

LAW 40860 Digital Law and Investigations Assignment 1

Describe and discuss the way in which Irish law addresses the identification of anonymous or pseudonymous internet users

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The purpose of this assignment is to describe and discuss the basis on which Ireland and other countries address the issue of anonymous and pseudonymous internet users. Many cases shall be described and discussed with the deciding factors being compared and contrasted, in relation to the effect on internet users.

Social media and the law is still largely virgin territory in Ireland¹. The main order against anonymous and pseudonymous internet users is a Norwich Pharmacal order. This order can be applied for in court, when a perceived wrongdoing has taken place against a party, including copyright infringement and defamation. A Norwich Pharmacal order is an order which requires that the defendant reveal the identity of a person who has wronged the plaintiff.² The order was established by the House of Lords in *Norwich Pharmacal v Customs and Excise Commissioners*.³ The principle upon which it was based was set out by Reid LJ in the following terms: "if through no fault of his own a person gets mixed in the tortuous 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 full information and disclosing the identity of the wrongdoers."⁴ The first case in Ireland or the UK to grant a Norwich Pharmacal order was *Totalise v Motley Fool Ltd*.⁵

The case of *Totalise v Motley Fool Ltd*⁶, a Norwich Pharmacal order was requested and if the defendant could give a plausible reason for their identity to be kept anonymous, the Norwich Pharmacal order would be rejected. An investment company operated a business providing financial information to individual investors. The information was made available via a website. Included on the website was a bulletin board facility allowing users to post views and comments. In order to access the website, users had to register and indicate acceptance of the operator's terms and conditions⁷. It contained a data protection notice to the effect that the provider was, registered under the Data Protection Act 1998⁸.

¹ "Social Media - Applicable Libel and Privacy Laws in Ireland," William Fry. Last Modified May 4, 2012, http://www.williamfry.ie/publication-article/social_media_-_applicable_libel_and_privacy_laws_in_ireland.aspx.

² Denis Kelleher and Karen Murray, *Information Technology Law in Ireland* (Dublin: Tottel Publishing Ltd, 2007), 383.

³ *Norwich Pharmacal v Customs and Excise Commissioners* [1974] AC 133.

⁴ *Ibid*, at 175.

⁵ *Totalise v Motley Fool Ltd* [2001] EWCA Civ 1897, [2002] 1 WLR 1233.

⁶ *Ibid*.

⁷ Llyoyd J. Ian, *Information Technology Law* (New York, Oxford University Press, 2011), 549.

⁸ All personal information you supply to us will be treated in accordance with that Act. We will collect and use your personal information in order to operate, enhance and provide to you the Information Services you request.

One user, using a pseudonym ‘Zeddust’ posted comments which were defamatory of the claimant company. Totalise requested provision of information identifying the poster in order that it might initiate proceedings for defamation. This was refused by interactive, who stated that the supply of personal data would place it in breach of the Data Protection Act 1998⁹.

An appeal was made on the issue, the key question being whether Interactive had acted unreasonably in refusing to hand over the data. The Court of Appeal held that the behaviour was not unreasonable. It was ruled that the issues involved were complex, especially with the addition of the Human Rights Act 1998 to the United Kingdom statute book. A balance had to be struck between the interests of the claimant in being able to secure a remedy and the right of the individual to respect for private life¹⁰. It was held that:

It is difficult to see how the court can carry out this task if what it is refereeing is a contest between two parties, neither of whom is the person most concerned, the data subject; one of whom is the data subject’s prospective antagonist; and the other of whom knows the data subject’s identity, has undertaken to keep it confidential so far as the law permits, and would like to get out of the cross-fire rapidly and cheaply as possible. However the website operator can, where appropriate, tell the user what is going on and to offer to pass it on in writing to the claimant and the court any worthwhile reason the user wants to put forward for not having his or her identity disclosed. Further, the court could require that to be done before making an order. Doing so will enable the court to do what is required of it with slightly more confidence that it is respecting the law laid down in more than one statute by Parliament and doing no injustice to a third, in particular not violating his convention rights¹¹.

In the case of *EMI Records v Eircom*¹², the plaintiffs sought Norwich Pharmacal orders, ‘requiring the defendants to make disclosure of the names and the addresses of seventeen of their subscribers’. These subscribers were ‘internet subscribers who are designated by what is called an Internet Protocol Address’. The plaintiffs had been ‘assigned the copyright in a large number of sound recordings’ and belonged to the Irish Recorded Music Association. The Irish Recorded Music Association employed experts to ‘investigate

We will not pass your personal information on to any other person except to our Service Providers, where it is necessary, to enable us to provide you with the Information Services you request from us.

⁹ Llyoyd J. Ian, loc.cit.

¹⁰ Llyoyd J. Ian, loc.cit., p.550.

¹¹ *Totalise v Motley Fool Ltd*, op.cit., at [26].

¹² *EMI Records (Ireland) Ltd & Ors v. Eircom Ltd & Anor* [2005] IEHC 233.

and gather evidence of what were perceived as activities which infringed the plaintiff's copyright'. Based on the case of *Megaleasing UK Ltd v Barrett*, Kelly J established 'very clear evidence of wrong doing' in this case¹³. In respect of this wrong doing, Kelly J, ordered that the defendants disclose the name, postal address and telephone number of each subscriber.

This case has outlined the essentials of how Irish Law invokes a Norwich Pharmacal order. To grant such an order there must be no alternative way to get subscribers personal information, also a clear evidence of wrong doing must be established. From studying this case, there are other factors to consider, how and when should a Norwich Pharmacal order be granted? Does it infringe on privacy rights and data protection rights which were in place between the ISP and subscribers and finally, should the subscriber be notified of any wrongdoing? The case *Totalise v Motley Fool Ltd*¹⁴ which took place in the United Kingdom provides that the defendant should be notified whether he or she would like to stay anonymous, if they could provide a valid reason. Four years later in the case of *EMI Records v Eircom and BT Communications*¹⁵ which took place in Ireland, the judge did not even suggest or consider that the defendants should be notified that their personal information will be used in future litigations.

In contrast to the *EMI Records v Eircom* case, the findings of *Ryanair v Johnston*¹⁶ declined a request of a Norwich Pharmacal order. It was stated by Mr. Justice Smyth that, "there was no conspiracy" and "there was no actionable wrong" found. The Norwich Pharmacal order sought to gain the pseudonymous users data, "in all instances must be granted sparingly". "In making an order in this context a balance has to be struck between the balance of justice and privacy". Mr. Justice Smyth then went onto to state that, "this is not a case in which it is either necessary or at all appropriate to make any of the orders sought". The case was dismissed on these grounds. This case outlines the facts that, if not used sparingly, the Norwich Pharmacal order may infringe on privacy rights.

In a similar case to *Ryanair v Johnston* in the USA, *Dendrite International v Doe*¹⁷, *Dendrite International* filed "a complaint against a number of fictitiously named defendants. Alleged various claims, or breach of contract, defamation and other actionable statements on

¹³ *Megaleasing UK Ltd v Barrett* [1993] ILRM 497 at 504.

¹⁴ *Totalise v Motley Fool Ltd*, loc.cit.

¹⁵ *EMI Records (Ireland) Ltd & Ors v. Eircom Ltd & Anor*, loc.cit.

¹⁶ *Ryanair v. Johnston* (unreported, High Court, Smyth J., 12 Jouly 2006).

¹⁷ *Dendrite International, Inc. v. John Doe et al.*, 342 N.J. Super. 134, 775 A.2d 756 (2001).

a Yahoo bulletin board”. The case law which stemmed from this is; “The Court first emphasised the importance of striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognisable claims based on the actionable conduct of the anonymous, fictitiously named defendants. We hold that when such an application is made, the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board”.

This ruling shows that the importance of privacy is recognised while it does not give the go ahead to post defamatory remarks online, anonymously or under a pseudonym¹⁸.

There is a similar law in the EU to the First Amendment in USA, which was referred to in the case of *Dendrite International v Doe*. It is the Article 10 of the European Convention on Human Rights. It provides for the freedom of speech in EU countries¹⁹. It is interesting that this has not been referred to in Irish case law, as the first amendment is referred to in the USA.

Irish law shows that in an internet defamation and adult cyberbullying case that a Norwich Pharmacal order can be of use in this situation, in the case of *McKeogh vs John Doe et al*²⁰. McKeogh was the subject of internet defamation and cyberbullying. While he was in Japan, a video was posted on YouTube of a man jumping out of a taxi in Monkstown Dublin, to escape a fifty euro fare. The taxi driver posted this video and asked whether this man could be identified. McKeogh was falsely identified by a pseudonymous user, with a user name of ‘Daithii4u’. After McKeogh was falsely identified, he was the subject of a tyrant of the “most vile, crude, obscene and generally obnoxious comments about him appeared on both YouTube and on Facebook”. McKeogh was in Japan at the time when this wrong doing occurred, only realising this when he arrived back in Ireland. Mc Keogh was awarded a

¹⁸ Lloyd, J, Ian., Op.cit. p. 550.

¹⁹ European Convention on Human Rights (2010) Convention for the protection of human rights and fundamental freedoms. Strasburg: European Court of Human Rights.

²⁰ *McKeogh v. John Doe 1 (User Name Daithii4u) and others*[2012] IEHC 95.

temporary injunction against Google, YouTube, Facebook, and Yahoo from hosting the video online for a week²¹.

A similar case which took place in Canada, *AB v Bragg Communications Inc*²², a girl through her father requested an order to identify the creator of a fake facebook profile which caused the young girl extensive harm through cyberbullying. It was determined that a prima facie case of defamation had been established and that there was no other way to identify the publisher of the defamation. It was granted that A.B. may “proceed anonymously in her application for an order requiring Eastlink to disclose the identity of the relevant IP user(s)”²³.

The main difference between Canadian, Irish, UK and USA case law in this area is that Canadian, Irish and UK case law does not require that defendants be notified that their personal information is being given to the plaintiffs.

There is substantial debate for and against anonymity and the use pseudonyms on the internet. A recent article in the Irish Examiner makes it clear what people are feeling in the context of cyberbullying on Ask.FM; “hatred hides behind the veil of anonymity”²⁴. One in seven Irish teens, have been the victim of cyber bullying between August, September and October 2013²⁵. A motion has been put to Cork City Council to call on the Government to introduce legislation to protect children from cyber bullying. The move, the first of its kind in Ireland, comes after the case of 13 year-old Erin Gallagher from County Donegal took her own life in October after being bullied online. Cork North Central councillor, Kenneth O’Flynn has put forward the motion, which will appear before Council in the coming weeks, asking authorities to provide protection for victims against defamation or abuse on chat rooms or social media sites²⁶. There have been very few convictions in Ireland in respect of

²¹ Warren Swords and Debbie McCann, “Crucified by vigilantes of the internet: MoS proves that innocent young man was falsely branded a thief on the world's biggest websites.” Daily Mail, January 22, 2012, accessed October 28, 2013, <http://www.dailymail.co.uk/news/article-2090070/Eoin-McKeogh-falsely-branded-thief-worlds-biggest-websites.html>.

²² *AB v Bragg Communications Inc* (Supreme Court of Canada, 27 September 2012), 2012 SCC 46.

²³ Ibid.

²⁴ Caroline O’Doherty, “Hatred Hides Behind the Veil of Anonymity,” Irish Examiner, 4 June, 2013, accessed October 24, 2013, <http://www.irishexaminer.com/ireland/hatred-hides-behind-veil-of-online-anonymity-233168.html>.

²⁵ Paul Melia and Eilish O’Regan, “One in Seven Teens Bullied Online in Last 3 Months,” Independent, October 2, 2013, accessed October 24, 2013, <http://www.independent.ie/irish-news/one-in-seven-teens-bullied-online-in-past-three-months-29626568.html>.

²⁶ Ann Murphy, “Motion on cyberbullies before council,” Evening Echo, November 3, 2012, accessed October 24, 2013, <http://www.eveningecho.ie/2012/11/03/motion-on-cyberbullies-before-council>.

cyberbullying²⁷. This in itself makes it clear that there is a need for change in Irish law relating to anonymity and pseudonyms on the internet. It is also clear that there will be a lot of development in this area in the near future.

This motion cannot come soon enough as cyberbullying is not just affecting teenagers, but adults also. In the case of, Irish minister of state, Shane McEntee, in December 2012, committed suicide after receiving a swath of online hate-mail. Shane McEntee had been particularly condemned for defending government cuts to Ireland's respite care programme. The French government also, is considering new rules to prevent racist, anti-semitic and homophobic remarks on social media. Racist and anti-Jewish hashtags were removed in France in October but Twitter now claims that it cannot reveal their real identities since they were filed in California; thus French laws do not apply²⁸.

Recently, Facebook have been in trouble with the German Telemedia Act (TMG) section 13, part 6²⁹. This section states that, "the service provider must enable the use of telemedia and payment for them to occur anonymously or via a pseudonym where this is technically possible and reasonable. The recipient of the service is to be informed about this possibility"³⁰. The German data protection body, Unabhaengiges Landeszentrum fuer Datenschutz, states that this clause exists to protect Europeans fundamental rights and in particular the fundamental right to freedom of expression on the Internet. As Facebook's Headquarters are in Dublin, Irish law states, it is the role of individual services to determine their own policies about anonymity within the governing law. This brings the next question; what are the good uses of pseudonyms and anonymity on the internet as Germany clearly maintains that they are necessary? The good uses of pseudonyms and anonymity online is that it allows individuals to explore their creative side, employees to 'blow the whistle' on

²⁷ "Cyberbullying could soon become a criminal offence in Ireland," SiliconRepublic, Last modified July 11, 2013, <http://www.siliconrepublic.com/comms/item/33422-cyberbullying-could-soon-be>.

²⁸ Robert Fisk, "Anonymous comments are as pathetic as the anonymous "sources" that contaminate gutless journalism from the New York Times, BBC, and CNN," The Independent, January 10, 2013, accessed October 24, 2013, <http://www.independent.co.uk/voices/comment/anonymous-comments-are-as-pathetic-as-the-anonymous-sources-that-contaminate-gutless-journalism-from-the-new-york-times-bbc-and-cnn-8446788.html>.

²⁹ German Telemedia Act (TMG) — section 13, part 6.

³⁰ Natasha Lomas, "Facebook Users Must Be Allowed To Use Pseudonyms, Says German Privacy Regulator; Real-Name Policy 'Erodes Online Freedoms'," Tech Crunch, December 18, 2012, <http://techcrunch.com/2012/12/18/facebook-users-must-be-allowed-to-use-pseudonyms-says-german-privacy-regulator-real-name-policy-erodes-online-freedoms>.

harmful corporate practices without the fear of retaliation, and consumers to search for information on sensitive topics³¹.

Throughout this assignment, similar case law from, Canada, Ireland, UK, and the USA has been compared and contrasted. A broad overview has been given of each case reflecting the decision and factors affecting each case. The benefits of anonymity and pseudonyms have also been outlined and discussed with examples reflecting both sides. A brief description has been discussed on the future changes, which in particular parents of young teenagers are calling for. Change is needed in the way Irish law is currently dealing with internet anonymity.

³¹ Eva Nagle, "The Faceless Few," Law Society Gazette Aug/Sep. (2013): 22, accessed October 30, 2013, url <http://www.lawsociety.ie/Documents/Gazette/Gazette%202013/Gazette-AugustSeptember2013.pdf>.