Copyright and the
Panoptic Sort

Artificial Intelligence algorithms (AI), coupled with massively large data sets are increasingly being deployed to mediate or to assist in legal determinations. Such systems are being deployed across a range of legal domains: criminal law, commercial law, national security, and elsewhere. As instances of such automated decision-making multiply, optimistic visions of such systems foresee unbiased and efficient AI regulators, free from the error of human decision makers. More pessimistic visions foresee the imposition of impersonal and regimented discipline on an unsuspecting populace. A growing scholarly literature seeks to understand the relative benefits and costs.

In this paper I explore the intersection between the social construction of markets and the social construction of algorithms in the context of intellectual property law. In particular, I examine the anticipated use of algorithmically processed "Big Data" for aligning market incentives with legal expectations. The increasing availability of massive consumer data sets has led to suggestions for harnessing data profiling to generate so-called "personalized law." Specifically, recent scholarship on both sides of the Atlantic has suggested that the collection of detailed information on consumers, together with algorithmic classification of such data, will allow for customized tailoring of legal standards. (Hacking, 2017) This body of work argues that legal standards could be matched to detailed consumer profiles to create "personalized" legal directives.

Proposals of this sort have been circulated for a variety of legal regimes, including contract, tort, and copyright. (Ben-Shahar & Porat, 2016; Porat & Strahalivitz, 2013) In the area of copyright, the "Big Data" proposals include the personalized modulation of infringement liability based on consumer market profiles. (Libson & Parchemovsky, forthcoming) This work postulates matching a consumer's willingness to pay for copyright protected content to liability for violation of the owner's exclusive rights – in essence, modulating exclusivity based on market profiling. Liability would attach only if the protected work were available at or below the consumer's expected willingness to pay.

Proposals of this type, relying on panoptic data assembly, are troubling, not the least for their implications regarding legal norms of privacy and equality. Such proposals additionally rest on a particular vision of price discrimination that has been shown to be problematic in the context of copyright law. (Cohen, 2000) This "personalized copyright" analysis adopts a similarly naïve view of Big Data and algorithmic interpretation of massive data sets, foregrounding ubiquitous consumer profiling as a vehicle toward realizing the mythical neoclassical ideal of perfect information.

Consequently, in this critique I begin to unpack and interrogate the ideological assumptions underlying such proposals for algorithmic law. The paper considers the conception of markets, the conception of consumers, and the conception of regulation that is becoming entrenched in visions of the data-driven economy. I then apply this understanding to the concept of personalized copyright, discussing how the algorithmic classification of content users will affect both the development of the law and the development of creativity that the law is intended to foster. My conclusions hold implications not only for copyright, but for algorithmic legal profiling in general.

References

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