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HCMP2487/2005

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO.2487 OF 2005**

IN THE MATTER of the Inherent
Jurisdiction of the High Court

and

IN THE MATTER of discovery of
the identity of infringers of the
copyright subsisting in the Plaintiffs'
sound recordings

BETWEEN

CINEPOLY RECORDS COMPANY LIMITED	1 st Plaintiff
EMPEROR ENTERTAINMENT (HONG KONG) LIMITED	2 nd Plaintiff
GO EAST ENTERTAINMENT COMPANY LIMITED	3 rd Plaintiff
GOLD LABEL ENTERTAINMENT LIMITED	4 th Plaintiff
SONY BMG MUSIC ENTERTAINMENT (HONG KONG) LIMITED	5 th Plaintiff
UNIVERSAL MUSIC LIMITED	6 th Plaintiff
WARNER MUSIC HONG KONG LIMITED	7 th Plaintiff

and

HONG KONG BROADBAND NETWORK LIMITED	1 st Defendant
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HUTCHISON GLOBAL	2 nd Defendant
COMMUNICATION LIMITED	
i-CABLE WEBSERVE LIMITED	3 rd Defendant
PCCW IMS LIMITED	4 th Defendant

Before : Deputy High Court Judge Poon in Chambers

Dates of Hearing : 9 and 16 January 2006

Date of Decision : 26 January 2006

 D E C I S I O N

INTRODUCTION

1. This is an action, the first of its kind ever brought in Hong Kong, by 7 leading music producers against 4 internet service providers for discovery of the name, Hong Kong identity card number and address of 22 alleged online copyright infringers (“the Data”) under the *Norwich Pharmacal* principles.

2. The Data are personal data within the meaning of the Personal Data (Privacy) Protection Ordinance, Cap.486 (“the Ordinance”). They are also subject to the confidentiality provision in each of the defendants’ licences granted by the Telecommunications Authority. The defendants are understandably very concerned about their obligations under both the Ordinance and their licence. Thus they are not in a position to consent to the application. The 1st, 2nd and 4th defendants adopt a neutral stance and will abide by any order that the court may make. The 3rd defendant takes a more serious view of the matter and opposes the application. It argues,

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inter alia, that it cannot disclose the Data without breaching the relevant provisions in the Ordinance and its licence.

3. This action brings into focus the very fine and delicate balance that the court needs to strike between the administration of justice and protection of privacy relating to personal data. In particular, the parties' debate raises the question whether *Norwich Pharmacal* relief is available when the information sought is personal data within the meaning of the Ordinance.

4. This action also raises the question whether the *Norwich Pharmacal* order, if made, will render the defendants to be in breach of the confidentiality provision in their licence, thereby exposing them to serious repercussions. This question is undoubtedly of considerable importance to the defendants, whose license may be put in jeopardy if there is a breach or non-compliance.

5. I will first set out the background leading to this action below.

ONLINE INFRINGEMENT

6. Copyright infringement has always baffled the music industry. It took in the older days the more traditional, tangible medium such as cassette tapes, videotapes and later CDs and DVDs. It has now reached an unprecedented scale on the Internet where massive number of music recordings, in the form of electronic files, can be uploaded, transferred, downloaded and shared by and among individuals with ease and speed and at minimal or virtually no costs to the infringers.

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7. The rampant online copyright infringement is made possible by the very popular “peer-to-peer” (“P2P”) communication.

8. P2P communication means direct communication between individual computers or “peers” through a computer network. The technology has been there for some time. But it gained worldwide attention in 1999 when the Napster service was launched in the USA. Napster was the first online P2P music sharing service. It provided a centralized index facility for music files sharing while the actual copying and transmitting of the files were conducted directly between computers using the service.

9. In 2002, Napster was closed down by a court order in the USA. The once centralized sharing system has since been replaced by de-centralized file sharing indices made available on the Internet by individual computer users by means of P2P file sharing programs. The typical scenario is this. A subscriber to an Internet Service Provider (“ISP”) stores music in the hard disc of his computer, either from a legitimate or illegitimate source. If he wishes to share his music stored in his computer, he uploads and posts it in the “Shared Folders” in the P2P software. The “Shared Folders” file can then be searched, assessed to and downloaded by other computers using the same software.

10. Online music copying continues unabated and has struck a heavy blow to the music industry. In Hong Kong, it is the plaintiffs’ estimate, derived from the data collected by surveys and not contradicted on the evidence before me, that 2 million music files are being copied among P2P users everyday; and that at least 1.5 million local Internet users,

aged between 15 to 64 years old, had downloaded music files from the Internet by using P2P programs in the 12 months' period preceding September 2005. The current state of affairs is indeed alarming.

THE CLOAK OF ANONYMITY

11. In Hong Kong, the P2P program that has been mostly used is the WinMX software because it can support Asian characters (including Chinese characters) searches for song titles and names of the performers. Because of the way the WinMX software is programmed, the true identity of the infringer is obscured. Put figuratively, his true identity is hidden behind a cloak of anonymity. This, I believe, partly explains why online copyright is so rampant nowadays.

12. But if need be, the infringer can still be tracked down. The clue is the Internet Protocol Address ("IP Address"), which is a unique number to enable the subscriber's computer to communicate with other computers on the Internet. An ISP assigns to its subscriber an IP Address. Whenever a computer is connected to the Internet, the ISP concerned will assign to it an IP Address. Depending on the ISP's practice, it is possible that a different IP Address is assigned every time when the same computer is being connected to the Internet. An IP Address itself does not directly reveal the identity of the subscriber. But the ISP can track the IP Address at a specific time or period to the records of their subscribers, which include names, Hong Kong ID card numbers and addresses.

13. In short, by cross checking the IP Address marked at a specific time or period with the ISP's records, the identity and address of the subscriber, whose computer has been used to upload the music files on

A the Internet by P2P program, including the WinMX software, can be
B revealed.

C
D 14. Accordingly, with the assistance of the ISPs, the cloak of
E anonymity can be pierced and the true identity of the infringers may be
F revealed.

F *THE 22 UPLOADERS*

G 15. On 3, 7 and 10 November 2005, the plaintiffs, together with
H the technical staff of the International Federation of Phonographic Industry
I (Hong Kong Group) Limited, conducted online investigation. They
J targeted 22 uploaders of various music files who used the WinMX
K software. These uploaders are identified by their respective IP Address
L assigned by the defendants at the time when they were targeted : see
M Annex A to D to the Order attached to this judgment for particulars.

N 16. However, the plaintiffs cannot go further to bring proceedings
O against the 22 uploaders. For without the defendants' assistance, they
P have no means to go behind the cloak of anonymity provided by the
Q WinMX software and track down their true identity. Hence this action.

P *THE NORWICH PHARMACAL PRINCIPLES*

Q 17. *Norwich Pharamacal* discovery as an equitable relief was
R firmly established by the House of Lords in *Norwich Pharmacal Co. &*
S *Others v. Customs and Excise Commissioners* [1974] 4 AC 133. It has
T since been consistently applied in Hong Kong.

A		A
B	18. A helpful summary of the principles can be found in <i>A Co. v. C Co.</i> [2002] 3 HKLRD 111 at pp.116F-118C where Ma J (as he then was)	B
C	said :	C
D	“10. Where innocent parties are caught up or have become involved in the tortious or wrongful activities of others, thus facilitating the perpetration(or continuation) of such activities, justice may require (and therefore the court may order) that such innocent persons come under a duty to assist the victim of the tort or wrongful activities, by the provision of full information even though such innocent persons cannot be shown to incur any personal liability at that stage. The foundation of the court’s jurisdiction here is its equitable jurisdiction. The court’s ability to make such orders was confirmed by the House of Lord’s decision in <i>Norwich Pharmacal Co v Customs and Exercise Commissioners</i> [1974] AC 133: see in particular the speech of Lord Ried at pp. 173F-175E. The principles and approach established by that decision have consistently been applied in Hong Kong.	D
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J	11. The jurisdiction is a wide one. It is not restricted, as was at one time thought, to the disclosure of the names of wrongdoers only. In particular, where a plaintiff wishes to investigate the passage of monies in and out of bank accounts in aid of a tracing claim, discovery can be ordered of a bank’s books and documents; see <i>Bankers Trust Co v. Shapira</i> [1980] 1 WLR 1274 at pp.1281F-1282F.	J
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M	12. Though founded ultimately on notions of justice, nevertheless, it is important to emphasise the extraordinary nature of this relief because it is not a usual order and is not one that a court would lightly grant in the absence of powerful factors. I emphasise the following characteristics of this type of order:	M
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P	(1) It is made against an innocent party whose only involvement is to become mixed up in the tortious or wrongful activities of others. There is, at that stage, no evidence of any wrongdoing on the part of the innocent party.	P
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R	(2) Instead, whatever wrongdoing there is, exists only on the part of a person or persons against whom no relief may be sought at that stage and indeed against whom there is probably insufficient evidence to found an action. In order words, this person or these persons will most probably not be before the court and would not be able to	R
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B	answer what are often very serious allegations made against them.	B
C	(3) Usually, there will, moreover, exist a legal relationship between the innocent person against whom a discovery order is sought and the alleged wrongdoer and this relationship may involve strict duties to be observed on the innocent party's part. The present case offers what is a common scenario: the innocent defendant is a bank and the alleged wrongdoers its customers. In this situation, any discovery to be made by the innocent party may well, apart from a court order, expose that innocent party to liability, both civil and possibly even criminal. At the very least, a breach of confidentiality is involved.	C
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G	(4) The court, accordingly, in applications for <i>Norwich Pharmacal</i> relief must, in its discretion, balance the competing interest of the victim of the alleged wrongdoing and an innocent party caught up in the wrongdoing.	G
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J	13. Given these characteristics as I have outlined, such orders are therefore not lightly made as I have said. In my view, it is essential for the court to bear the following in mind before a <i>Norwich Pharmacal</i> order is made:	J
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L	(1) There must be cogent and compelling evidence to demonstrate that serious tortious or wrongful activities have taken place. And where fraud or similar serious allegations are made, the degree of proof must correspondingly be high: see <i>Re H (Minors)(Sexual Abuse: Standard of Proof)</i> [1996] AC 563 at p.586C-H. All the more so when the alleged wrongdoer is not and will not likely be before the court.	L
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O	(2) It must also be clearly demonstrated that the order will or will very likely reap substantial and worthwhile benefits for the plaintiff. Where, as in the present case, the plaintiff is likely to make a tracing claim, there must be a serious possibility that the discovery sought must either allow the plaintiff to preserve what may well be his assets or realistically lead to the discovery of such assets: see <i>Arab Monetary Fund v. Hashim (No. 5)</i> [1992] 2 ALL ER 911 at pp. 916D-E, 918J-919A.	O
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S	(3) The discovery sought must not be unduly wide. There is no entitlement to general discovery (by general discovery is meant discovery in the <i>Compagnie Financière et Commerciale due Pacifique v. Peruvian Guano Co</i> (1882-83) LR 11 QBD 55 sense): see <i>Arab Monetary</i>	S
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Fung v Hashim (No. 5) [1992] 2 ALL ER 911 at pp.918D-E, 919H. It follows therefore that not only must any order be specific, it must also be restricted to those or those classes of documents that are necessary to enable the plaintiff to preserve or discover assets. This is not to say that discovery orders cannot be wide; what is important is that the discovery, whether wide or narrow, is necessary.”

19. In my view, the application of the above principles requires an applicant for *Norwich Pharmacal* discovery of the identity of an alleged wrongdoer to first establish the following essential elements :

- (1) Serious tortious or wrongful activities have been committed.
- (2) The alleged wrongdoer is a person whom the applicant *bona fide* believes to be infringing his rights in the sense that he can reasonably be assumed to be the wrongdoer *vis-à-vis* the applicant : see *Norwich Pharamacal, supra, per* Lord Kilbrandon at p.205G-H and Lord Morris at p.179B-C.
- (3) The innocent party, against whom discovery is sought, has caught up or has become involved in such activities, thus facilitating the perpetration or continuation of the same.

If the applicant fails to establish any of these elements, his application must fail at this stage.

20. After establishing the above elements, the applicant needs to go further and demonstrate that it is just and convenient in all the circumstances of the case for the court to exercise its discretion to grant the relief. The factors that the court will take into account may vary from case to case. For example, the court may consider if the innocent party is the only practical source of information : see *Norwich Pharmacal, supra, per* Lord Kilbrandon at p.205H. If the innocent party is subject to a duty

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of confidentiality, imposed by contract or otherwise, not to disclose the information, the court will bear in mind the competing interests in ordering or refusing disclosure.

21. I will first consider if the plaintiffs have established the 3 elements essential to their entitlement of *Norwich Pharamcal* relief.

THE 1ST ELEMENT : COPYRIGHT INFRINGEMENTS BY THE 22 UPLOADERS

22. The first element is whether copyright infringements of the plaintiffs’ musical works have taken place by the acts of the 22 uploaders.

23. On the evidence before me, I am satisfied that for the purpose of this action :

- (1) Copyright subsists in the musical works in question.
- (2) The plaintiffs are the owners of the copyright subsisting in those musical works.
- (3) The plaintiffs had not consented to or authorized the uploading of those musical works on the Internet.
- (4) The unauthorized uploading of those musical works on the Internet constituted copyright infringement under various provisions of the Copyright Ordinance, Cap.528 :
 - (a) Section 24(2) for issuing copies to the public;
 - (b) Section 26(2) for making available copies to the public; and
 - (c) Section 32(2) for knowingly transmitting copies by telecommunication.

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24. The copyright infringement was very serious indeed. The online investigation conducted in November 2005 revealed massive online infringement activities. Each of the 22 uploaders identified for the purpose of this action had uploaded more than 100 song titles. Some had approached and some had even exceeded 1,000 song titles. Some of the songs uploaded had not even been made commercially available in CDs or DVDs.

25. The first element is clearly established.

THE 2ND ELEMENT : WHETHER THE SUBSCRIBERS ARE INFRINGERS

26. The next element relates to the question if the uploaders were the subscribers.

27. The 3rd defendant contends that it is technically not possible to identify the copyright infringer from an IP Address. The IP Address can identify the subscriber to the Internet service but not the actual user or the service at the material time when the uploading was carried out. For it is not an uncommon fact in Hong Kong, which the plaintiffs accept, that there are multiple users to a single Internet account. Thus, Mr Pao, counsel appearing for the 3rd defendant, argues that the plaintiffs' application for disclosure of the identity of the subscribers is no more than a fishing exercise, which is not permissible : *AG v. Wellcome Foundation Ltd* [1992] HKC 158, *per* Litton JA (as he then was) at p.169E-G.

28. At this stage of the proceedings, the plaintiffs are not required to prove as a matter of fact that the subscribers are the uploaders. It will

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be sufficient if the subscribers can reasonably be assumed to be the wrongdoers *vis-à-vis* the plaintiffs : see paragraph 19(2) above.

29. A subscriber of the Internet service provided by the 3rd defendant can, unless otherwise specified, only have the service for his personal use and shall not part with, transfer or licence any of his rights to use the service : see Clause 12 of the General Terms and Conditions for the Supply of i-Cable Broadband Services. It is thus reasonable in the circumstances to infer that the subscriber, who can only use the Internet service provided by the 3rd defendant personally, is the uploader. I accept on the evidence before me that it is not uncommon that there are multiple users to a single Internet account. However, it is also in my view reasonable to infer that the subscriber has consented to or authorized others to use his Internet account for uploading the music files.

30. The above inferences are equally applicable to the other defendants.

31. For these reasons, I disagree with Mr Pao. I rule that the second element is also established.

THE 3RD ELEMENT : THE DEFENDANTS' INVOLVEMENT

32. As to the third element, it is common ground that all the defendants, by providing the Internet service, have innocently caught up or have become involved in the uploading of the music works in question.

33. The plaintiffs have accordingly established all the 3 elements essential to their entitlement to *Norwich Pharmacal* relief.

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ADMINISTRATION OF JUSTICE AND PROTECTION OF PRIVACY

34. I now turn to consider if I should exercise my discretion to grant the discovery sought. This brings me to the most important question in this action, namely, how to strike the balance between the administration of justice and protection of privacy relating to personal data.

(A) The statutory regime

35. It will be useful, in my view, to start with the statutory regime laid down by the Ordinance, which is broadly this.

36. The Ordinance creates for the first time in Hong Kong statutory protections of privacy of individuals in relation to personal data. But the protections cannot be absolute. For there are obviously cases where public interest or competing private rights and interests may require such protections to be removed. Thus the Ordinance also creates certain exemptions : see Part VIII. The exemptions can basically categorized into (a) public interest exemptions and (b) competing private interests exemptions. For public interest exemptions, examples can be found in section 57 on security, defence or international relations in respect of Hong Kong; section 58(1)(a) and (b) relating to crime; section 58(1)(c) relating to tax matters; section 58(1)(f) and (3) relating to certain functions of a financial regulator including protecting the public against financial loss; and section 61 on matters relating to news. (These examples are not meant to be exhaustive.) For competing private interest exemptions, an example that it pertinent here is section 58(1)(d) which deals with prevention, preclusion and remedying of unlawful or seriously improper

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conduct, or dishonesty or malpractice, by persons. Various prerequisites for the exemptions are prescribed.

37. In my view, the Ordinance strikes the balance between the administration of justice and protection of privacy relating to personal data by :

- (1) Creating exemptions to protection of privacy relating to personal data, thereby confirming that the protection is not absolute and can be removed where appropriate;
- (2) Requiring the person who seeks to invoke an exemption to satisfy the relevant prerequisites, thereby subjecting the case to careful scrutiny under the applicable statutory provisions and ensuring that the exemption may be invoked only if the prerequisites are all met.

38. The burden rests squarely on the person who seeks to invoke an exemption to satisfy the court that all the relevant prerequisites are met. He must support his claim with cogent evidence. Bare allegation will not be sufficient.

39. In making the determination, the court will bear in mind the principal objective of the Ordinance, which is to protect privacy relating to personal data, and the careful balance that the Ordinance seeks to strike between protection of privacy and the administration of justice. The court will scrutinize the case carefully and will allow the exemption to be invoked only if the applicable prerequisites are all met.

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(B) *Principle 3 and section 58(2)*

40. Here, the protection that is pertinent is Data Protection Principle 3 in Schedule 1 of the Ordinance (“Principle 3”). It reads :

“Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than –

- (a) the purpose for which the data were to be used at the time of the collection of the data; or
- (b) a purpose directly related to the purpose referred to in paragraph (a).”

41. The exemptions can be found in section 58(2) of the Ordinance. It provides :

“Personal data are exempt from the provisions of [Principle 3] in any case in which –

- (a) the use of the data is for any of the purposes referred to in subsection (1) (and whether or not the data are held for any of those purposes); and
- (b) the application of those provisions in relation to such use would be likely to prejudice any of the matters referred to in that subsection,

...”

The purposes as set out in section 58(1) include :

- “(a) the prevention of detection of crime;
- (b) the apprehension, prosecution or detention of offenders;
- (c) the assessment or collection of any tax or duty;
- (d) the prevention, preclusion or remedying (including punishment) of unlawful or seriously improper conduct, or dishonesty or malpractice, by persons;

...”

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In this action, it is section 58(1)(d) that is relevant.

42. In order to successfully invoke section 58(2), the plaintiffs need to satisfy, with cogent evidence, 2 requirements :

- (1) that the use of the Data sought from the defendants is for the prevention, prevention or remedying (including punishment) of unlawful or seriously improper conduct by persons; and
- (2) that the application of Principle 3 in relation to such use would be likely to prejudice any of the matters referred to in (1).

I will consider them in turn.

(C) *The 1st requirement*

43. As to the first requirement, the bone of contention between the plaintiffs and the 3rd defendant is whether tortious conduct, including copyright infringement, is unlawful or seriously improper conduct within the meaning of section 58(1)(d), so as to bring section 58(2) into operation.

44. The Ordinance itself does not define what is “unlawful or seriously improper conduct”. Whether the phrase covers tortious conduct depends on a proper construction of section 58(1)(d). In *Tse Lai Yin Lily v. Incorporated Owners of Albert House* [1999] 1 HKC 386, Suffiad J took up the task and had this to say at p.393C-G :

“It is clear from s 58(2) that personal data are exempted from the provisions of data protection principle 3 where the use of the data is for any of the purposes referred to in s 58(1), and whether or not the data are held for any of those purposes. What I have to decide, therefore, is whether the use of such data in a civil action claiming for damages resulting from the collapse of this

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B	canopy falls within the ambit of s 58(1)(d) of the Ordinance which provides for, inter alia, the remedying of unlawful conduct.	B
C	Firstly, I note that in s 58(1), the use of the word ‘crime’ in para (a) and the word ‘offender’ in para (b). This to my mind suggest, therefore, that the use of the words ‘unlawful or seriously improper conduct’ in para (d) extend beyond criminal conduct to include civil wrongs. Secondly, the use of the word ‘remedying’ in para (d) is again suggestive of the same thing. The most natural meaning that can be given to the word ‘unlawful’ is that it normally describes something which is contrary to some law or enactment or is done without lawful justification or excuse. (See R v. R [1991] 4 All ER 481 per Lord Keith of Kinkel at 488d.)	C
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H	Since tort is a civil wrong, the bringing of a civil claim for damages in tort amounts to the remedying of unlawful or seriously improper conduct. For these reasons, I have no hesitation in coming to the conclusion that the words contained in s 58(1)(d) of the Personal Data (Privacy) Ordinance is sufficiently wide to cover claim for damages in a personal injuries and/or fatal accident case. That being the case, the use of such data in respect of such a civil claim is therefore exempted from the provisions of protection principle 3 by s 58(2) of the Ordinance.”	H
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M	45. I respectfully agree with Suffiad J’s analysis and conclusion. For my part, I rule that the phrase “unlawful and seriously improper conduct” in section 58(1)(d), on a proper construction, covers tortious conduct, including copyright infringement.	M
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P	46. Mr Pao submits that the phrase “unlawful and seriously improper conduct” in section 58(1)(d) does not cover tortious conduct. He takes three points.	P
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S	47. First, Mr Pao refers to the enacting history of the Ordinance and in particular, the Report of the Law Reform Commission of Hong Kong on Reform of the Law relating to the Protection of Personal Data	S
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published in August 1994 (“the Report”), upon which the Ordinance was enacted. He argues that the exemption in paragraph 58(2)(d) was the result of submissions received by the Law Reform Commission from various regulatory bodies specifically seeking any exemption to secure the flow of information about individuals whose activities could adversely affect their statutory functions; that the formulation of the expression “unlawful or seriously improper conduct” was intended to encompass breaches of regulatory codes of conduct, professional codes and practices that are contrary to the public interest; and that the Law Reform Commission specifically recommended that this exemption should only extend to those disclosures which may reasonably further the public interest.

48. Enacting history is of limited purpose when construing a statute. In appropriate cases, it may be used to ascertain the mischief the legislature intended to remedy by the enactment. But the court remains the sole authority on statutory construction. A committee report should not be relied on for any statement in it as to what the legal meaning of an enactment is. See *Bennion on Statutory Interpretation*, 3rd Edition, Sections 227 and 229 at pp.534-537. Otherwise, it will be an encroachment of the court’s constitutional sphere, as explained by Lord Wilbforce in *Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591 at p.629 :

“In my opinion it is not proper or desirable to make use of such a document as a committee or commission report... for a direct statement of what a proposed enactment is to mean... Legislation in England is passed by Parliament, and put in the form of the written words. This legislation [the Foreign Judgments (Reciprocal Enforcement) Act 1933] is given legal effect on subjects by virtue of judicial decision, and it is the function of the courts to say what the application of words to particular cases

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or particular individuals is to be. This power which has been devolved on the judges from the earliest times is an essential part of the constitutional process by which subjects are brought under the rule of law... and it would be a degradation of that process if the courts were to be merely a reflecting mirror of what some other interpretation agency might say... It is sound enough to ascertain, if that can be done, the objectives of any particular measure, and the background of the enactment; but to take the opinion, whether of a Minister or an official or a committee, as to the intended meaning in particular applications of a clause or a phrase, would be a stunting of the law and not a healthy development.”

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49. It follows that the Report is inadmissible for construing the meaning of the phrase “unlawful or seriously improper conduct” in section 58(2) of the Ordinance. No reliance can be placed on it for the purpose of the present action.

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50. Second, Mr Pao compares the exemption provisions in the Ordinance with section 35 of the English Data Protection Act 1998, which provides :

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“35. (1) Personal data are exempt from the non-disclosure provisions where the disclosure is required by or under any enactment, by any rule of law or by the order of a court.

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(2) Personal data are exempt from the non-disclosure provisions where the disclosure is necessary –

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(a) for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), or

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(b) for the purpose of obtaining legal advice, or is otherwise necessary for the purposes of establishing, exercising or defending legal rights.”

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Mr Pao argues that had it been the intention of the exemption provisions in the Ordinance to cover conduct prejudicial to public interest as well as

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private rights, it would only need to adopt the approach in section 35 of the English Act.

51. For my part, I do not think any useful assistance can be derived from the comparison with the English Act in construing section 58(1)(d) of the Ordinance. There is simply no suggestion that the Ordinance was modeled on the English Act. The language used in the English Act is different. More importantly, as I have demonstrated in paragraph 36 above, the exemption provisions in the Ordinance do cover public interest as well as private rights.

52. Third, Mr Pao argues in effect that the *Lily Tse's* case is wrongly decided. With respect, I disagree.

53. None of the points taken by Mr Pao is valid.

54. Mr Pao's construction of section 58(1)(d) of the Ordinance is objectionable on a more fundamental and important ground. If his contention were correct, the Ordinance would have the effect of depriving a victim wronged by tortious conduct of *Norwich Pharmacal* relief when the information that he seeks is personal data within the meaning of the Ordinance. *Norwich Pharmacal* discovery is a well-established equitable relief. Nothing in the Ordinance (or the Report that Mr Pao seeks to rely on) suggests that this entrenched relief is removed when the information sought is personal data within the meaning of the Ordinance. The legislature could not have intended to alter the law by a sidewind : see *Bennion*, Section 269 at p.626. The Ordinance cannot have been intended to change the landscape of discovery in the administration of justice so

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drastically. *Norwich Pharmacal* relief, in my view, remains intact after the enactment of the Ordinance.

55. The plaintiff seeks the Data so as to enforce their copyrights including taking legal actions against the alleged infringers. Accordingly, the use of the Data is clearly for the purpose of prevention, preclusion (in the form of injunctions) or remedying of the copyright infringements of the plaintiffs’ musical works. I am satisfied that the first requirement in section 58(2)(a) is met.

(D) The 2nd requirement

56. Here, the plaintiffs need to demonstrate that the application of Principle 3 in relation to the use of the Data for the purpose of prevention, preclusion or remedying of the copyright infringements would be likely to prejudice any of these matters.

57. Applying Principle 3, the defendants cannot disclose the Data to the plaintiffs. And without the Data, the plaintiffs cannot take the matter any further. Not matter how anxious they are, they will never be able to commence any action against the alleged infringers. They will continue to suffer helplessly from the infringing activities. I am therefore satisfied that the application of Principle 3 would be likely to prejudice the prevention, preclusion or remedying of the copyright infringements in question. The 2nd requirement is also met.

58. For these reasons, the 3rd defendant’s objection under the Ordinance fails.

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DUTY OF CONFIDENTIALITY

59. I next come to the 3rd defendant’s duty of confidentiality. Special Condition 7 of the 3rd defendant’s Public Non-Exclusive Telecommunications Service Licence provides :

“The Licensee shall not disclose information of a customer except with the consent of the customer, ... , except for the prevention or detection of crime or the apprehension or prosecution of offenders or except as may be authorized by or under any law.”

It is the exception “as may be authorized by or under any law” that requires my determination.

60. As I have noted earlier, the court needs to take into account the 3rd defendant’s duty of confidentiality when considering how to exercise the discretion in determining the plaintiffs’ application. Mr Pao in effect argues that if the court grants the relief, the 3rd defendant will be acting in breach of Special Condition 7.

61. With respect, I disagree. *Norwich Pharmacal* discovery is an equitable relief. The duty on the innocent party to make discovery is imposed by equity, which is part of the law of Hong Kong. In other words, when the innocent party makes discovery under the *Norwich Pharmacal* principles, whether voluntarily or compelled by the court exercising its equitable jurisdiction, the discovery is authorized (and indeed required) by law. It follows that there can be no breach of Special Condition 7 when the 3rd defendant discloses the Data pursuant to a court order granted pursuant to the *Norwich Pharmacal* principles.

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62. My ruling above also applies to the licenses of the other defendants, which contain provisions similar to Special Condition 7.

63. This disposes of all the grounds of objection raised by the 3rd defendant.

RELEVANT FACTORS

64. That said, I still need to be satisfied that it is an appropriate case to grant the relief sought. After all, *Norwich Pharmacal* discovery is an extraordinary remedy. The court will not likely grant it in the absence of powerful factors.

65. I am able to identify the following factors which strongly suggest that I should grant the relief.

66. First, there is no practical source of the Data other than the defendants. This action is really the last resort for the plaintiffs to take to track down the infringers.

67. Second, the ease, speed and scale of the online infringement is indeed alarming and unprecedented. It has hurt the music industry so much that on the undisputed evidence before me, the plaintiffs' viable existence is very much at stake. The plaintiffs do need the Data to take actions against the 22 uploaders, whose infringements are but the tip of the iceberg.

68. Third, refusing the relief would be to give the clearest indication to the copyright infringers that they can infringe with impunity

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behind the cloak of anonymity afforded by the Internet technology :
cf. Totalise Plc v. The Motley Fool Ltd [2001] EMLR 29. This will make
a mockery of the law.

69. Fourth, as I have demonstrated, granting the relief will not
have the effect of compelling the defendants to act in breach of either the
Ordinance or their duty of confidentiality under the licence.

70. Fifth, the ambit of the Data sought is not unduly wide. It is
only the essential information that the plaintiffs need in order to bring
further actions against the infringers.

71. Sixth, the Data can only be used for the purpose of enforcing
the plaintiffs' copyrights and related rights against the persons identified in
the order to be made. The court will take any abuse or misuse of the Data
very seriously. Those who so act in breach of the order are liable to be
committed for contempt.

GRANTING THE RELIEF

72. In the circumstances, I will allow the plaintiffs' application
and will make an order in terms of the Order attached to this Judgment.

COSTS

73. A *Norwich Pharmacal* action is not ordinarily adversarial
proceedings. The normal costs order to be made is that the applicant shall
pay the innocent party costs, including the costs of providing the
information : see *Hong Kong Civil Procedure 2006*, para.24/2/1 at p.424.

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Following this general rule, the plaintiffs and the 1st, and the 4th defendants have agreed on costs in the following terms (“the Costs Order”) :

“The plaintiffs shall pay the defendant (a) costs of the Action including all costs reserved on an indemnity basis in any event; and (b) costs of compliance with the Order on an indemnity basis; and reimburse the defendant for all other reasonable cost of compliance of the Order, all such costs to be taxed if not agreed.”

74. The plaintiffs however refuse to pay the 3rd defendant’s costs. Mr Liao, for the plaintiffs, argues that the 3rd defendant has descended into an adversarial arena and has taken bad points in contesting the action. He contends that the 3rd defendant should be responsible for its own costs of the two affirmations filed in opposition, the costs of the two affirmations filed by the plaintiffs in reply and the costs of the plaintiffs and other defendants for the substantive hearing.

75. In my view, what the 3rd defendant has done is perfectly understandable. It only wishes to have its concerns about its obligations under both the Ordinance and its licence fully ventilated in and its arguments properly dealt with by the court. Given the importance of the questions raised in this action, this is plainly a legitimate approach. Although it has caused some inconvenience (and extra costs) to the plaintiffs, I can see no fault. The 3rd defendant should not be penalized on costs.

76. I will therefore make an order in terms of the Costs Order in respect of all the defendants.

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A TIMELY REMINDER

77. Finally, I wish to say this.

78. The Internet is invaluable and even indispensable, some would suggest, to the free communication, dissemination and sharing of information in modern societies. For my part, I have no intention whatsoever to restrict, obstruct or otherwise frustrate the free flow of communication and information on the Internet. My determination in this action does not and should not be understood to have such effect. What I do hope is that it can serve as a timely reminder. Users of the Internet, like any individuals, must abide by the law. And the law protects the users' rights as much as others' legitimate rights, including those of the copyright owners. Some online copyright infringers may well think that they will never be caught because of the cloak of anonymity created by the P2P programs. They are wrong. And from now on, they should think twice. They can no longer hide behind the cloak of anonymity. The court can and will, upon a successful application, pull back the cloak and expose their true identity. It is not an intrusion into their privacy. It does not even lie in their mouths to say so. For protection of privacy is never and cannot be used as a shield to enable them to commit civil wrongs with impunity.

(J. Poon)
Deputy High Court Judge

A		A
B	Mr Martin Liao and Mr Anthony Wu, instructed by Messrs Pang, Wan & Choi, for the Plaintiffs	B
C	Mr Mark Lin of Messrs Lovells, for the 1 st Defendant	C
D	Mr Patrick Swan of Messrs Freshfields Bruckhaus Deringer, for the 2 nd Defendant (9 January 2006)	D
E	Mr Peter Yuen of Messrs Freshfields Bruckhaus Deringer, for the 2 nd Defendant (16 January 2006)	E
F		F
G	Mr Felix Pao, instructed by Messrs Johnson, Stokes & Master, for the 3 rd Defendant	G
H	Mr William Barber of Messrs Richards Butler, for the 4 th Defendant	H
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Order

1. That the 1st Defendant do within 10 days of the date of the Order disclose to the Plaintiffs' solicitors (if or to the extent known or otherwise available to the 1st Defendant and in documentary form so far as reasonably practicable and convenient to the 1st Defendant) the full name/s, postal address/es and identity card number/s of the person/s whose Internet account/s was or were assigned the Internet Protocol address/es listed in Annex A hereto on the date/s and time/s (according to the Hong Kong time of the Hong Kong Observatory) shown therein;

2. That the 2nd Defendant do within 10 days of the date of the Order disclose to the Plaintiffs' solicitors (if or to the extent known or otherwise available to the 2nd Defendant and in documentary form so far as reasonably practicable and convenient to the 2nd Defendant) the full name/s, postal address/es and identity card number/s of the person/s whose Internet account/s was or were assigned the Internet Protocol address/es listed in Annex B hereto on the date/s and time/s (according to the Hong Kong time of the Hong Kong Observatory) shown therein;

3. That the 3rd Defendant do within 10 days of the date hereof disclose to the Plaintiffs' solicitors (if or to the extent known or otherwise available to the 3rd Defendant and in documentary form so far as reasonably practicable and convenient to the 3rd Defendant) the full name/s, postal address/es and identity card number/s of the person/s whose Internet account/s was or were assigned the Internet Protocol address/es listed in Annex C hereto on the date/s and time/s (according to Hong Kong time of the Hong Kong Observatory) shown therein;

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4. That the 4th Defendant do within 10 days of the date of the Order disclose to the Plaintiffs' solicitors (if or to the extent known or otherwise available to the 4th Defendant and in documentary form so far as reasonably practicable and convenient to the 4th Defendant) the full name/s, postal address/es and identity card number/s of the person/s whose Internet account/s was or were assigned the Internet Protocol address/es listed in Annex D hereto on the date/s and time/s (according to Hong Kong time of the Hong Kong Observatory) shown therein;

5. That each of the Defendants shall by an officer duly authorized make and file an affidavit or affirmation and serve a copy thereof on the Plaintiffs' solicitors verifying that it has duly complied with the applicable provisions of the Order within 7 days of its compliance with the Order;

6. That the Plaintiffs are only permitted to use the documents and information disclosed pursuant to this Order for the purposes of enforcing their copyrights and related rights against all and any persons identified pursuant to this Order;

7. Liberty to apply.

Annex A

Internet Protocol Address	Date	From (Hong Kong Time of the Hong Kong Observatory)	To (Hong Kong Time of the Hong Kong Observatory)
61.238.86.128	07/11/2005	3:15:38 p.m.	3:35:16 p.m.
61.93.62.244	07/11/2005	3:54:20 p.m.	4:19:20 p.m.
61.92.223.21	07/11/2005	5:08:52 p.m.	5:24:19 p.m.
61.92.217.66	07/11/2005	6:38:25 p.m.	7:03:16 p.m.
210.6.153.64	07/11/2005	7:19:10 p.m.	7:40:05 p.m.

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Annex B

Internet Protocol Address	Date	From (Hong Kong Time of the Hong Kong Observatory)	To (Hong Kong Time of the Hong Kong Observatory)
218.190.142.14	03/11/2005	6:02:23 p.m.	6:23:23 p.m.
221.124.98.205	07/11/2005	3:51:33 p.m.	4:18:42 p.m.
221.126.81.107	07/11/2005	4:46:02 p.m.	5:07:17 p.m.
221.127.40.18	07/11/2005	5:25:20 p.m.	5:51:09 p.m.
218.191.48.239	07/11/2005	6:13:57 p.m.	6:28:05 p.m.

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Annex C

Internet Protocol Address	Date	From (Hong Kong Time of the Hong Kong Observatory)	To (Hong Kong Time of the Hong Kong Observatory)
61.18.129.80	03/11/2005	5:05:48 p.m.	5:31:42 p.m.
222.166.244.196	03/11/2005	6:34:27 p.m.	7:02:00 p.m.
222.167.133.25	03/11/2005	7:33:29 p.m.	8:03:22 p.m.
218.254.18.38	07/11/2005	4:51:42 p.m.	5:19:40 p.m.
61.15.172.31	07/11/2005	7:23:11 p.m.	7:47:17 p.m.
61.18.94.217	10/11/2005	6:45:56 p.m.	7:09:33 p.m.

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Annex D

Internet Protocol Address	Date	From (Hong Kong Time of the Hong Kong Observatory)	To (Hong Kong Time of the Hong Kong Observatory)
203.218.220.230	03/11/2005	4:38:30 p.m.	5:03:08 p.m.
220.246.135.43	03/11/2005	7:40:15 p.m.	8:03:48 p.m.
219.77.77.125	07/11/2005	4:20:33 p.m.	4:47:56 p.m.
219.79.207.65	07/11/2005	6:05:32 p.m.	6:30:12 p.m.
218.102.230.173	07/11/2005	7:13:21 p.m.	7:37:30 p.m.
219.78.165.47	10/11/2005	7:32:10 p.m.	7:58:18 p.m.