Remembering Ian Kerr

Author : James Grimmelmann

Date : September 22, 2019

Ian Kerr, who passed away far too young in 2019, was an incisive scholar and a much treasured colleague. The wit that sparkled in his papers was matched only by his warmth toward his friends, of whom there were many. He and his many co-authors wrote with deep insight and an equally deep humanity about copyright, artificial intelligence, privacy, torts, and much much more.

Ian was also a valued contributor to the Jotwell Technology Law section; his reviews here display the same playful generosity that characterized everything else he did. In tribute to his memory, we are repaying the favor. This memorial symposium consists of short reviews of a selection of Ian's scholarship, written by a range of scholars who are grateful for his many contributions, both on and off the page.

Table of Contents

Jotwell Reviews by Ian

Memorial Notices

Ian Kerr and Jane Bailey, The Implications of Digital Rights Management for Privacy and Freedom of Expression, 2 Journal of Information, Communication & Ethics in Society 87 (2004)

Evaluating legal scholarship from 2004, especially articles that focus on technology, can be a freighted process. Only the most astute predictions about the future hold up fifteen years after publication. But Ian Kerr was an unusually forward-looking scholar. He was highly motivated to use law as a tool to improve the interface between technology and humans. Kerr and his co-author Jane Bailey demonstrated exceptional perspicacity within the relatively modest length

of this exceptional article. It continues to resonate in 2019.

Kerr and Bailey frame Digital Rights Management (DRM) as a new form of social control, and one that is particularly perfidious for public institutions such as libraries. They focus on technological protection mechanisms, and associated legal measures which legislatures have enacted to create enforceable rights for entities that employ DRM technologies against consumers. Looking specifically at the surveillance function of DRM and its ability to unbundle copyrights into "discrete and custom-made products," Kerr and Bailey warn that DRM "has the potential to seriously undermine our fundamental public commitments to personal privacy and freedom of expression."

Kerr and Bailey explain that a typical DRM system combines two parts: first, a database containing information about the contents of a work, the relevant rights holders, the interested consumers, and the consumers' computers and software; and second, a licensing arrangement establishing the terms of use for the work. The database, ostensibly intended to restrict access to those who have contracted and paid to use the work, actually facilitates intensive surveillance of consumers and their online activities. The license in turn forces consumers to capitulate to the data-collection demands of the copyright holders. How, Kerr and Bailey ask, should society respond to DRM technologies that regulate conduct and make values choices without transparency or accountability, often transgressing preexisting ethical and legal norms? They suggest uncovering the structure of DRM architectures as a first step. Most importantly, they emphasize the necessity of building robust personal privacy standards into DRM software.

Kerr and Bailey next focus on freedom of expression, identifying the freedom to speak and the freedom to access information as the freedoms most at risk from copyright-driven DRM. Freedom from government restrictions, they observe, may not be the appropriate goal. Instead governments may need to act to preserve freedom of expression in the face of behavior by private actors. Finally, they conclude that conscious choices could result in DRM that improves consumer access to privacy-friendly content, rather than giving increased control to content owners that will favor corporate goals over the public interest.

There are many reasons to love this article. It is smart, readable, and lays out complicated issues in a very accessible way. It describes a fundamental conflict between DRM and personal privacy that was extant in 2004 and remains critical, under-recognized, and poorly addressed today. It is but one example of Ian Kerr's scholarship that has remained very relevant for a long time, and will continue to be useful going forward. It reminds readers of the fresh and exuberant manner in which Ian expressed himself. It is also an example of his many successful collaborations with his colleagues. His brilliant insights will continue to educate and inspire for many years to come.

— Ann Bartow

Ian Kerr and Jena McGill, Emanations, Snoop Dogs and Reasonable Expectation of Privacy, 52 Criminal Law Quarterly 392 (2007)

Ian Kerr was a man who loved words. A court's logic is not "flawed"; it is "pickwickian." New technologies locate, track, process, and store. But they also melt, pawn, unzip, curl, and coat.

Rereading *Emanations, Snoop Dogs, and Reasonable Expectations of Privacy*, which Ian co-authored with his student Jena McGill in 2007, I marveled anew at the sheer literary chutzpah. Here is a law review article that opens with an intellectual history of emanations dating back to ancient Greece and ends with Sting lyrics. And yet the argument winds up being cited approvingly by the Supreme Court of Canada the next year. Sometimes Ian's work reads like legal scholarship from an alternate universe of the better-read.

Emanations, Snoop Dogs, and Reasonable Expectations of Privacy is concerned with the direction of Canadian privacy law in the wake of *Regina v. Tessling*—Canada's version of *Kyllo v. United States*—in which the Canadian Supreme

Court upheld a warrantless heat scan of a house on the basis that the defendant's subjective expectation of privacy in the distribution of heat patterns across the exterior of his home was not objectively reasonable. Some lower courts had begun to extend the logic of *Tessling* to dog sniffing cases by reasoning that smells, too, are outside the container and hence fair game to law enforcement. Ian and Ms. McGill's purpose in the paper was to critique this extension before it becomes the law of the land.

The authors offer several arguments that *Tessling*is inapposite to dog-sniffing; one in particular stands out. Extending *Tessling*in this way ignores the inherently normative dimension of police action. The use of thermal imagining on a home that an informant has already flagged to police as a marijuana nursery has a vastly different social significance than, for example, bringing a police dog into a school to randomly sniff students' lockers and backpacks. Analogizing these situations is only possible by stripping away the social context and reducing the interaction to a desiccated scientific account of "inside" versus "outside," and "internal" versus "external" sources of information.

In pressing their case, Ian and Ms. McGill invoke Oliver Wendell Holmes, Jr.—courts that ignore the inherently normative dimension to privacy violations behave like Holmes' bad man, who famously conceives of law as a mere prediction of what courts will do in practice. This move is powerful, and classic Ian: the seamless vacillation between doctrine and jurisprudence in service of a deeply humanistic thesis. To Ian, theory was practice, and both aim squarely at human flourishing.

Other aspects of the article exemplify Ian: That he wrote the paper with a student he was in a position to support and empower. That the article anticipates technological developments, from EEGs to fMRIs to machine learning, that have the potential to amplify the harms of today's poorly thought-out legal constructs. That the conclusion again sidesteps convention and, rather than summarize the argument as most articles do, introduces a note of wisdom and humility."This ending," they write, "is really just a beginning."

It is hard for me to articulate how much Ian and his scholarship have meant to me. Convention has a weight to it. Writing about odd or marginal topics, or writing about mainstream topics in odd or marginal ways, can feel professionally suicidal. But Ian did not feel this weight, or else had the strength to shrug it off. And in doing so, he opened a path for others. You spend four or seven or more years prostrate to the higher mind. But you get your papers, and you are free.

— Ryan Calo