

Legal Regulation & Education: Doing the Right Thing?

Kevin O'Sullivan

Law Faculty, University College Cork

kevin.tosullivan@gmail.com

Towards a Privacy Right in Copyright Enforcement Online: Embracing " Activity Data" under the European Data Protection Framework

Legislative and non-legislative attempts to create a three-strike graduated penalty system for the enforcement of copyright in the online context has met with relative success in recent years. In France, the now repealed 'Loi Hadopi', the UK Digital Economy Act and the Irish 'Eircom Protocol' have proven that a paradigm of relative absolutism is possible for copyright-holders within the national legal systems of European member states. The shift towards greater ISP accountability and incentivised intervention on its network to enforce copyright has led to general criticism that the development of three-strike enforcement models engage internet subscriber fundamental rights. Indeed tacit recognition by the European Court of Justice of such engagement and attempts by the European Parliament to provide procedural safeguards to future internet disconnection strategies highlight a growing tension between absolutism on the one hand and pluralism on the other. Yet, suggestions of a pluralist paradigm taking hold suffers from an absence of contours as to what the parameters of a pluralist paradigm might be; particularly when it is considered that enforcement models may be channelled through private contract with the ISP. On a broad level, designing enforcement models for copyright in the online context, integrating pluralist concerns will be incremental at best, in turn the purpose of this paper is to analyse one element of that paradigm; privacy and data protection.

Three-strikes has illustrated that any enforcement model integrating an ISP policing function will rely on the interception and use of internet subscriber IP addresses. Assigned by the ISP to each subscriber, data protection issues are difficult to assert where the latter already know each other and the IP address is considered as not constituting "biographical data". Does the fact that IP addresses are forwarded to the ISP by agents for the copyright-holder change anything? Ruling on the Irish three-strike model- the "Eircom Protocol"- the Irish High Court has held that data protection does not apply on the grounds that (i) an IP address collected by such an agent is not "personal data" as it does not identify the internet subscriber to the agent and (ii) when received by the ISP continues to not be "personal data" on account of the fact the ISP already has the data linkage between the IP address and biographical data of the internet subscriber. Emphasising the "biographical" element of personal data, the observations of the Irish High Court demonstrate the limited applicability of the European data protection framework at the Member State level and raise questions as to whether a new approach is necessary for the 21st century.

This paper will argue that any enforcement model for copyright using IP addresses must contend with the European Data Protection framework, leaving aside the biographical element of "personal data" towards embracing "activity data" under the European Data Protection Directive (DPD). To this end, the argument will be made that in linking the IP address to data corroborating infringement, a conceptual 'data-unit' is in fact forwarded to the ISP that may be caught under Art.1 of the DPD. In achieving accountability under the DPD, the paper will then consider obstacles to the real-world application of such an argument focusing on (i) whether an internet subscriber has a privacy right against the ISP in such activity data and (ii) whether the limits to the existing Data Protection Framework will hinder enforcement, e.g. consent versus safeguards, rights of data access and rectification rather than real data subject empowerment. The ultimate purpose will be to demonstrate that the normative interpretation of "personal data" as "biographical data" is having real-world impacts on protecting individuals from an abuse of power and goes to the core of the data protection/privacy agenda. In turn, the focus of this paper will be on how to align the pre-2000 DPD with 21st century realities with a particular emphasis on the copyright enforcement agenda and the competing pluralist agenda of fundamental rights.