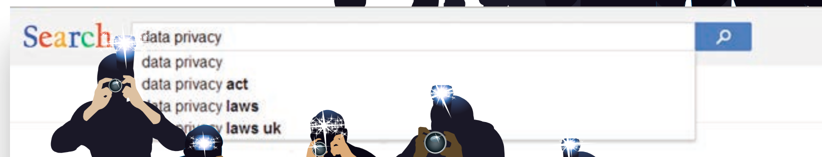
Private eye

Tom Morrison & David White review the world of information law



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IN BRIEF

- The ICO is on a mission against nuisance calls.
- *Mail Online* in a jam over image rights.
- The right to be forgotten: an Orwellian dilemma or a triumph for Human Rights?

Nuisance calls are well named. There can be few homeowners who look forward to the lotteries of "Will we get an uninterrupted night's television?" or, "Will someone wake the baby by calling to enquire about how I purchase my electricity and gas?". Relatives of new parents know not to call the main house telephone around the witching hour. Many telesales people, it seems, do not.

Unwanted marketing telephone calls are not a new problem. The industry has taken welcome steps over the years to try to alleviate the issue with initiatives such as the telephone preference service (TPS)—now with the force of law behind it—but clearly not everyone is playing by the rules.

Two businesses in particular have been highlighted by the Information Commissioner's Office (ICO) for not only breaching the law by calling people on the TPS list, but also apparently trying to mask their true identities when calling. While they were issued with enforcement notices another company, Amber Windows, was hit with a £50,000 fine after repeatedly ignoring the ICO's requests to stop breaching the law by calling TPS subscribers. A further two companies (in the direct marketing and payment protection insurance claims industries) were threatened with fines totalling £140,000 at the end of May unless they could prove they were not responsible for making or initiating the calls.

The ICO has now issued a call to arms for members of the public to contact its helpline if they have received nuisance calls relating to boilers, insulation and solar panels. So for any business thinking of flouting the laws on permitted and prohibited telephone marketing, perhaps now is the time to give greater weight to the risk of the ICO proactively coming after them and, if the case is proven, slapping them with a fine—particularly if they are trying to sell home improvement products.

> *"Relatives of new parents know not to call the main house telephone around the witching hour"*

Images as personal information: the Weller case

In a world obsessed by social media it is becoming increasingly common for people to document everyday activities by way of a Tweet or a Facebook post. We happily blog about making a cup of tea, or Whatsapp our friends over our pet's latest hijinks. Often a message will be accompanied by an image captured using the latest smartphone or tablet which documents the notable occasion.

The plethora of ways in which images can be captured and shared with others creates a number of interesting legal quagmires; none more so than with regard to the right to privacy. For example, it is not uncommon for an image of a third party to be posted to the world without any form of consent having first been obtained. In such circumstances, said third party might feel aggrieved that their right to privacy has been infringed and that, in the process, their personal data has been misused.

The first obstacle faced by our aggrieved third party is that there is no general tort of invasion of privacy in the UK. The right to privacy has developed through case law, with the majority of cases centring on celebrities involved in lengthy legal battles following harassment from overzealous journalists. There is also no specific law of "image rights" in the UK and, when combined with differing views as to whether a photograph of a person constitutes sensitive personal data, our aggrieved third party might feel that they have no legal remedy for this perceived injustice.

Such hurdles were successfully negotiated by The Jam frontman Paul Weller, after photographs of him and his children enjoying a day out in Los Angeles were published by the *Mail Online*. The judgment from Mr Justice Dingemans in the High Court and the potential implications arising from it may well have publishers in a panic (*Weller & Ors v Associated Newspapers Ltd* [2014] EWHC 1163 (QB)).

The first question faced by Dingemans J in deciding the case was whether there was a reasonable expectation of privacy. This is the foundation for building a claim of misuse of private information, and a claim for a breach of the Data Protection Act 1998 (DPA 1998) will stand or fall on the answer.

In considering whether there is a reasonable expectation of privacy, one has to look at the circumstances of the case including the attributes of the claimant,

the nature of the activity and the place at which it was happening. A person's image constitutes one of the chief attributes of his or her personality as it reveals that person's unique characteristics. In *Weller*, however, Dingemans J appears to have expanded the common law tests by holding that photographs showing expressions on children's faces displaying a range of emotions could be regarded as a chief attribute of their personality and could give rise to a reasonable expectation of privacy.

After determining that the Weller children had a reasonable expectation of privacy in respect of the photographs, Dingemans J then had to balance their right to respect for their private and family life under Art 8 of the European Convention on Human Rights against the publisher's right to freedom of expression under Art 10 of the Convention. If photographs of children have been published without authorisation it will always be an important factor and Dingemans J held that "the general interest of having a vigorous and flourishing newspaper industry does not outweigh the interests of the children in this case". As such, Weller's claim for misuse of private information was successful along with his claim for breach of DPA 1998.

The *Weller* case highlights that a high degree of care will be required whenever publishing pictures of children: one could argue that it creates an image right in respect of the facial features of children for the first time. The *Mail Online* has stated its intention to appeal the decision and so it remains to be seen whether the decision will be overruled or whether the door will be kept ajar for the law on "image rights" and privacy to be developed further and, in the process, for the hurdles to be lowered for our aggrieved third party.

Google & the right to be forgotten

If you have ever Google searched your own name, you will be aware that the search results might reveal links to your Facebook or LinkedIn page, perhaps a press release in which you were mentioned or a link to your employer's website. Sometimes, the information revealed might be more controversial. For Mr Mario Costeja Gonzàlez, a Spanish national resident in Spain, a Google search provided a link to an historic publication on La Vanguardia newspaper's website, which revealed details of his bankruptcy proceedings.

Gonzàlez did not want this historic episode of his life to be easily accessible to the public and so he lodged a complaint with the Spanish Data Protection Agency requesting that La Vanguardia remove or alter the article to remove his personal details. Gonzàlez also requested that Google be required to remove links to the publication from its search engine.

The Spanish Data Protection Agency rejected the complaint relating to La Vanguardia holding that publication of the information was legally justified; however it upheld the complaint against Google holding that operators of search engines are subject to data protection legislation and that it has the power to require them to withdraw data which compromises an individual's data protection rights. Google appealed to the Spanish National High Court, which referred the following questions on to the European Court of Justice (ECJ):

- If Google carries out its search activities outside of Spain, does the national legislation transposing Data Directive 95/46 (the Directive) apply?
- Does the activity of its search engine render Google a data controller?
- With regards the right to be forgotten; can individuals require Google to remove links to their personal data published on third parties' web pages, even when such information has been lawfully published?

The decision of the ECJ

With regards to the first question, the ECJ commented that Google Search is responsible for indexing websites throughout the world and that it is operated by Google Inc. located in the US. Google Spain is a subsidiary of Google Inc. and it is responsible for various advertising activities. Despite the search activities being carried on outside of Spain, the ECJ held that Google Spain was "inextricably linked" to the activities of its parent company through its own advertising activities. Therefore, critically, Google's search engine was deemed to be subject to EU data protection laws.

> *"Google is a key source of information to the masses and so limiting or removing data from searches needs to be carried out with care"*

The ECJ also held that the activities of a search engine, ie finding information, indexing it, storing it temporarily and making it available to users, must be classified as the processing of personal data when the information contains personal data and it follows that the operator of such search engine must be deemed a data controller within the meaning of the Directive.

It therefore follows that as a data controller, Google Spain has to comply with data protection legislation and could therefore be required to remove name links to webpages published lawfully by third parties from the list of results displayed as part of a search. Whether or not this right to be forgotten applies depends on whether the data has become inadequate, irrelevant or no longer relevant.

The implications

The ramifications of this decision are far-reaching. Google is responsible for approximately 90% of online searches in the EU and it has confirmed that since the ruling it has received thousands of requests from individuals wishing to have links to their personal data removed. While Google may have the capacity to deal with such requests, it is yet to be seen whether smaller companies will be overwhelmed by an influx of such requests.

The decision will be welcomed by many who would like their past to be forgotten, but it must surely be right that care must be taken that a balance is struck between the protection of personal data and the public's right to know. The ECJ did not provide an indication as to how this balance should be struck and it is yet to be seen how data protection authorities will apply the judgment. The ICO is giving Google some space to determine how it is going to work out a practical solution, but the EU's Art 29 Working Party has issued a strong statement requiring action and promising a co-ordinated response to any failure to comply.

Google is a key source of information to the masses and so limiting or removing data from searches needs to be carried out with care. Too rigid an approach could undermine human rights, whereas too much editing and we may start drawing parallels with position of Winston Smith, the protagonist in George Orwell's *Nineteen Eighty-Four*, responsible for historical revisionism at the Ministry of Truth. **NLJ**

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