

Chapter 62

Digital Copyright Enforcement: Between Piracy and Privacy

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ABSTRACT

Copyright and privacy are two fundamental values for a democratic society, since both enhance the development of each individual's personality. Nevertheless, in cyberspace, copyright enforcement and the right to informational self-determination have become two clashing realities. In fact, with the arrival of digital technology, especially the Internet, rightholders, facing massive on-line copyright infringements, mainly by file-sharers on peer-to-peer (P2P) systems, started developing more and more intrusive new enforcement strategies in electronic communications as a means to identify the infringers and the committed infractions. The goal of the present paper is to study, in a context where massive unauthorized uses of copyrighted works is an undeniable reality, how the boundaries between what is public or private become fainter, whether the use of tracking software is consistent with personal data protection legislation, and whether it is possible to reconcile these two human rights.

INTRODUCTION

Until recently, the mere idea of a conflict between copyright and privacy rights would be quite surprising. The tension between these rights was indeed almost imperceptible, since the referred branches of law – both recognized as human rights and related to the development of an individual's personality as an ethical entity in articles

12 and 27 § 2 of the Universal Declaration of Human Rights – have developed autonomously, in tangentially unrelated fields, and have hence co-existed peacefully.

In fact, traditionally, the boundaries between copyright and privacy were perfectly drawn in the context of the enforcement of the patrimonial rights granted to a copyright holder. Indeed, both in the common law copyright system and in the *droit d'auteur* system, despite their different bases and principles, copyright has been drawn

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as an instrument to grant the holder, amongst other rights, the exclusive economic right to use and exploit his/her original work. This does not mean that copyright can be reduced to a mere patrimonial right. Actually, in the *droit d'auteur* approach that prevails in European legislations, the copyrightable intellectual work is considered an extent of its creator's personality and, therefore, the legal copyright regime directly regards the development of his/her personality and subsequently promotes cultural diversity. For that reason, beyond the recognition of patrimonial rights, law grants the creator moral rights over the work, such as the right to claim authorship of the work and to object to any distortion, mutilation or other modification of or other derogatory action in relation to the said work which would be prejudicial to his honor or reputation. Recently, moral rights have been introduced in common law countries in general – where they were not traditionally recognized – and, although in very limited terms, in the United States of America (USA) legislation, in particular.

Not disregarding the mixed nature of copyright, the possible conflict between that right and privacy rights could only find relevant space in the field of patrimonial rights' enforcement. If, on the one side, rightholders had the exclusive right to exploit publicly their copyrighted work, on the other side, private and non-commercial uses of the copyrighted work were free and escaped their control, since they belonged to the private sphere of its consumer.

However, with the advent of digital technology, especially the internet, this state of things has altered dramatically since rightholders, facing massive on-line copyright infringements, mainly by file-sharers on peer-to-peer (P2P) systems, started developing more and more intrusive new enforcement strategies in electronic communications as a means to identify the infringers and the committed infractions, reaching personal electronic information of consumers of online copyrighted works.

Recognizing the importance of creative contents to the digital economy, legislators have been accompanying the rightholders' efforts to strengthen copyright protection in the digital environment, by creating sectorial legislation in the field of copyright enforcement. However, cyberworld's idiosyncrasies, its specific structure and architecture, have been revealing copyright's highly porous new external boundaries that have been forcing it to leave the ivory tower where it used to stand in the old analogical world. In the digital relationship established with privacy rights, copyright's boundaries are becoming faintly outlined. In fact, considering that all data flowing through the internet is basically computer code, it is not possible for rightholders' tracking software to distinguish which collected data is public or private, lawful or unlawful, without a subsequent human-made normative evaluation. This simple example demonstrates clearly how thin the line between the exercise of a private surveillance power granted by law to the intellectual property's owner and the violation of the users' right to privacy can be.

The purpose of the present paper is precisely to present and briefly study the tension that has been arising in the digital world between new intrusive copyright enforcement mechanisms, on the one side, and internet users' privacy, on the other, and how these rights can be reconciled.

BACKGROUND

Technology has always been an essential element for copyright regulation. In fact, since copyright regards the protection of intellectual aesthetic creations or, in other words, immaterial goods, the exteriorization of such kind of object needs the mediation of a physical support which may transform and evolve according to the known technology. The *corpus mysticum*, i.e., the copyrighted creative expression, is to be revealed by the *corpus mechanicum* that technology permits.

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