

Chapter 17

Electronic Surveillance, Privacy and Enforcement of Intellectual Property Rights: A Digital Panopticon?

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ABSTRACT

In cyberworld, intellectual property rights and the right to informational self determination have become two realities in tension. Nevertheless, they are two main concerns of the e-commerce stakeholders. From the industry point of view, new digital technologies, left unregulated, may allow a free flow of information and unauthorized access to contents both from consumers or competitors; from the consumers' perspective, security and privacy concerns are the major barriers to contracting on-line. The goal of the present chapter is to understand the relationship between anti-piracy oriented private electronic surveillance and consumers' privacy. If, on the one hand, the enforcement of intellectual property is a laudable activity – since the recognition of economic exclusive rights is an incentive to artistic or scientific creation and the protection of the investments is an ICT industry's legitimate interest –, on the other hand, the individual's privacy sphere is one of the most important values and personal freedoms that law, including intellectual property law, must preserve.

INTRODUCTION

In the last years, with the emergence of information and communication technologies (ICT), digital contents have been assuming a preeminent role within the context of the knowledge economy, in general, and of the e-commerce, in particular. Nevertheless, the growth and the competitiveness

of the digital content based informational economy have been facing several obstacles: from the industry point of view, new digital technologies, left unregulated, may allow a free flow of information and unauthorized access to contents both from consumers or competitors; from the consumers' perspective, security and privacy concerns are the major barriers to contracting on-line.

However, the protection of both focuses of interests may rely on conflicting goals, which is

DOI: 10.4018/978-1-60960-765-4.ch017

perfectly drawn in the field of digital intellectual property enforcement, specifically in the cases of the on-line market of digital music, movies or software.

Intellectual property law, including patent and copyright law, was one of the bodies of law called to protect the ICT industries' legitimate interests, since a large part of digital contents like music, films, software or data bases were copyrightable or patentable. Intellectual property was seen by the industry as an adequate tool to control access to contents, since it gives the rights holders the exclusive right to use or to explore the work, excluding others from using it without authorization. But, considering the proliferation of peer-to-peer (P2P) file-sharing technology permitting the exchange of digital files and contents, and the economic loss that it causes to rights' holders, the need to preventively control access to those contents can easily be regarded as one of the main vectors of the competitiveness in the sector.

In this context, the use of tracking software or other technological measures to identify unauthorized and non-paying users of protected works or to restrict unauthorized usages has been increasing.

Undoubtedly, controlling the access to or the usages of protected contents is a right of the rights' holders and, in an economic perspective, a factor of security and of competitiveness advantage. However, the use of technological protection measures (TPM) may have serious impacts on users' privacy. In fact, amongst other powers, digital rights management (DRM) systems give the rights' holders the power to control access to protected works, to restrict unauthorized reproduction and possibly other usages of such works, to identify the works, the relevant rights' holders or even some of the users' identification data.

This means that the holders of rights over digital content protected under intellectual property laws may electronically survey users' behaviors and invade their privacy.

The collision between digital intellectual property and privacy is a reality, which is to say

that, considering the constitutional basis of both rights, industry's and consumers' concerns need to achieve a balanced but not a manichean answer.

In fact, if, on the one hand, the enforcement of intellectual property is a praiseworthy activity – since the recognition of economic exclusive rights is an incentive to artistic or scientific creation and the protection of the investments is an ICT industry's legitimate interest –, on the other hand, the individual's privacy sphere is one of the most important values and personal freedoms that law, including intellectual property law, must preserve.

The goal of the present chapter is to understand the relationship between anti-piracy oriented private electronic surveillance and consumers' privacy, to analyze the most important case law and court decisions on the matter and to describe some future trends regarding the need to conciliate both fundamental rights.

PRIVATE AND ANTI-PIRACY ELECTRONIC SURVEILLANCE:

Toward a Digital Panopticon?

Generally, intellectual property law gives rights' holders the exclusive rights to use and to explore their works, excluding others from its unauthorized consumption or exploitation. Traditionally, in cases of intellectual property infringement, rights' holders have the right to sue infringers in public courts. This protection is reactive and localized, since national courts' jurisdiction and competence are territorially confined and limited by territorial sovereignty.

If the shortly described public enforcement mechanism is acceptable in the analogical world, it seems feeble in a digital context. In fact, digital technologies allow not only to make perfect copies of works massively but also to disseminate them world widely through the internet. Consequently, digitization had an inevitable impact on intellectual property.

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