Chapter 3
File-Sharing of Copyrighted Works, P2P, and the Cloud:
Reconciling Copyright and Privacy Rights

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ABSTRACT

In cyberspace, copyright enforcement and privacy rights have become two clashing realities. In fact, with the arrival of digital technology, especially the Internet, right holders, facing massive online infringements to their reproduction or distribution exclusive rights, mainly by file-sharers on Peer-to-Peer (P2P) systems or Cloud storage systems clients, 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 chapter is to study 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, proposing a reflection on a possible extension of the use of levies in order to compensate right holders for private copies originating from unlawful sources.

INTRODUCTION

The tension between copyright and privacy is a relatively recent phenomenon.

In fact, until the dawn of the 21st century, the mere idea of the existence of a conflict between copyright and privacy rights would cause some strangeness. The tension between these rights was indeed almost imperceptible, since the referred branches of law, despite the fact that both are recognized as human rights, 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 grounds, which allowed them to co-exist peacefully.

Traditionally, in the pre-digital world, the boundaries between copyright and privacy were perfectly drawn in the context of the enforcement of the patrimonial rights granted to a copyright holder. Although copyright cannot be reduced to a mere patrimonial right – since beyond the recognition of such kind of rights, law grants the creators moral rights over their intellectual aesthetic works,

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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 – both in the common law copyright system and in the droit d'auteur system that prevails in European legislations, where 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 despite their different bases and principles, copyright has been drawn primarily as an instrument to grant the holder, amongst other rights, the exclusive economic right to use and exploit his/her original work. Not disregarding the referred mixed nature of copyright, the possible conflict with privacy rights could only be perceived 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 were integrated in the private sphere of its consumer.

However, with the advent of digital technology, especially the internet, this state of things has altered dramatically. Rightholders, facing massive on-line copyright infringements or others unauthorized uses of works, mainly by file-sharers on peer-to-peer (p2p) systems or, more recently, by users of cloud computing platforms, 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.

As a consequence of recognizing the importance of creative contents to the digital economy, legislators around the world have been escorting the rightholders' efforts to strengthen copyright protection in the digital environment, by creating not only sectorial substantive legislation but also in the field of digital copyright enforcement.

Cyber world's peculiarities, such as its specific structure and architecture and the fact that the enforcement is no longer only related to the apprehension of tangible things physically supporting the protected works but with the control of information and data, 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 and, therefore, to confront itself with other rights like freedom of expression, privacy or consumers' rights.

In the digital relationship established with privacy rights, copyright's boundaries are becoming dimly defined, since it has been becoming more and more difficult to trace the line between what is public and what is private in p2p systems or in the cloud. 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 normative evaluation. This simple example demonstrates clearly how thin can be the line between the violation of the users' right to privacy and the lawful exercise of a private surveillance power granted by law to the intellectual property's owner or to a regulatory administrative agency.

The present chapter aims to examine how digital technology like p2p systems or cloud computing constantly allows new unauthorized uses of protected works, the tension that has been arising in the digital world between intrusive copyright surveillance and enforcement mechanisms and internet users' privacy, suggesting how these rights can be reconciled.