



Privacy protection online II

Free Speech and Media law

MVV1368K Privacy and Personal Data

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Structure of the seminar

- **1) Essays**
 - Basic info + readings
- **2) Topics**
 - Do celebrities have any privacy?
 - Protection of whistleblowers
 - Free press as a watchdog
- **3) Slides**
 - Title – Question – Discussion - Information

Essays - Topics

- **Essay Deadline: 31 October, 8:00 AM**
- approx. 10 500 - 16 000 characters long (+ footnotes) = 5-8 pages
- **For further essay requirements see interactive syllabus**
- **Presentation day** (only students with **Presentation No. 1**): 1 November
 - Do celebrities have any privacy?
 - Protection of whistleblowers - a necessity in the transparent democratic society?
 - Free press as a watchdog and the obligation to protect sources - are there any limits?

Readings

- **Padawan level:**

- GULDE, Jonas, 2013. An Assessment of the European Court of Human Rights' Balancing of the Rights to Privacy and Freedom of Expression - Is It Satisfactory. *Edinburgh Student Law Review* [online]. 2015 2013. Vol. 2, p. 29–41. [Accessed 29 September 2018]. Available from: <https://heinonline.org/HOL/P?h=hein.journals/edinslr2&i=40>
- REID, Elspeth, 2012. Rebalancing Privacy and Freedom of Expression Analysis. *Edinburgh Law Review* [online]. 2012. Vol. 16, p. 253–258. [Accessed 29 September 2018]. Available from: <https://heinonline.org/HOL/P?h=hein.journals/edinlr16&i=254>

Readings

- **Initiate level:**

- WESTKAMP, Guido, 2012. Private Life and the Margin of Appreciation, Introductory Note to the European Court of Human Rights: *Alex Springer AG v. Germany and Von Hannover v. Germany (No. 2)*. *International Legal Materials* [online]. 2012. Vol. 51, p. 631–684. [Accessed 29 September 2018]. Available from:
<https://heinonline.org/HOL/P?h=hein.journals/intlm51&i=677>
(contains text of the cases)
- SMITH, Robin Callender, 2012. From von Hannover (1) to von Hannover (2) and Axel Springer AG: Do Competing ECHR Proportionality Factors Ever add up to Certainty. *Queen Mary Journal of Intellectual Property* [online]. 2012. Vol. 2, p. 389–393. [Accessed 29 September 2018]. Available from:
<https://heinonline.org/HOL/P?h=hein.journals/qmjip2&i=389>

Readings

- **Knight level:**

- KROTOSZYNSKI, Ronald J. Jr., 2014. Reconciling Privacy and Speech in the Era of Big Data: A Comparative Legal Analysis The Contemporary First Amendment: Freedom of Speech, Press, and Assembly Symposium. William & Mary Law Review [online]. 2015 2014. Vol. 56, p. 1279–1338. [Accessed 29 September 2018]. Available from: <https://heinonline.org/HOL/P?h=hein.journals/wmlr56&i=1326>

- **Master level:**

- CANATACI, Joseph, ZHAO, Bo, VIVES, Gemma, MONTELEONE, Shara, BONNICI, Mifsud, PIA, Jeanne and MOYAKINE, Evgeni, 2016. ID 2883043: Privacy, Free Expression and Transparency: Redefining Their New Boundaries in the Digital Age [online]. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network. [Accessed 29 September 2018]. Available from: <https://papers.ssrn.com/abstract=2883043>

- **Recommended & Interesting**

- The Global Principles on Protection of Freedom of Expression and Privacy - <http://article19.shorthand.com/>
- <https://globalfreedomofexpression.columbia.edu/cases/>
- Case Law - <https://rm.coe.int/freedom-of-expression-the-media-and-journalists-iris-themes-vol-iii-de/16807c1181> - introduction 33-39



Do celebrities have any privacy?

Quick recap: Privacy

Privacy and why does it matter?

- **control over self-determination**
 - freedom to choose one's future – „**freedom to make mistakes**“
 - expression and development of unique personality + social profile
 - control over one's outside image – self-esteem/self-representation
- **personal data** = data about an individual
- **private sphere** = intimate / vulnerable / „true self“
- types of privacy – spatial x social x intellectual x informational
- levels of privacy - solitude x intimacy x anonymity x reserve

- => surveillance = attempts to **profile for outside control** = public – excessive behaviour / private – customer behaviour
- **data profile + data processing**
 - control over profile => categorization => prediction („pre-crime“ / „minitruue“ / „what is not on the menu?“)
 - control over individual - capacity for discrimination / normalization / manipulation

Quick recap: Surveillance v Privacy

Why worry, if you have nothing to hide?

- *„systematic investigation or monitoring of the actions or communications of one or more persons“*
- **Electronic communications => Dataveillance => Data Trail**
- **chilling effect**
 - omnipresent surveillance in public places
 - surveillance through private online activities
- **Freemium business model**
- **ISP liability – eCommerce directive**
 - **notice-and-action framework**
 - delegated enforcement
 - Private censorship vs. protection from „info-pollution“

Freedom of expression

What is the underlying value for free speech?

- value – purpose – moral justification
 - basic foundation of any **democratic society**
 - central part in protection of the fundamental rights
 - protection of **public debate**, opposite views, speaking one's mind, **discourse, dissent**
- **conflict of rights**
 - personality rights = privacy / dignity / reputation...
- **abuse of free speech**
 - fake news / disinformation / slander / libel / hate speech

Sharing v harassment

How does the context matter in free speech?

- **Context**
 - consent / awareness / avoidance
 - positive x negative x embarrassing x misleading
- Targeted attention => intrusion of privacy?
 - **actively sought attention X undesired attention**
 - position of the target
 - position of the observer / public
- free speech + **social media**
 - new platform of presence / mass communication
 - **reporting about others X reporting about oneself**
 - fragmentation of sources – **users become reporters**

In the spotlight

What is public and what is private?

- **public life vs private life**
 - exercise of official function x
 - activities of purely private nature
 - hobbies, walks, visit to restaurant, holiday activities
 - **paparazzi** => omnipresent surveillance?
 - recognizable face => nowhere to hide?
- **reporting what the people want?**
 - contributing to public debate in democratic society X satisfying the interest of viewers/readers

Dark side of attention

How to take into account morals in free speech?

- **information obtained in bad faith**
 - **hacking of celebrity cloud**
 - dissemination of intimate pictures
 - iCloud hacking 2014 – 4 perpetrators jailed
 - **fake pictures / deep fake videos**
 - machine learning + database of images => fake reality
- **information shared in bad faith**
 - **revenge porn**
 - victims – undesired attention – abuse of trust
 - **cyber abuse / virals**
 - online public shaming, social media / youtubers / twitter
 - **cyber hate**
 - discrimination, threats
 - political / xenophobic / chauvinistic / religious

Von Hannover case

What public deserves to know about royalty?

- right to reasonable expectation of privacy for celebrities?
- *„it ain't what you do, but the way that you do it“*
 - Melvin „Sy“ Oliver
- **paparazzi in public places – free speech?**
- protection of privacy X protection of media – **equal rights**
- **5 criterion test**
 - relevant to debate of general interest
 - public interest in publication – particular reason that goes beyond mere „interested public“
 - status of the person in question
 - degree of fame – figure of contemporary society „par excellence“
 - subject of accompanying report
 - illness of the monarch and behaviour of the family
 - person's prior conduct in press
 - Von Hannover case (2004)
 - specific content, form and consequences of publication
 - circumstances in which the photos were taken – surreptitiously or by secret means?

Public interest

How to separate gossip from reporting?

- **public debate**
 - beneficial informative value X mere interest
 - interest of a group (fans) X broader public
 - position of the person (royalty/politician/celeb)
 - broader impact (role model/influencer/trend)
- **public recognition and fame**
 - **waiver** of one's right to complete anonymity X limits
 - **official acts** and appearances X private activities
 - **attention** by media X **constant shadowing and harassment** (online / offline)

Publicly known persons

Privacy of suspect v privacy of victim?

- **famous by their own choice?**
- Publicly active persons
 - politicians, head state officials, judges, state attorneys, royalty
 - news anchors, reporters, journalists, moderators, actors, musicians, models, celebrities
 - youtubers / influencers
- „one-time heroes“ / suspects and criminals
- victims of crime / of shaming (viral videos)

Justified criticism

What conditions should be met?

- Venice commission 2004 - Council of Europe - [Amicus Curiae](#) Opinion on the **Relationship between the Freedom of Expression and Defamation**
- **permissibility of evaluative judgement**
 - standard of need to prove the truthfulness of the claimed facts
 - fact vs. opinion
 - legitimate criticism
 - reasonable reasons for truthfulness of the defamatory information
 - prove of adequate attempts towards verification of its truthfulness
 - questioning the affected person included - publication of his/her position
 - absence of known reasons for holding the information for untruthful
 - motivation for publication
 - complex assessment of the claimed defamatory facts + impact of context factors



Protection of whistleblowers

Protection of whistleblowers

People „who stand up for what is right“?

- not only free speech vs. privacy, but also **privacy of free speakers**
- **public interest in their story X personal repercussions**
 - Wikileaks, Dieselgate, Luxleaks, the Panama Papers, Cambridge Analytica...
- uncovering **unlawful activities that damage the public interest**
- proposal for EU-wide standards – [April 2018](#)
 - Safe (clear, confidential) channels for reporting within an organisation / to public authorities
 - three tier reporting system
 - internal reporting channels
 - reporting to competent authorities
 - public/media reporting
 - All forms of retaliation (dismissal, demotion...) are forbidden and should be sanctioned
 - Training for public authorities on how to deal with whistleblowers
 - feedback obligations for authorities and companies (follow-up to the whistleblowers' reports within 3 months)
 - The burden of proof will be reversed in such cases
 - Whistleblowers will also be protected in judicial proceedings (exemption from liability for disclosing the information)



Free press as a watchdog

Media

What role do media play?

- **traditional (established) media**
 - editorial boards – scrutiny of published content
 - ethic standards – neutrality / verification of sources
 - public vs. private media
 - legal limits concerning content (young viewers protection / time slot allocation / advertisement limitations / minority rights to authentic content)
- **new media (online/audiovisual)**
 - social networks / youtubers / online media portals
 - fragmented / limited regulation / platform rules
 - passive public => active contributors – content quality?

Axel Springer case

Right to one's reputation v press as watchdog?

- **Parameters**

- contribution to the debate of general interest
 - arrest and conviction of drug abuse
- fame of the person
 - actor – public figure – role model
- subject of the report
 - cocaine abuse
- conduct of the person prior to publication
 - „actively sought the limelight“ => legitimate expectation of privacy?
- how the information was obtained
 - bad faith? – balancing test – reliable source + verified information

Protection of sources

Is anonymous information trustworthy?

- Without guarantee of anonymity, many would be deterred from coming forward
 - X **traceable electronic communications** => **surveillance** = possible to determine the origin of information
 - Secure and private web browsing - Tor
 - End-to-end encryption communication – Signal
 - Secure file storage and encrypted sharing – VeraCrypt
 - Password managers – KeePassXC
 - Two-factor authentication and its innovations - physical security key
- „[p]rotection of journalistic sources is one of the **basic conditions for press freedom**“
 - ECHR case of *Goodwin v. United Kingdom* (1996)
- Council of Europe - [Recommendation No. R \(2000\) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information](#)
- Recent cases - [NYT White House opinion piece](#) / [Syrian war reporters](#)

Right to response

Free speech v equal voice on the issue?

- **In traditional media** – relative personality right
 - obligation to publish free of charge a **response of the affected person** with similar form as the original story
 - **against factual claims** (= where test of truthfulness applicable) X not applicable to assessments, polemics or criticism
 - common in EU – based on Directive 89/552/EHS (as modified by 97/36/ES)
- **X new media** = online audiovisual media services
 - Council of Europe 2004 - Recommendation Rec(2004)16 of the Committee of Ministers to member states on the right of reply in the new media environment
 - Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry (*OJ L 378, 27.12.2006, p. 72–77*)

Social media and free speech

How effectively mitigate the environment of hate?

- Increasing pressure on ISP providers to **effectively identify and suppress illicit content**
 - Terrorist propaganda, incitement of hatred, hate-speech, cyber-bulling, fake news, propaganda disinformation or interference with personality rights
 - **Social media content moderator** – [impossible job => role for AI?](#)
- Netzwerkdurchsetzungsgesetz in Germany
- EC operational measures on tackling illegal content online [2018](#)
- High-Level Expert Group on Fake News and Disinformation Spread Online by the European Commission
- 3/2018 [Report](#) on a multi-dimensional approach to disinformation



Thank you for your attention!

Questions?

Ideas?

Answers?

Looking forward to your essays!