Proposal for Presentation at 8th Annual Intellectual Property Scholars' Conference

Online Privacy Principles: Lessons from Digital Copyright Law

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In recent years, we have begun to recognize that traditional notions of privacy law are increasingly ineffective in an online world.[1] Digital technology facilitates the ready collection of private information[2] - in text, audio, and video formats[3] – as well as the large scale dissemination of that information over the Internet.[4] These new technological capabilities raise questions about: (a) the need to redefine legal boundaries of public versus private conduct; (b) appropriate regulation of information gathering activities, particularly those facilitated by new forms of digital technology; and, (c) appropriate regulation of dissemination and use of private information online.

As several commentators have noted, the questions posed for privacy law in the digital age are not unlike those that have faced digital copyright law over the last decade or so.[5] Some of the questions common to both areas of law include: (a) how to effectively control access to, and use of, digitally available information; (b) how to balance the rights of an "information rights holder" against competing interests such as free speech and other legitimate uses;[6] (c) what kinds of liability, if any, should be faced

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1 See, for example, DANIEL SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET, 105 (2007) [hereinafter, "SOLOVE, THE FUTURE OF REPUTATION"]("With so much data being collected about us and with anybody being able to disseminate it around the globe, is there anything we really can do to protect privacy? According to the science fiction writer and essayist David Brin, it is too late: "Light is going to shine into nearly every corner of our lives." Scott McNealy, CEO of Sun Microsystems, has famously quipped: "You already have zero privacy. Get over it." His stance reflects a view that many are increasingly sharing. Privacy is dead, they believe, and there's not much that can be done except deliver a eulogy and move on.").

2 *id*., 17 ("We're heading toward a world where an extensive trail of information fragments about us will be forever preserved on the Internet, displayed instantly in a Google search.")

3 The growth of video files online is a particularly significant recent development in the privacy context. See *id*., 165 ("As the law professor Andrew McClurg points out, captured images have permancne, something fleeting memories lack. People can scrutinize a photo and notice details that thy might not otherwise see when observing the scene as it unfolds.")

4 *id.*, 17 ("The Internet allows information to flow more freely than ever before.")

5 *id*, 184-5 (identifying some of the similarities between the regulatory imperatives faced by copyright and privacy law in the digital age, and citing others who have written on this point)

6 Legitimate uses might include those traditionally associated with copyright law such as news reporting on matters of public interest, and some non profit educational uses. In the privacy context, certain kinds of data aggregation might also be legitimate uses if appropriate safeguards against unauthorized privacy invasions are implemented. See, for example, *Whalen v Roe*, 429 U.S. 589 (1977) (upholding law requiring computerized data aggregation of information relating to prescription of certain medications, and acknowledging that appropriate information security safeguards were in place).

by Internet intermediaries, such as Internet service providers, for unauthorized activities of others; (d) identifying appropriate forums for dispute resolution in a global information society; (e) dealing with global disharmonization of relevant legal principles;[7] (f) identifying wrongdoers in an online medium where it is relatively easy to remain anonymous; and, (g) providing remedies for "viral" online dissemination of protected information.

This is not detract from the many significant differences between copyright law and privacy law. Copyrights are granted to promote progress and innovation in society[8] while privacy is protected, to the extent it is protected, largely on theories of individual autonomy[9] and "the right to be let alone".[10] Hence, copyright is generally regarded as a form of intangible intellectual property right,[11] while it is unclear whether, or to what extent, privacy rights merit a property or quasi-property label.[12] Copyrights inhere in original expression,[13] while privacy rights extend to facts.[14] Problems of global

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[7] For example, the European Union and United States take very different approaches to privacy. The European Union approach is largely codified in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the "Data Protection Directive"). The United States, on the other hand, takes a more piecemeal approach to private data protection: RAYMOND KU AND JACQUELINE LIPTON, CYBERSPACE LAW: CASES AND MATERIALS, 544 (2 ed, 2006) ("[T]o date, the United States largely relies upon unfair and deceptive business practice law and self-regulation [to protect privacy]. In contrast, other nations, and most notably, the European Union have taken more aggressive steps to protect individual privacy in data collection.")

[8] The Copyright Act is enacted under U.S. Const., art. I, § 8 cl. 8 ("Congress shall have power …To promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries."). See NIMMER ON COPYRIGHT, § 1.02 ("It is from this [constitutional] clause that the federal power to enact both copyright and patent legislation is derived.")

[9] Samuel Warren and Louis Brandeis, *The Right to Privacy*, 4 HARV L REV 193, 198 (1890) ("The common law] secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.")

[10] *id*, at 205. See also discussion in Neil Richards and Daniel Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEORGETOWN L J 123, 237-233 (2007).

[11] For a recent discussion of the "propertization" of copyright, see Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S CAL L REV 993 (2006).

[12] See, for example, Pamela Samuelson, *Privacy as Intellectual Property?* 52 STAN L REV 987 (2000); Jessica Litman, *Information Privacy/Information Property*, 52 STAN L REV 1283 (2000); Mark Lemley, *Private Property*, 52 STAN L REV 1545 (2000). It is also arguable that privacy or privacy-like rights are more likely to be accorded a property-like status in a jurisdiction where the rights are held to be enforceable against all the world, as opposed to being enforceable against another party to a specific relationship of confidentiality. As Professors Richards and Solove have noted, early British law tended to focus privacy protections more on relationships of confidence while the early American conceptions of privacy law were more often regarded as rights enforceable against others outside the existence of any confidential or contractual relationship: Richards and Solove, *supra* note 10, at 126 ("Confidentiality … recognizes that nondisclosure expectations emerge not only from norms of individual dignity, but also from norms of relationships, trust, and reliance on promises. American privacy law has never fully embraced privacy within relationships; it typically views information exposed to others as no longer private."), 132 (noting that Warren and Brandeis conceived of the right to privacy as a right as against the world, as opposed to a right arising from contract or special trust).

[13] 17 U.S.C. § 102(a) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they

disharmonization play out differently with respect to privacy than with respect to copyright law. For the most part, copyright law is relatively well harmonized by international agreements,[15] whereas privacy protections are more varied from jurisdiction to jurisdiction.[16]

The protection of online privacy also arguably requires more of a two-step process than the protection of digital copyrights. Privacy rights have traditionally covered both the gathering and dissemination of private information.[17] In many circumstances, the gathering stage can be more intrusive and worrisome to the information subject than the subsequent dissemination.[18] Recent advances in digital technology impact on both stages of privacy protection, necessitating a new look at both the information gathering[19] and information dissemination[20] stages of potential privacy

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can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.")

[14] Privacy rights, to the extent they exist at all, protect information about a private individual, whatever format that information may take in terms of expression: for example, Article 2(a) of the Data Protection Directive in the European Union defines 'personal data' as, "any information relating to an identified or identifiable natural person …".

[15] For example, World Intellectual Property Organization Copyright Treaty of 1996; Berne Convention for the Protection of Literary and Artistic Works (1971).

[16] See *supra* note 7.

[17] For example, the four branches of privacy tort included in the Restatement (Second) of Torts include both "unreasonable intrustion upon the seclusion of another" (which suggests a physical intrusion into another's solitude for information gathering purposes), and "a public disclosure of private facts" (which relates to information dissemination).

[18] This is particularly so in cases involving celebrities and other well-known individuals who are often hounded by the press and the paparazzi for photographs. The most egregious example is probably the death of Diana, Princess of Wales, while being followed by paparazzi in a high speed chase in Paris. See discussion in Irene Kim, *Defending Freedom of Speech: The Unconstitutionality of Anti-Paparazzi Legislation*, 44 SOUTH DAKOTA L REV 275, 276 (1999) ("The tragic and senseless demise of a widely-admired public figure [Princess Diana] underscored the increasingly aggressive paparazzi campaign to obtain the most profitable photos. In their zeal to obtain more and more revealing pictures, many paparazzi have ignored common sense and courtesy and have physically injured their subjects.") Other examples include a situation in 1997 when Arnold Schwarzenegger's car was forced off the road, trapping Schwarzenneger, his wife and son in the car while a photographer climbed onto the hood to take a photo through the winshield: *id*. See also *Galella v Onassis*, 487 F 2d 986, 999 (1973) (court affirmed lower court's injunction under New York harassment law against a paparazzi photographer who was stalking former First Lady Jacqueline Onassis, and her family).

[19] For example, to deal with modern advances in recording technology, California's Civil Code provides in § 1708.8(b): "A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used."

[20] While not prohibiting dissemination of private information *per se*, California's Civil Code also contains some provisions aimed at commercial uses of unauthorized images and inducement to gather unauthorized images. These provisions seem to be aimed at people like to publish or disseminate relevant information who may be involved in paying someone to intrude on an individual's privacy for the purpose of gathering information. See, for example, § 1708.8(d) ("If the plaintiff proves that the invasion of privacy was committed for a commercial purpose, the defendant shall … be subject to disgorgement to the

infringements. Digital copyright law, on the other hand, has been largely concerned with unauthorized online distribution of protected works[21] – with much of the focus on viral distributions of unauthorized copies.[22] There are clearly also practical differences with respect to lobbying power of those who champion strong copyright laws versus those who champion strong privacy rights. Many powerful corporate interests lobby to protect their intellectual property rights online while there are few such institutions that would lobby to protect privacy.

Acknowledging the need to step up privacy protections for individuals in the Internet age, the aim of this paper is twofold. First, it attempts to address criticisms that regulation of private information online is impossible or impracticable. In doing so, it draws on lessons learned from the development of digital copyright law over the last 10 to 15 years. In the 1990s, many thought that it would be impossible or impracticable to control unauthorized viral distributions of copyright works online.[23] However, this has not proved to be the case in practice. Copyright holders have been able to combine technological, contractual and regulatory approaches to effectively protect – some would say over-protect[24] - their works in online environments.

The second aim of the paper is to consider how best to approach online privacy protection in practice. As with copyright law, it is probably necessary to consider a mixture of approaches including technological, contractual and regulatory mechanisms. However, because of the global disharmonization of much privacy legislation, and the development of social norms of behavior online, a fourth approach may be useful. Perhaps online communities could develop informal privacy principles and guidelines that could be enforced through private means. In the early days of the Internet, and

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plaintiff of any proceeds or other consideration obtained as a result of the violation of this section."); 1708(e) ("A person who directs, solicits, actually induces, or actually causes another person … to violate any provision of subdivision …(b)… is liable for any general, special, and consequential damages resulting from each said violation. In addition, the person that directs, solicits, instigates, induces, or otherwise causes another person … to violate this section shall be liable for punitive damages …"). See also SOLOVE, THE FUTURE OF REPUTATION, 29 ("With blogs and social network sites, personal information is being posted online at a staggering rate. Given the ease at which information can be recorded and spread, there will be more instances when information we want to keep on a short leash will escape from our control.")

[21] Raymond Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 UNIVERSITY OF CHICAGO L REV 263 (2002) (advocating the need to unable distribution rights from creation rights in digital copyright law and noting that the current focus on protecting online distributors creates perverse economic incentives).

[22] *A&M Recording, Inc v Napser, Inc*, 239 F 3d 1004 (9th Cir 2001) (involving online peer to peer file sharing); *Metro-Goldwyn-Mayer Studios v Grokster*, 125 S Ct 2764 (2005) (involving online peer to peer file sharing). Of course, advances in digital copying technology have been of significant concern to copyright holders in recent years. This may be the copyright analogy to "gathering" information in an unauthorized manner. However, many copyright holders have combated this concern with access and copy control measures technologically imposed on their digital copyright works and bolstered by anti-circumvention legislation like the Digital Millennium Copyright Act: 17 U.S.C. § 1201.

[23] In fact, many thought that cyberspace could not, or should not, be regulated at all: JOHN PERRY BARLOW, A DECLARATION OF THE INDEPENDENCE OF CYBERSPACE (available at http://homes.eff.org/~barlow/Declaration-Final.html, last viewed on May 6, 2008).

[24] Pamela Samuelson, *The Copyright Grab*, WIRED (Jan. 1996); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH L J 519 (1999).

growing online communities, the phrase "netiquette" was often used to describe acceptable modes of online interaction.[25] It may be that an advanced privacy-specific version of "netiquette" could develop to protect privacy norms online in a way that could cut across global borders and lessen the need to create internationally harmonized legislation on privacy rights.

Such an approach could include the development of express guidelines available in specific online communities, including blogospheres, facebook networks, and virtual worlds that would be accessible to all participants in the relevant community. These guidelines could include sanctions for contravening privacy norms, such as being barred from the relevant community. They could also ultimately include private online dispute resolution or other remedial procedures. These procedures might assist victims of privacy violations in seeking appropriate remedies. They could include assistance with removing widely disseminated private information from public view, and perhaps also identification of a privacy rights violator to enable the victim to seek legal redress in an appropriate forum.

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[25] "Netiquette" is defined in Wikipedia as: "[a] portmanteau of "network etiquette", is the convention on electronic forums (Usenet, mailing lists, live chat, and Internet forums) to facilitate efficient interaction …. However, like many Internet phenomena, the concept and its application remain in a state of flux, and vary from community to community. The points most strongly emphasized about USENET netiquette often include avoiding cross-posting, using simple electronic signatures, and other techniques used to minimize the effort required to read a post. Netiquette guidelines posted by IBM for employees utilizing Second Life in an official capacity, however, focus on basic professionalism, maintaining a tenable work environment, and protecting IBM's intellectual property. Similarly, some Usenet guidelines call for use of unabbreviated English while users of online chat protocols like IRC and instant messaging protocols like SMS often encourage trends in the opposite direction." (available at http://en.wikipedia.org/wiki/Netiquette, last viewed on May 6, 2008). Some online netiquette advocates already cite privacy as one of the principles of appropriate online behavior. See, for example, extracts from Virginia Shea, Netiquette, Rule 8, Respect Other People's Privacy (available at http://www.albion.com/netiquette/rule8.html, last viewed on May 6, 2008).