegations online to a potential audience of millions. And with the wide availability of peer-to-peer file-sharing

protocols such as BitTorrent it is also all too easy for those unwilling to pay for their entertainment to copy and distribute music, movies, and computer games unlawfully.

The immediate problem facing copyright holders and those identified by defamatory publications who want to protect their rights is to identify the wrongdoer. Online defamers will often try to escape liability for defamation, breach of confidence and/or breach of employment covenants by hiding behind a cloak of

anonymity, and registering anonymous e-mail, social networking or bulletin board accounts, to disseminate their messages. However, while the names and other details used to register these accounts will almost invariably be fictitious, the IP address of the computer used to access the accounts will not be and will often be logged.

Similarly it is possible to identify the IP addresses used by file-sharers to access clients such as BitTorrent.

Invariably, citing data protection principles and contractual obligations of confidence, the operators of webmail, social networking and bulletin board services will resist voluntary disclosure of IP addresses, and ISPs will resist voluntarily disclosure of the names and physical addresses associated with those IP addresses. However, recently reported cases have confirmed that the court will be prepared to exercise its discretion and order such disclosure, provided certain criteria are met.

Jurisdiction

The basis for the court's jurisdiction is the House of Lords' decision of *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC133, in which Lord Reid described the principle as follows:

'... if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him

expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration'.

(1) *Totalise v Motley Fool*

So in *Totalise plc v The Motley Fool Ltd and Another* [2001] EMLR 750 Owen J was prepared to exercise the Court's discretion to order the operators of two Web site discussion boards to disclose all documents in their possession or control relating to the identity of an anonymous poster 'Z Dust' who had allegedly defamed the claimant ISP. In reaching his findings, the judge held that the *Norwich Pharmacal* principles were not restricted by the Data Protection Act 1998, bearing in mind the express exemption in s 35 which applies where disclosure of personal data is required by order of a court or where the disclosure is necessary for the purpose of or in connection with any legal proceedings.

The factors cited as relevant to the exercise of the judge's discretion were:

- the plainly defamatory content of the postings concerned
- the seriousness of the defamatory allegations (concerning solvency and managerial competence and integrity)
- the considerable threat posed to the claimant by the poster's concerted campaign against it, bearing in mind the potential size of the Internet audience



Andrew Tibber explores *Norwich Pharmacal* orders and their increasing relevance in helping claimants identify online wrongdoers

- the fact that the author was using the discussion board to hide his true identity
- the claimant had no other practical means of identifying the author.

At first instance Owen J awarded costs to the claimant, holding that the defendants should have complied with the claimant's request for voluntary disclosure rather than force the issue at court. The second defendant, Interactive Investor Ltd, appealed the costs decision and the Court of Appeal ([2002] 1 WLR 1233) agreed that Owen J had come to the wrong conclusion on costs. In a normal case, ruled Aldous LJ, 'the applicant should be ordered to pay the costs of the party making the disclosure including the costs of making the disclosure'. Circumstances requiring the court to make a different order did not include cases whether the party required to make the disclosure had a genuine doubt that the person seeking the disclosure was entitled to it.

Although the *Norwich Pharmacal* order itself was not under appeal, Aldous LJ expressed some concern that in exercising its discretion, the court should not act in a way incompatible with Articles 8 (Right to Privacy) and 10 (Freedom of Expression) of the European Convention on Human Rights. In particular the judge was concerned that such an exercise could be difficult in a *Norwich Pharmacal* application of this sort where the affected party concerned, ie Z Dust, was not before the court to argue against disclosure. The judge went on to suggest a procedure that might address such concerns, whereby prior to the making of an order, the Web site operator could tell the

individual concerned what was going on and offer to pass on in writing to the claimant and the court any worthwhile reason that individual wanted to advance for not having his identity disclosed.

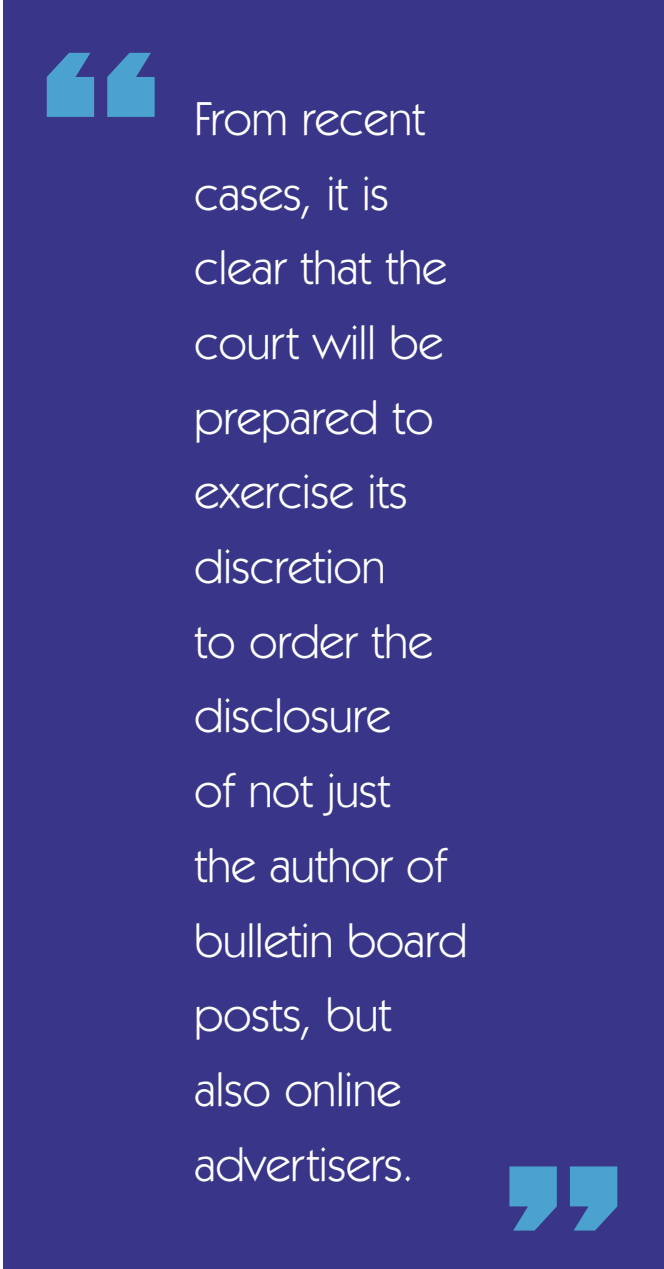
Aldous LJ went on to speculate that a court might refuse disclosure of the identity of a data subject whose attacks, though legally defamatory, were visibly the product of a deranged mind or were so obviously designed merely to insult as not to carry a realistic risk of doing the claimant quantifiable harm.

(2) Sheffield Wednesday FC Ltd and Others v Neil Hargreaves

In *Mitsui Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch) Mr Justice Lightman set out three conditions which had to be satisfied for the court to exercise the power to order *Norwich Pharmacal* relief:

- a wrong must have been carried out or arguably carried out by an ultimate wrongdoer
- there must be the need for an order to enable action to be brought against the ultimate wrongdoer
- the person against whom the order is sought must:
 - (a) be mixed up in the wrongdoing so as to have facilitated it; and
 - (b) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.

These conditions fell to be considered by Richard Parkes QC (sitting as a Deputy Judge) in the case of *Sheffield Wednesday FC Ltd and Others v Neil Hargreaves* [2007] EWHC 2375 (QB). Again the claimant was concerned to discover the identity of various individuals who had made



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allegedly defamatory postings to a discussion board hosted on the defendant's Web site for the benefit of fans of Sheffield Wednesday FC.

Unlike *Totalise v Motley Fool*, the seriousness of the defamatory allegations concerned was at issue. All of the postings were found to be at the very least arguably defamatory, so that condition 1 of the *Mitsui* conditions was held to be satisfied. (The judge was

prepared to readily accept that conditions 2 and 3 were also satisfied.)

However, when it came to the exercise of the court's discretion, the judge referred himself to the Court of Appeal's comments in *Totalise* and distinguished between those postings that bordered on the trivial, which were barely defamatory or little more than abusive or likely to be understood as jokes, and

those of a more serious nature which might be reasonably be understood to allege greed, selfishness, untrustworthiness and dishonest behaviour on the part of the club and its directors. While the judge was not prepared to make a *Norwich Pharmacal* order in respect of the postings in the former category, he was for those in the latter, holding that the claimants' entitlement to take action to protect their right to reputation outweighed the right of the authors to maintain their anonymity and to express themselves freely. The judge also noted as a relevant factor that the rules of the defendant's bulletin board prohibited the use of defamatory language. In this case, the judge did not feel constrained to order the defendant Web site to contact the data subjects concerned prior to the making of the order, as envisaged by Aldous LJ in *Totalise*.

Recent Developments

From recent cases, it is clear that the court will be prepared to exercise its discretion to order the disclosure of not just the author of bulletin board posts, but also online advertisers. In *Helen Grant v Google UK Limited* [2005] EWHC 3444 (Ch), it was sufficient for the court to make the order that Google (the publisher of the advertisement concerned, which linked to a website selling unauthorised copies of a yet to be published book) had become mixed up in the apparent wrongdoing of others (the advertisers) and was in a position to disclose the identity of those others.

And the case of *Nigel Smith v ADVFN plc and Others* [2008] EWHC 1797 (QB) reinforces the comments of the Court

of Appeal in *Totalise* and Richard Parkes QC in *Sheffield Wednesday* that the nature of the defamatory allegations concerned is a relevant fact to consider when the court decides how to exercise its discretion.

In *Smith*, the claimant had already obtained a number of *Norwich Pharmacal* orders against the defendant financial bulletin board operator to disclose the identity of anonymous posters, and a total of 37 claims had been issued with more threatened by the aggrieved claimant. It fell to Eady J to decide whether to uphold a decision of the Senior Master to stay the existing claims from proceeding, and any new stays from being issued.

Of particular note are the judge's comments on the nature of bulletin board communications. Eady J held that these were 'rather like contributions to a casual conversation' and were more like slander than libel, people tending to 'read the remarks, make their own contributions if they feel inclined, and think no more about it.' From this finding, the judge went on to conclude that remarks on bulletin boards are often not intended, or to be taken, as serious, and were more often 'mere vulgar abuse' than intended to be taken literally or seriously.

This finding contributed to the judge's decision to uphold the stays on the proceedings, but it can be inferred from the decision that if the matter had fallen to him, he may well not have made some of the *Norwich Pharmacal* orders against the Web site operator in the first place.

Finally, from recent press reports, it appears that the computer games industry has

started an aggressive fightback against filesharing in the UK, using the *Norwich Pharmacal* jurisdiction to identify thousands of filesharers.

One such order against nine UK ISPs has been published on the Web site of Digiprotect Gesellschaft Zum Schutze Digitale Medien GmbH, a German firm used by the rights holders to identify the IP addresses in the first place. According to the order, made by Chief Master Winegarten on 30 June 2008, disclosure was justified by virtue of the fact there was:

'a prima facie case that each of the subscribers associated with the IP addresses listed in Schedule 1 to this order have copied the Applicant's work(s) on to his or her personal or office Computer (the "Work(s)") without the Applicant's permission for the purpose of making it available via file sharing Web sites for third parties to download, which may give rise to a claim for Copyright infringement'.

Once the names and addresses of subscribers are disclosed, it seems the intention is to write to them threatening proceedings unless they settle on specified terms. The unfortunate Isabela Barwinska, who ignored such demands, was reported to have been ordered by the court to pay more than £16,000 in damages and costs to the developer Topware Interactive after downloading the game *Dream Pinball Interactive* through a file-sharing site.

The scale of this legal exercise is unprecedented, and there must be considerable doubt that the rights holders will ever recover the associated legal costs, bearing in mind their liability to pay the ISPs costs of

complying with the order, and the difficulties of enforcing any judgments or agreed settlements against such a number of individuals, many of whom may be unable to pay. However, the deterrent effect of such widely reported actions could be great, and the benefits it may bring of curbing file-sharing and correspondingly increasing revenue from legitimate sales, may well outweigh the costs.

Conclusion

In summary, therefore, *Norwich Pharmacal* orders can be an effective tool for those defamed to identify an attacker, and for rights holders to identify file-sharers and bring high profile court proceedings against them to far-reaching deterrent effect.

Of course *Norwich Pharmacal* orders can only go so far. If the Web site operator or ISP is outside of the jurisdiction, then they are less likely to comply with the order. And for the more sophisticated author or file-sharer, who has used proxy servers to conceal his identity, it can also be prohibitively expensive to obtain orders against each successive ISP revealed (bearing in mind the claimant's liability to meet the defendant's costs as well as his own).

However, not every author or file-sharer will take such elaborate steps to conceal their identity, and for the majority of cases, *Norwich Pharmacal* orders will remain worthy of serious consideration. ●

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