

# Copyright Existentialism: Technology and the Timing of Law-Making\*

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## Abstract

The intrinsic relationship between copyright and technology is well appreciated. By introducing new technological applications of copyrighted information, innovation continuously challenges the scope and enforcement of copyright laws.

This paper examines two often overlooked effects of technological change on copyright law: the issues of timing and specificity. Specifically, I argue that the elusiveness of copyright protection is due to the interaction between technology, legal delay and social norms.

First, because of the dynamic and unpredictable nature of technological innovation, the *legal* adaptation of copyright law necessarily lags behind technological change. This is because in a fast-changing environment (1) the optimal timing of law making often favors delaying legislative or adjudicative solutions; (2) copyright law requires open-ended standards rather than specific rules.

Second, the resulting gap between technological and legal innovation increases the reliance on self-help. Copyright owners invest in anti-piracy protection technologies while users invest in circumvention technologies. Because the very technology that creates a lock can be used to pick that lock, this results in a cyclical arms race between content owners and pirates, creating reoccurring lapses in enforcement and polarization.

Third, because technological innovation and new uses precede legal adaptation, technological innovation carries a social norm component. By the time that questions of copyright scope are solved with regard to new technology, users of that technology are no longer neutral bystanders. Content users have internalized the use of the technology and experience loss aversion when a previously “free” use is banned. As a result, copyright enforcement is frustrated by the stickiness of social norms and countervailing effects. Copyright enforcement attains a degree of impossibility here because credible levels of deterrence require punishments that have adverse effect on anti-copyright norms.

Together, technology, social norms and legal delay present three interrelated gaps in the enforcement of copyright law. Technology never accomplishes perfect protection, legal adaptation is slow and social norms complicate enforcement efforts. An analysis of these intrinsic constraints provides a better understanding of the enforcement problems of copyright law than market failure arguments and moderates claims of the death of copyright law by both sides of the “copyright war”.

In the final section of this article I address a number of normative proposals, including restrictions on self-help and the introduction of sunset-provisions in copyright legislation.

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