

BOURDIEU AND DATA DOXA

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Abstract:

The relationship among contract, copyright and privacy/data security law remains unclear in its boundaries. Digital contract law is plagued by a tension between subjective and objective assessment, and enforcement increasingly favors the unnegotiated interests of drafters. Digital copyright law has expanded to potentially include protection for technological measures that can harm, as well as protect. Meanwhile, to date, the role of privacy and data security law has been underanalyzed in its relationship to these two bodies of law. Applying the work of Pierre Bourdieu to this context helps clarify the relationship across these fields, as well as the fields' relationship to humans' legal expectations and behaviors.

For Bourdieu, humans each operate within a system of acquired dispositions that are "the product of structure, producer of practice, and reproducer of structure," permit "regulated improvisation" and the "conductorless orchestration" of their conduct - "habitus." The system of dispositions people acquire depends on their particular endowment in economic, cultural, and social capital. Applying this lens to contract, copyright and privacy/security, the ability of consumers to function within the existing structures of law and the digital world is limited by the reality of their digital capital endowment. It also explains the challenge in building standards for reasonableness in connection with digital conduct. The variation are great in individuals' legal and technology-related capital endowments. As habitus informs practice from within, a "field" structures action from the outside. People simultaneously exist within "fields" or structured spaces of positions, where struggling agents and institutions seek to preserve or overturn the existing distribution of capital. Individuals and institutions within a field and across fields vie for control. Established members have a vested interest in preserving the existing order and criteria of judgment, new entrants have an interest in challenging them. While contract law and copyright law have established legal traditions arising in the US from the Constitutional level, commercial privacy/ data security law do not and represent a new field in law. Leveraging the presence or absence of particular capital allows for opportunism by agents within a field. In the case of the tension across contract, copyright, and privacy, this dynamic results in the comparative weakness of privacy interests in debates, as seen in various provisions of the United States Digital Millennium Copyright Act. Similarly, the degree of autonomy of particular fields to insulate themselves from external influences varies. Privacy, unlike contract or copyright, is a field which is characterized by low autonomy, making it more fragile than the others.

The concepts of habitus, capital, and field are thus internally linked to one another and must all be analyzed simultaneously. When discordances arise between habitus and field, innovation, crisis, and structural change arises. In the presence of consonant habitus and field, "doxa," a set of shared opinions and unquestioned beliefs, grow to bind participants to one another. Discordance currently exists between habitus and these fields, both independently and in combination. Users' experiences with code, particularly in context of digital rights management and other privacy invasive code, demonstrate need for structural change in these legal fields. Affirmative legislative data protection efforts are necessary to bolster the role of privacy/data security as a field. The confluence of consumers' low digital capital and low autonomy of privacy/ data security will not self-correct in the short term, and the risks of long term negative consequences are too severe to ignore. As such, a regime of data accountability is necessary. Specifically, two corrections in the balance may be useful – first, shifting the burden of proof from an aggrieved consumer to the dataholder who lost control of the consumer's information, with the opportunity for an affirmative defense of due care in datahandling and data minimization, and second, creating a minimum statutory damages remedy for lost information modeled on copyright law.