

Copyright and Privacy Governance: Policy Intersections and Challenges

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1. Introduction

Among the most profound changes in the governance of communication and media in the past 15 years is the fact that certain policy areas have attained an immense presence and significance in the average media user's everyday life. Two of these seemingly and previously largely unrelated areas are those of copyright and privacy regulation. They have become a regular part of public debate and increasingly a matter of concern, albeit for different reasons and from conflicting perspectives, for all parties involved. For a start, citizens are concerned because the terms and conditions of consuming and using media artefacts are uncertain and messy, and individual media usage behavior, which was not regarded problematic in the analogue world is often criminalized in the digital world, through the change of the law. Further, policymakers seek to reconcile opposing ends of interests and pursue law directions that do not always derive from diffused interests, not least because the pressures from the industry to monitor digital content traffic on copyright grounds clashes with existing privacy laws. Moreover, a wide range of actors from civil society and professional organizations, politics and independent artists and media workers are concerned with the impact of copyright in digital environments, the creation and making of culture and the erosion of earned rights and liberties – whether as a matter of current status quo or as a matter of principle – in the lives of citizens. Thus, not only have both policy and rights domains become important for the average user, having exceeded the realm of celebrities and the state (for privacy, for example) or large corporations and expert communities (such as librarians or lawyers in the case of copyright), but they are also increasingly entangled in each other. This chapter discusses this phenomenon on the basis of recent policy initiatives and aims to show the change of paradigm in the governance of media and communication by arguing that ultimately a larger weight is applied on individual activity, regulation and policing.

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2. Where copyright meets privacy

In the past decade, Europe has shifted its Copyright policy focus towards what it describes “anti-piracy” protection. It does so within its larger remit of law harmonization and the promotion of a single market of Intellectual Property. It combines a regulatory tradition of Intellectual Property regulation in the form of Copyright, Trademarks and Patents, as a broad framework of what the European Commission termed as the “Galaxy of IP Rights” (Horns, 2011; Kroes, 2012a; Kroes 2012b). The force of “harmonization” is crucial in facilitating policy change there where political and industrial elites, whether through pressure, negotiation or lack of political options (or imagination) pursue an agenda of specific transformation with important implications in other policy areas. Generally, the drive for policy change is found in global and other national and regional contexts.

Historically, the international framework for the regulation of the right to copy (Copyright) Intellectual Property is heir to the Berne Convention of 1886 with further institutionalizations and revisions through the 1967 establishment of the World Intellectual Property Organisation (WIPO) and the 1996 agreement on Trade Related Intellectual Property Services (TRIPS) of the World Trade Organization (WTO). The European Directive of the harmonization of certain aspects of Copyright and Related Rights in the Information Society (also known as Directive 2001/29/EC Directive Infosoc) updated the 1996 TRIPS and marked the starting point for several changes in the regulation of Intellectual Property (IP) in EU member states. Some authors consider the Infosoc’s role to reinforce the framework of WTO controversial, because it left “the most important issues of copyright in the digital environment unresolved” (Hugenholz, 2000). The EU aimed to harmonize existing national laws relating to the Information Society (2001/29/EC). Also criticized is the Directive on the enforcement of Intellectual Property Rights (IPRED 2004/48/EC) by several authors for its draconian measures and demands that intermediaries, such as telephone companies and Internet service providers (ISPs) *reveal customer data* and control contents (Anderson, 2004).

The IPRED complements and supports other directives, such as electronic commerce with the Software Directive (2009/24/EC) and the European Framework of Telecommunications (or Telecoms Package which includes several directives (2009/14/EC, 2009 / 136/EC and regulation number 1211/2009). This latter establishes the Body of European Regulators for Electronic Communications (BEREC). The telecoms package allows

companies to restrict users' access to or use of services and applications through electronic communications networks (PE-CONS 3677/6/09 REV 6:30). This is a turning point in the relation of copyright law and privacy law and the intersection where larger private i.e. industrial interests collide with citizens' private interests. Although the e-Commerce Directive states that the ISPs are not required providing users' data, the combination of the three directives (that is, the IPRED Telecommunications and Trade) transforms intermediaries to actors in law implementation. Thus, the Spanish Royal Decree approved 1889/2011 of 30 December (BOE, 2011) regulates the operation of the Commission on Intellectual Property, which is tasked to seek collaboration of service providers (Sarikakis & Rodriguez-Amat, 2012). Similarly, France and the UK follow similar legal frameworks. In France, the new institution HADOPI (High Authority for the Distribution of Works and the Protection of the Rights of the Internet) was created in 2009. Ireland, has not updated a law that suggests a gradual response in case of violation of intellectual property, but the most important company providing Internet services in the country (Eircom) has decided to apply the measure on their own accord with their users and customers (Healy, 2012).

At the same time, a long-standing preparation of the U.S. and Japan to define an anti-counterfeiting agreement, since 2006, was consolidated in the recently largely contested and temporarily defeated ACTA or Anti-Counterfeiting Trade Agreement. ACTA came out of a series of closed meetings among countries and organizations, including the European Union. It was signed in October 2011 by eight countries, and by the end of 2012 by 30 states (European Parliament, 2012), including 22 member countries of the European Union *as part of the i2010 agenda* (EC, 2009). The intentions of this new multilateral contract, the process through which it was achieved and consequences for freedom of speech have been widely discussed, among others, because it gave rise to the establishment of an authority outside governments and international organizations to police anti-counterfeiting. It is within this context, and possibly in the derived update from national frameworks, where shifts in regulation must be understood. At the European level, the need for update in the regulation has been expressed in several occasions. For instance, Neelie Kroes, vice-president of the European Commission mentioned in her blog

at the moment, we're not flexible or responsive enough. Too often the response to innovative ideas – to ideas like Netflix or iTunes – is simply to be paralyzed with fear and inaction. Spotify just reached us here in Belgium – a

whole three years after it launched elsewhere in the EU! Ideas shouldn't take so long to spread within a single market. (Kroes, 2012a).

And, a month later,

*this framework must adapt to the digital era: and not with 27 different, fragmented systems, but acting as the EU: so that artists, entrepreneurs and citizens benefit from a **borderless, digital single market**, where accessing and distributing content is easy and legal, generating more value and more visibility. (Kroes, 2012b)*

The Communication COM(2011)-287 from the European Commission refers to

the Commission's overall strategic vision for delivering ... a European IPR regime that is fit for tomorrow's new economy, rewarding creative and inventive efforts, generating incentives for EU-based innovation and allowing cultural diversity to thrive by offering additional outlets for content in an open and competitive market.

The notion of “Galaxy” in this single market means effectively three things: a regulatory single market is based on the technological convergence in the specific regulatory geography of Europe; fields of regulation historically separated (copyright, trademark and patent) “merge”; and the new technology of cloud computing which facilitates consumption anytime, anywhere cements the drive and control for around-the-clock monitoring of users. These changes are reflected in the European Directive on “collective management of Copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market” (EP, 2012). The Galaxy notion of interconnection and continuity also implies the blurring of boundaries between what is considered to be a private, personal realm of media consumption and usage and what is a realm accessible by not just – or not any more – the state and its institutions, but by private commercial i.e. market actors whose own roles have been enhanced to law enforcers. As a consequence, notions of privacy and privacy laws are now challenged *vis à vis* the proclaimed goal of “anti-piracy”.

Therefore, the issue of privacy is becoming increasingly important to users as they find themselves more often and for longer in this “Galaxy” through their participation in online purchasing, social media, file exchange activities and everyday labor and leisure activities in general. The radical development of monitoring technologies and its minimized cost, provide the means for the monitoring and policing of individual behavior in the most private sphere of one's home. Bound by private commercial contracts or by clicking the agreement of the terms and conditions privately

lead companies are authorized, ISPs can monitor, file and provide (share with authorities) information about the uses, contents and interactions of citizens.

Internationally, privacy is recognized as a fundamental right in the International Covenant on Civil and Political Rights (ICCPR) the right to privacy in Article 17 (UN, 1976). The United Nations standards on Computerized Personal Data Files provide specific principles to states about the use of private data. Moreover, the European Convention of Human Rights established by the Council of Europe recognizes the right to privacy in Article 8, but still mark certain limitations, such as in the cases of “national security, public safety or the economic well-being of the country for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others” (CE, 2010). In addition, in the Charter of Fundamental Rights of the EU, data protection is included as an independent fundamental right under Article 8, which appoints an “independent authority” responsible for the enforcement of the laws (E.U., 2000). The creation of the Data Protection Directive (Directive 95/46/EC of the European Parliament, 1995) was an effort to harmonize the laws on privacy and data protection. That directive expanded the Convention 108 detailing the criteria from which the processing of data is legitimate (Richter, 2011:10). Therefore, the e-Privacy directive, of 2002 was outlined as an extension of the Directive of Data Protection to cover certain provisions, such as cookies, spam and confidentiality of communications.

Monitoring the European Data Protection (EDPS) is the new “instrument”. It is an independent authority responsible for the supervision of the European institutions and bodies considering their privacy and data protection issues, its implementation has already generated some conflict with the European Commission regarding measures that allow retention of data, particularly the Directive for Data Retention (Directive 2006/24/EC) calls for providers of telecommunications services in the European Union to retain all traffic data and location of its customers for a period of at least six months and at most for two years from the date of communication. The European Commission considers that this is a “very useful tool for criminal justice systems and to strengthen the law in the EU” (EC, 2011). The EDPS has established that “the retention of telecommunications data is a clear interference with the right to privacy of the persons involved as provided in Section 8 of the European Convention of Human Rights and Article 7 of the Charter of Fundamental Rights [...]” (EDPS, 2011:2, 7). In

2012, the European Commission announced the forthcoming reform policies on data protection. A proposal for a new regulation “On the protection of individuals with regard to processing of personal data and on the free movement of such data” was published in January 2012 (EC, 2012). This is intended to replace the main data protection Directive 95/46/EC – with a new directive that provides specific data protection rules. There is a focus on the economics of privacy and data protection. Since the announcement of the new reform, several parties have expressed interest in the proposed framework, but also have shown some concerns. For example, the EDPS has expressed concern about the regulation that opens

the possibilities to restrict basic principles and rights, the possible repeal of the transfer of data to third countries, excessive use of powers granted to the Commission in the mechanism designed to ensure consistency between the supervisory authorities and the new framework for exceptions as purpose for the principle of limitation. (EDPS, 2011)

Most of the privacy aspects of the law are oriented towards the destination of the data: the collection, processing and handling without consent – and increasingly, even with user-consent. While laws also erode the sanctity of privacy through exceptions allowing state interference, online technologies can be used for such purposes without warning or knowledge of the individual. There is a certain sense of uncertainty and fluidity in terms of user protection that derive not only from the differences between the normative and philosophical dimensions of privacy, but also the difficulty of effectively protecting a right so fragile. Moreover, average users lack the technical and economic resources to counter international (and) corporate actors.

The United States based Center for Copyright Information (CCI) is formed by the most important music and motion picture industry organizations: The Recording Industry Association of America (RIAA), The American Association of Independent Music (A2IM), The Motion Picture Association of America (MPAA), The Independent Film & Television Alliance (IFTA) and some important U.S. Internet service providers: AT&T, Cablevision, Comcast, Time Warner Cable, Verizon. The entity, with the support of the Presidency of the United States has launched a program called Copyright Alert System (CAS) that permits the massive monitoring of the peer-to-peer networks activity in search of illegal download or upload (Fitzpatrick, 2013). This software scans and collects the circulating material in the P2P networks looking for pieces of copyrighted material. In case illegal material is found, the tracker emails the ISP with the IP address

of the file-sharer. The ISP then sends warnings and punishments to the subscriber of the accused P2P Network “including mandatory "copyright education" and potential bandwidth throttling or blocking of popular websites” (Stoltz, 2012). In the process, CCI claims transparency but avoids nearly every significant detail of how the massive P2P monitoring scheme will work (Stoltz, 2012) and insisting on its website that the system will protect Internet users’ “important free speech and privacy rights” (Fitzpatrick, 2013).

The European effort to regulate has consisted in involving the ISPs in the process of detection and identification of the illegal traffic of copyrighted material (BBC, 2011b). The transposition of the European Directives that had left that possibility open combined with the progressive presence of the right holders of the copyrighted material, often under the form of collecting societies, in the policymaking. The final result is very similar to the picture that in the US represents the CCI: a collaboration between both. However the national idiosyncrasies have materialized in different policies and in different paces of implementation. The pioneer was the French Loi Hadopi in 2009 that claimed to track more than 18 Million IP addresses between November 2010 and July 2011) (BBC, 2011a). The UK passed the Digital Economy Act in 2010 that incorporated the need to adopt anti-piracy measures; however the regulation is not finally settled due to the resistance of the ISPs that do not want to deal with the costs of notification to the infringing users. The elevated costs of implementing the measures appear to be the major break for these anti-piracy measures (see the cases of France in Masnick, 2013 or New Zealand in Enigmax, 2013), not the invasion of privacy or the limitations in the freedom of expression.

3. Outlook

In the age of digital communications our understandings about privacy are being challenged. Regulatory frameworks are still pushed to accommodate corporate pressures to a global framework between public concerns and even states on the permeability of corporate practices. This is the case at the macro level of communication policies, especially where global developments of markets, politics and political institutions respond and normalize, in fact, a new regime that emerges from corporate practices (Chakravarty and Sarikakis, 2006). In the case of global communication,

as in the case of social networks, the difficulty of effective national regulation has led nations and governments to co-regulation. Much of this direction is the development of self-regulatory incentives, which do not always come with the expected results.

Privacy protection is directly related to personal autonomy and democratic practices and personal development and freedom (Sarikakis and Tsapogas, 2012). Several authors have pointed out that intervention policies, even if based on economic predicaments, threaten open communication and democratic participation. Mitrou argues (2010, p.133) “the danger of retaining all data communication has to do with how this could shape the public's willingness to express critical ideas and constructive forms of communication that are critical to democratic societies.” Moreover, conceptual blurring is tied to the blurring of the conditions in the digital environment of work. Authorship – and hence the holding of rights on IP – was always a matter of definition difficult to regulate (Silbey, 2008, p. 345), and the historical trajectory of this attempt has been to benefit the publishers. Nowadays, cross media productions, the remix and authorship network is much more problematic, because the author cooperates, participates and “vanishes” at the same time. Tushnet writes “lawyers, especially judges, may not understand the context of remixed culture like the media fans, in which each contribution goes into a community with various traditions” (2010, p. 8). Not only the author, but also other cross media dynamics of the international and global dissemination, the simultaneous protection of a single product in multiple media or the protection of not yet performed work pose challenges of balance (Rodriguez-Amat & Sarikakis, 2012).

Given this brief sketch of the intersections and challenges posed by copyright and privacy juridical understandings and international law, it is important to keep an eye on the impact on other rights. The debate is still not over. It is arguable that the global policy regimes emerging from this intersection do not favour citizens’ free spaces of interaction and expression. At the same time, political resistance to the erosion of civil liberties and fundamental freedoms has not succumbed to these pressures. It remains to be seen, where the new boundaries for privacy will be situated when and if the question of copyright in digital works is stabilized.

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