

DATA PROTECTION ISSUES RELATED TO INTELLECTUAL PROPERTY RIGHTS

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Abstract

This study explores how Digital Rights Management (DRM) systems, used to protect copyrighted content, can conflict with data protection laws, especially in Europe. It examines how techniques like content tagging, user profiling, and surveillance may infringe on privacy rights under laws like Directive 95/46/EC. The research highlights the role of technologies such as Trusted Computing and watermarking, and how copyright holders collect personal data via ISPs and legal tools. It concludes that intellectual property enforcement must respect privacy rights, urging for privacy-enhancing technologies, user consent, and strict legal limits on data collection and third-party access.

Keywords: *Digital Rights Management (DRM), Data Protection, User Privacy, Copyright Enforcement*

INTRODUCTION

The Working Party notes that the increasing exchange of information linked to the development of the Internet touches more and more the delicate question of control over copyright protected information. Issues at stake relate in particular to the rights and obligations of actors having interests in copyright-protected information, and who are involved in the management of digital rights.

The Working Party acknowledges the necessity of implementing measures to safeguard the rightful interests of holders of intellectual property rights against alleged fraud. At the same time, the Working Party (“WP”) has observed that some of these measures aimed at ensuring the effective protection of some copyright material against alleged unlawful exchange, taken at various levels by copyright holders, involve the processing of personal data of individuals. The first aspect the Working Party intends to address relates to the digital management of rights (“DRMs”) which is currently developing, insofar as DRMs provide for the identification and tracking of individuals accessing legally protected information (e.g., songs, software) on the Internet. The second aspect relates to the possibilities available to copyright holders to enforce their rights against individuals suspected of copyright violation.

Considering the different levels where data protection issues arise, this document intends to recall not only the main legal principles to be complied with by copyright holders in the exercise of the rights but also by other actors involved more specifically in the digital management sphere, such as the industry and service providers offering digital rights management technology.

Digital Rights Management

As regards the development of digital rights management, the WP notes that new technologies to identify and/or trace users are being established at the level of exchange of information as well as at the platform level (i.e., verification of hardware/software).

As regards the exchange/downloading of information on the Internet, in case of transactions on copyright-protected information, the access to such information is submitted more and more to preliminary control of the user's identity, which is completed by further tracing of the use of the information, through tags or digital watermarks. Users will for example, often have to identify themselves before being able to download a song from an official provider, and their profile will be completed with information collected through the unique identifier included in each piece of music downloaded by the user. In addition to the claimed purpose of control of the use of the information by the individual in compliance with DRM, the tagging is often used to profile and target advertisements to the users. As already stated by the International Working Group on Telecommunications, “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 concerned”.¹

At the level of platforms, the Working Party has been following closely the developments of some industry projects, such as TCG, destined to ensure the trusted character of information included in and accessed from a computer platform. If such systems,

as acknowledged by the WP, can have a very positive impact on the level of security of information, their potential applications are wide and could very well permit the distance verification of copyright compliance of the constituents of computer platforms. In its working document of 23 January 2004, the WP mentioned that “TPM based applications could be used [...] for instance by the content industry in order to regain the control of the distribution and use of digital content (including software) that they have lost with the advent of Internet and peer-to-peer applications”. Such controls could happen on a routine basis, in the framework of any kind of contact between platforms, as “the use of TPM, promoted by such a strong representation from industry, is likely to become a *de facto* standard, a necessary feature to participate in the information society”.

Enforcement of copyright

While control and tracing are developing at the source with the intention of checking “*a priori*” every user downloading legally information on the Internet, the protection of copyright information also leads most of copyright actors to take actions “*posteriori*” and to conduct investigations towards users suspected of infringements.

Among the means used by right holders, the Working Party notes in particular the following:

Peer-to-peer tools available on the Internet have been identified as a major mean to find information on individuals making available on-line, or downloading, protected information. The research conducted by rights holders is usually based on the collection of the IP addresses of the users.² This information is then combined with users' data as detained by ISPs. In some cases, the

right holders directly request the identity of the user to the ISP in order to send cease and desist letters to the users. In other cases, copyright holders request the collaboration of ISPs so that they themselves send letters to the users concerned asking them to take down the alleged infringing material, or that they disconnect users from the network.

The extent to which right holders obtain access to detailed users information varies depending on countries. In Belgium, right holders have been requesting the collaboration of ISPs to send warnings to users. In the United States, ISPs were requested to communicate the ID of their clients directly to the music industry representatives, without Court order.³ This led to several court decisions (i.e., the Verizon case – December 2003), where finally such direct communication of information to right holders was considered illegal by the Court. As another example, the Australian legislation (through the “Anton Pillar order”) permits the search of inquiries, including domiciliary visits, by private actors such as holders of IP rights.

In order to connect alleged infringements with users responsible and to complete the profile of the user, an attempt is made by right holders to use existing public registers, such as “Whose” databases, which keep personal details about those who have registered a domain name. It contains in particular information as to the name of the contact point for the domain name, including phone number, e-mail address, and other personal data. Some information is accessed directly online, while other details are kept offline and must thus be requested to the controller of the database.

Finally, the Working Party notes that, considering the fact that the collection of personal information by right holders is regulated by data protection principles, discussions are taking place in several countries with stake holders in order to give them more flexibility as to the processing of personal data. In this context, the French data protection legislation, for example, now includes an exemption aiming specifically at allowing the processing of judicial data by specific right holders defined by the law 4, in certain circumstances and subject to prior authorization by the French DPA.⁵

The Working Party deems it necessary, in this changing context, to recall the main data protection principles and the extent to which they apply in the framework of digital right management and enforcement of copyright.

The management of intellectual property rights

The legitimate purpose followed by right holders to prevent misuse of protected information often results in the tracing of users and the monitoring of their preferences. In particular, the use of unique identifiers linked with the personal information collected leads to the processing of detailed personal data. Directive 95/46 on the protection of personal data provides for several principles that shall be complied with by any right holder in such cases where personal data are being processed. Article 2(3) (a) of Directive 2004/48/EC, on the enforcement of intellectual property rights confirmed the principle that the Directive 2004/48/EC does not affect Directive 95/46 and therefore the application of the data protection principles.

The focus will be put in this document on the necessity principle and the need for anonymous access to network services, on the transparency principle, the compatibility of purpose, and the limitation regarding storage of data.

The Working Party reaffirms the necessity to allow for anonymous or pseudonymous transactions on the Internet. This principle was developed by the Working party on several occasions⁶, since its Recommendation related to “Anonymity on the Internet” adopted on 3 December 1997, where the WP already stated that the processing of personal data on the Internet has to respect data protection principles just as in the offline world. “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 service”.⁷ This principle is justified by the necessity principle stated in article 6 c) of the Data Protection Directive, according to which personal data must be adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed.

The use of unique identifiers enables the interconnection of data related to a single individual and facilitates their profiling. In the framework of digital rights management, they permit the profiling of the user based on the quality and quantity of documents he/she consults. For example, a company offering legal content online will be able to trace the circulation of such watermarked documents (which use unique identifiers) on peer-to-peer networks and identify the user at the origin of the legal downloading as well as further alleged unlawful uses of the document. Also in the workplace, the music or the film industry would have the capability to trace the use by their employees of protected information put at their disposal. The

Working Party seriously questions the use of identifiers for the purpose of tracing “a priori” every user, in order to go back to a specific individual in case of suspected copyright abuse. The tagging of a document should not be linked to an individual except if this link is necessary for the performance of the service or if the individual has been informed and has consented to it.

As stated by the International Working Group on Telecommunications, it should be provided for the greatest possible transparency in the operation of the copyright management system. Pursuant to article 10 of Directive 95/46, no information can be collected regarding data subjects without them being informed about several elements, and in particular, the identity of the controller, the purpose(s) of the processing, the recipients or categories of recipients of the data and the existence of a right of access and rectification of the data.

Any personal data collected from the user on a voluntary basis or because they are necessary for the performance of the service should only be used in compliance with the stated purpose, as provided for by Article 6 b) of the Directive. Indeed, it is not allowed, for example, to collect the name and address of the user at the occasion of a credit card payment, and to use them for marketing purposes, after having linked them with the preferences of the user collected through downloaded tagged information. Also pursuant to Article 13 of the Directive on Privacy and Electronic Communications, the user should be clearly informed and be given the choice to accept such profiling and marketing of his data. The same principle applies for any envisaged transfer of the users' data to third parties. Moreover, the Working party stresses that the collection

of information related to consumption habits can lead to the processing of sensitive data if data subjects are being profiled on the basis of the nature of the information consulted (e.g. the downloading of a book over religious or political issues...). Such processing could only take place in strict compliance with the provisions of Article 8 of Directive 95/46.

The extent of investigation powers

In addition to the development of technical protection through tagging and tracing of copyright documents, for a few years, copyright holders have been initiating actions intended to prosecute more specifically those suspected of copyright infringements. Such actions imply the collection of information about users suspected, by different means and using various information publicly or non-publicly available, as described in section I b.

Right holders base their research primarily on the establishment of facts available online, such as the displaying of copyright-protected documents in peer-to-peer networks. Data such as date and time of possible infringement, nature of the protected document, as well as indirect identifiers such as pseudonyms of the author of the possible infringement, are available. The temptation is then great to complete this collection of personal information with additional details that could be found with the help of Internet service providers or in other databases, such as the Whois database, which compiles information about domain name holders.

The Working Party insists on the legal restrictions applying to the re-use of personal information. The content of databases, be they public or not, can only be processed and further used for a purpose

compatible with the one for which they were first collected. As regards the Whose database, the Working party has already emphasised in its opinion of 13 June 2003 8 that “from the data protection viewpoint it is essential to determine in very clear terms what is the purpose of the Whose and which purpose(s) can be considered as legitimate and compatible to the original purpose. [...] This is an extremely delicate matter as the purpose of the Whose directories cannot be extended to other purposes just because they are considered desirable by some potential users of the directories. Some purposes that could raise data protection (compatibility) issues are for example the use of the data by private sector actors in the framework of self-police activities related to alleged breaches of their rights e.g. in the digital right management field.”

On the basis of the compatibility principle as well as in compliance with the confidentiality principle included in Directives 2002/58 and 95/46, data detained by ISPs processed for specific purposes including mainly the performance of a telecommunication service cannot be transferred to third parties such as right holders, except, in defined circumstances provided by law, to public law enforcement authorities.

In this regard, the Working Party notes that the recent Directive 2004/48 of 28 April 2004 on the enforcement of intellectual property rights provides for conditions in which personal data shall be requested by judicial authorities. These authorities may order, on justified and proportionate request, communication of information on the origin and distribution networks of the goods or services which infringe an intellectual property right, when the infringement presents a commercial scale, and without prejudice of principles

related to confidentiality of information sources or the processing of personal data. A fair balance shall have to be found between the legitimate interests of copyright holders and individuals concerned. The criteria of the commercial advantage linked with the infringement may be decisive in this respect.

CONCLUSION

The Working Party is concerned about the fact that the legitimate use of technologies to protect works could be detrimental to the protection of personal data of individuals. As for the application of data protection principles to the digital management of rights, it has observed, an increasing gap between the protection of individuals in the off-line and online worlds, especially considering the generalised tracing and profiling of individuals. The Working Party calls for a development of technical tools offering privacy-compliant properties, and more generally for a transparent and limited use of unique identifiers, with a choice option for the user.

As far as the investigation powers is concerned, the Working Party deems it necessary to recall that investigations performed by private actors such as copyright holders must be performed in a clear legal framework along the lines developed above, especially as to the information that can legally be collected, and to the enforcement powers that can be attributed to these actors.

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