

Zentrum für Medien und Interaktivität der Justus-Liebig-Universität Gießen

Das Internet zwischen egalitärer
Teilhabe und ökonomischer
Vermachtung

Panel 3: How the Internet Changes Copyright

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How the Internet Changes Copyright

■ Lawrence Solum:

- The gap between legal and social norms
- Copyright against filesharing vs. social norms of sharing
- Implications for the future of intellectual property?

■ Example: European and German law of copyright enforcement against filesharing

- Filesharing is copyright infringement
- But who is the infringer?
- Property vs. privacy

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Copyright vs. Data Protection: European Law

- European Law: ECJ Case No. 275/06 of January 29, 2008 – Promusicae
 - Does Community law require that Member States lay down an obligation to communicate personal data in the context of civil proceedings between a right holder and an ISP, in order to ensure effective protection of copyright?
 - Art. 8 Directive 2004/48: Right of information against ISPs
 - However: „Such protection cannot affect the requirements of the protection of personal data“.
- Member States must strike „a fair balance“ between the fundamental right to property and to effective judicial protection on the one hand and the fundamental right that guarantees protection of personal data and hence of private life on the other.

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Copyright vs. Data Protection: German Law

- Criminal proceedings against Jon Doe
 - But: prosecutors demand showing of an infringement on a commercial scale: 3000 songs or 200 movies
- Since September 1st, 2008: civil right of information against ISPs; court order necessary, if traffic data are used (Sec. 101(2) no. 3 Copyright Act)
 - But: Are ISPs allowed to retain and use the data concerning the internet use?
 - Not for billing purposes in the case of an internet access for a flat fee (appr. 70 % of all users)
 - Not the data saved according to the Directive 2006/24 on the retention of data, because the Copyright Act does not refer to the respective Sec. 113b of the German Telecommunications Act
 - Moreover: To protect the secrecy of telecommunications, the data may only be used in the case of serious criminal acts, not for copyright enforcement (German Federal Constitutional Court, March 11, 2008, 1 BvR 256/08)

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Copyright vs. Data Protection: Possible Scenarios

■ New ways of copyright enforcement

- French draft “création et internet”: ISPs have to reveal the identity of users; a state agency sends warning letters; after three letters, the internet connection will be suspended
- The notion of “**lawful content**” in the current EC Telecoms Reform (2007/0247 and 0248/COD)
 - Principle that end-users should be able to access and distribute any lawful content and use any lawful applications and/or services of their choice
 - Applications and services are deemed lawful or harmful in accordance with national substantive and procedural law
 - ISPs are obliged to issue public interest warnings regarding copyright infringement, other unlawful uses and dissemination of harmful content
 - Authorities shall promote cooperation between ICT undertakings and the sectors interested in the promotion of lawful content in electronic communication networks and services

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Copyright vs. Data Protection: Concluding Remarks

- How to strike a balance between copyright and the right of personality, in particular as regards the secrecy, confidentiality, and integrity of IT systems and their usage:
- Radical solutions:
 - No copyright enforcement against anonymous file sharing
 - EC Telecoms Reform: “Any cooperation procedures ... should however not allow for **systematic surveillance of internet usage.**”
- Middle ground
 - Enforcement against sharing on a commercial scale (however: What constitutes commercial scale?)
 - Copyright enforcement must comply with the principles of a free society under the rule of law! No public/private censorship in favor of certain companies!
 - Right holders have to adopt to the culture of sharing: online services for a flat fee

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