

Common Position on Privacy and Copyright Management

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Copyright and the right to privacy have always been considered to have the same roots. Warren and Brandeis referred to the common law on the protection of intellectual property when laying the foundations for the individual's "right to privacy"¹. And yet in the framework of electronic commerce via the Internet copyright and privacy seem to collide.

Whereas in the analogous (offline) world copyright law provided for exemptions for private (non-commercial) use in the digital (online) world copyright law covers every act of temporary reproduction and transfer to a computer's Random Access Memory for the purpose of reading, listening or viewing². The author of a digital work (including software programs, databases) has the right to forbid this or to charge for any such use.

Partly the practical problem may be attributed to the fact that there are so far no reliable privacy-friendly methods of payment on the Internet available. Once methods of anonymous payment will be offered digital works could be provided for use or download in return for just in time payment.

For the legitimate purpose of protecting intellectual property in cyberspace and to prevent software piracy copyright protection technologies such as robots ("web spiders") will identify protected items or digital works which send reports to central servers when used or copied asking for permission or billing. Electronic Copyright Management Systems (ECMS) are being devised and offered which could lead to ubiquitous surveillance of users by digital works. Some ECMS are monitoring every single act of reading, listening and viewing on the Internet by individual users thereby collecting highly sensitive information about the data subject concerned³.

ECMS will be run not so much by individual copyright-holders but by large publishing houses and intermediaries (representatives of rights-holders) who have a strong interest in monitoring user behaviour for secondary purposes not related to copyright protection (e.g. direct marketing). By contrast in the analogous world no one is storing personal data about who is reading which book how many times. Not only privacy but also freedom of speech and information are at stake here.

¹ Warren/Brandeis, Harvard Law Review Vol. IV (1890), 193, 204

² Bygrave/Koelman, Privacy, Data Protection and Copyright: Their Interaction in the Context of Electronic Copyright Management Systems, 1998;

<http://www.ivir.nl/publications/koelman/privreportdef.pdf>

³ For a detailed analysis of available technologies see Greenleaf, "IP Phone Home", ECMS, c-Tech, and Protecting Privacy Against Surveillance by Digital Works, Proceedings of the 21 International Conference on Privacy and Personal Data Protection, Hong Kong 1999,

http://www2.austlii.edu.au/~graham/publications/ip_privacy/

Increasingly rights management information (RMI) is being used for copyright purposes. This includes digital watermarks or other techniques identifying the copyright item. This information is in turn protected against removal by provisions of the WIPO Copyright Treaty 1996 which are aimed at preventing circumvention of copyright protection. However, rights management information may in itself be personal information e.g. if it contains the identity of the user/purchaser or conditions of a personalized licence. Therefore it can be used to collect and disseminate personally identifying information on an individual's online activities.

Attempts to delete such information or to prevent robots ("web spiders") from looking for such information even for direct marketing purposes could be seen as illegal circumvention of copyright technologies.

Monitoring the "flow" of digital works can create a personally identifiable audit trail. Blocking access to copyright items altogether e.g. by using encryption could be preferable from a privacy perspective as long as this does not in turn lead to the registration of user behaviour. National systems to block certain illegal content following the search-and-seizure-model on borders are under consideration which could be used not only to prevent copyright infringements but also access to material in cyberspace which is illegal under the relevant national law. However, this could lead to inroads into telecommunications secrecy and - due to the architecture of the Internet - this is unlikely to be effective.

In order to strike a fair balance between copyright-holders and users' privacy the Working Group calls on designers, producers and providers of ECMS to

a) Design, produce and provide Electronic Copyright Management Systems, which do not collect personal information and which allow for anonymous or pseudonymous transactions. The Working Group reaffirms in this context the view that in general users should have the option to access the Internet without having to reveal their identity where personal data are not needed to provide a certain service⁴. Under certain conditions the use of pseudonyms could protect user privacy while at the same time preserving the economic interests of copyright-holders: Digital watermarks could contain transaction codes whereby individual copies are numbered and these numbers would be linked to individual users in a secure database run e.g. by a trusted third party. That link should only be made for copyright protection purposes e.g. once a court order had been issued;

b) inform users about the processing of personal data (including pseudonyms) by digital works and provide for the greatest possible transparency in the operation of the copyright management system. The Working Group supports the Recommendation 1/99 adopted by the European Working Party on the Protection of Individuals with regard to the Processing of Personal Data on Invisible and Automated Processing of Personal Data on the Internet Performed by Software and Hardware⁵. This applies equally to the processing of personal data by digital works.

Filtering and scanning techniques to monitor content lead to inroads into privacy and telecommunications secrecy. The Working Group therefore does not consider them to be appropriate for preventing copyright infringements.

The privacy-friendly protection of intellectual property is essential for the development of global electronic commerce. Therefore an international agreement e.g. within the framework of WIPO as well as standardisation measures are needed to solve the problems of transborder copyright protection using privacy-enhancing technologies.

⁴ Report and Guidance on Data Protection and Privacy on the Internet ("Budapest-Berlin-Memorandum") of 19.11.1996, Recommendations 6 and 9; http://www.datenschutz-berlin.de/attachments/138/bbmem_en.pdf

⁵ http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/1999/wp17en.pdf