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Snowden leaks could make copyright enforcement tougher internationally

It was inevitable that Edwin Snowden's leak this summer about a secret National Security Agency program, PRISM, that targeted Internet communications and stored data of "non-U.S. persons" outside the United States would cause ripples in diverse areas of law, including privacy, international relations and telecommunications.

It was less clear that Snowden's revelations could adversely impact the ability of copyright owners to protect their works internationally. Unfortunately, the emergence of Snowden's revelations may have swung public sentiment back toward wide-sweeping protection of identity information, making the battle against copyright infringement even harder to win internationally.

The fight against digital piracy is tough enough even during the best of times. In Europe, efforts to secure the identities of end users engaged in copyright infringement have consistently faced higher proof standards than in the United States due to heightened European Union privacy concerns.

In the United States, the Digital Millennium Copyright Act allows copyright holders to secure end user identities in cases of online infringement immediately upon the filing with the magistrate of a copy of a takedown request and a sworn declaration that the identity is only being sought to protect copyright. (17 U.S.C. Section 512(h)).

There is no need for judicial review of the subpoena or for any evidence of potential infringement beyond the "good faith belief" declaration in the takedown notice that the posting of the work is infringing. There is also no obligation of prior notice to the end user of the disclosure request before his identity is disclosed "expeditiously" by the subpoenaed Internet service provider.

These magisterial subpoenas were used as part of the well-known campaign by the Recording Industry Association of America against end users engaged in unauthorized file-trading of music. There is no EU equivalent in any EU directive governing copyright

liability on the Internet. In fact, obtaining such information can be problematic in light of strong privacy protections contained in EU data privacy directives.

Briefly, the EU Data Privacy Directive (95/46/EC) requires the protection of "the fundamental rights and freedoms of natural persons and, in particular, their right to privacy with respect to processing of personal data." (Article 1). This obligation to protect privacy in a digital environment was re-emphasized in the EU Directive on Data Privacy in Electronic Communications (2002/58/EC).

Together these directives impose significant limitations on the right to obtain, exploit or even transmit personal information without the express permission of the affected person.

As a result of this strong privacy protection, the European Court of Justice, the highest court in the European Union, has insisted on "proportionality" in balancing copyright and privacy interests when seeking end user identities. In a broad reaching decision in 2008, *Promusicae v. Telefonica de España* (Case No. C-275/06), the court rejected any claim that identity disclosure was required "to ensure effective protection [of copyright] in civil procedures."

Instead, copyright protection had to be balanced against privacy rights to ensure that "a fair balance" was struck between the two sometimes conflicting rights. This proportionality test has similarly been applied in cases involving injunctive relief and/or monitoring obligations to prevent illegal file-trading of copyrighted works by end users. In *Scarlet Extended v. SABAM* (Case C-70/10), the court overturned an injunction requiring a social networking site to install a filtering system to monitor and block end users' unauthorized file-trading of SABAM-members' works.

The injunction was overturned on the grounds that such a filtering system leaned too far in favor of intellectual property protection and failed to respect "the right to protection of personal data."



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Despite an initial balance that appeared largely to favor privacy interests, European courts have reconfigured the proportionality balance, upholding both identity disclosures and filtering obligations in limited situations.

For example, in April 2012 in *Bonnier Audio AB v. Perfect Communication Sweden AB* (Case No. C-461-10), the court upheld Sweden's domestic disclosure laws that required "clear evidence" of an infringement, along with proof that the requested information "facilitates" the investigation and that the reasons for the disclosure "outweigh the nuisance or other harm" it might entail.

EU courts have similarly found a proportionate balance in favor of copyright protection in connection with orders to impose filtering blocks to prevent end users from posting illegal copies from known pirate websites.

In February, in *EMI Records Ltd. v. British Sky Broadcasting Ltd.*, a

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British court found that filtering blocks to prevent end-user posts of files from The Pirate Bay, a well-known file-sharing website, were both proportionate and effective. In particular, it found that copyright owners' interests "outweigh the ... rights of the users of the websites, who can obtain the copyright works from many lawful sources."

I have long been concerned that the hard-fought proportionality that supported copyright protection over privacy rights might be undermined by the enactment of a proposed new EU regulation on data privacy. (See my Oct. 26, 2012, column.) Currently, U.S. subsidiaries operate under fairly generous "safe harbor" framework agreements that allow for personal data transfers from Europe to the U.S.

These safe harbors are threatened by a new draft privacy regulation that promises to significantly increase EU privacy protection for personal data. The draft regulation even grants end users a "right to be forgotten" through erasure of personal data (Article 17).

In the months prior to the Snowden leaks, efforts were underway to mitigate some of the harsher provisions. Post-Snowden calls for even stronger privacy protection are gaining ground. Such protection will undoubtedly tip the proportionality balance in the direction of privacy.

Before copyright owners lose this battle, it is time to try to stop the tilt. Current EU draft privacy regulations do not specifically address nor seek a proportionality balance. An express statement that the regulation is not intended to favor privacy over other fundamental rights would help.

It would also be helpful for U.S. copyright owners to begin negotiations now with major Internet service providers in Europe to secure individual agreements regarding filtering and other efforts to block traffic from known pirate sites.

With such agreements in place, regardless of the "Snowden effect," achieving future proportionality balances becomes less problematic.