



Privacy protection online I

Surveillance

MVV1368K Privacy and Personal Data
František Kasl

Structure of the seminar

- **1) Essays**
 - Basic info + readings
- **2) Topics**
 - Surveillance then and now
 - Chilling effect
 - New surveillance
- **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
 - Surveillance then and now: Development of the issue of state surveillance in the privacy context
 - Chilling effect: How lack of privacy affects the political freedom and social dissent
 - New surveillance: From pursuit of national security to erosion of privacy for commercial purposes

Obligatory readings

- **These readings are the prerequisite for the understanding of the concept of surveillance and its historical development.**
 - CLARKE, Roger. *Introduction to Dataveillance and Information Privacy, and Definitions of Terms*, 1997.
Available at: <http://www.rogerclarke.com/DV/Intro.html>
 - MARX, Gary T. What's new about the "new surveillance"?: Classifying for change and continuity, *Knowledge, Technology & Policy*. 2004, Vol. 17, No. 1, pp. 18–37.
Available (through university computers) at:
<https://link.springer.com/article/10.1007%2FBF02687074>

Voluntary readings

- **These readings provide additional insight into the challenges related to the conflict of surveillance and privacy.**
 - STUART, Avelie; Mark Levine. Beyond 'nothing to hide': When identity is key to privacy threat under surveillance. *European Journal of Social Psychology*. 2017, Vol. 47, 694-707. Available (through university computers) at: <https://onlinelibrary.wiley.com/doi/abs/10.1002/ejsp.2270>
 - MILAJ, Jonida. Privacy, surveillance, and the proportionality principle: The need for a method of assessing privacy implications of technologies used for surveillance, *International Review of Law, Computers & Technology*, 2016, Vol. 30, No. 3, pp. 115-130. Available (through university computers) at: <https://www.tandfonline.com/doi/abs/10.1080/13600869.2015.1076993>
 - POSNER, Richard A. Privacy, Surveillance, and Law, *The University of Chicago Law Review*. 2008, Vol. 75, No. 1, pp. 245-260. Available (through university computers) at: https://www.jstor.org/stable/20141907?seq=1#page_scan_tab_contents
 - PENNEY, J. W. Chilling Effects: Online Surveillance and Wikipedia Use. *Berkeley Technology Law Journal*. 2016, Vol. 31, No. 1. Available (through university computers) at: <https://heinonline.org/HOL/LandingPage?handle=hein.journals/berktech31&div=6&id=&page=>
 - ZUBOFF, Shoshana. Big other: surveillance capitalism and the prospects of an information civilization. *Journal of Information Technology*. 2015, Vol. 30, No. 1, pp. 75-89. Available (through university computers) at: <https://link.springer.com/article/10.1057/jit.2015.5>

Additional readings

- **These readings provide broader context and up-to-date examples of situations, where privacy is being challenged by surveillance.**
 - BUNIN, G. 'We're a people destroyed': why Uighur Muslims across China are living in fear. *The Guardian*. 7. 8. 2018. Available at: <https://www.theguardian.com/news/2018/aug/07/why-uighur-muslims-across-china-are-living-in-fear>
 - SCHNEIER, Bruce. It's Not Just Facebook. Thousands of Companies are Spying on You. *CNN*. 2018. Available at: https://www.schneier.com/essays/archives/2018/03/its_not_just_faceboo.html
 - SCHNEIER, Bruce. Security vs. Surveillance. *Don't Panic: Making Progress on the 'Going Dark' Debate*. 2016. Available at: https://www.schneier.com/essays/archives/2016/02/security_vs_surveill.html
 - SCHNEIER, Bruce. The Era Of Automatic Facial Recognition And Surveillance Is Here. *Forbes*. 2015. Available at: https://www.schneier.com/essays/archives/2015/09/sep_29_2015_0930_am_.html
 - CLARKE, Roger. *Risks Inherent in the Digital Surveillance Economy: A Research Agenda*. 2017. Available at: <http://www.rogerclarke.com/EC/DSE.html>
 - CLARKE, Roger. *Data Retention as Mass Surveillance: The Need for an Evaluative Framework*. *International Data Privacy Law*, 2015, Vol. 5, No. 2, pp. 121-132. Also available at: <http://www.rogerclarke.com/DV/DRPS.html> .
 - CLARKE, Roger; Marcus WIGAN. You Are Where You've Been The Privacy Implications of Location and Tracking Technologies. *Journal of Location Based Services*, 2011, Vol. 5, No. 3-4, pp. 138-155. Also available at: <http://www.rogerclarke.com/DV/YAWYB-CWP.html>
 - CLARKE, Roger. *From Dataveillance to Ueberveillance*. 2013. Available at: <http://www.rogerclarke.com/DV/DV13.html>
 - SOLOVE, Daniel J.; Paul. M. SCHWARTZ. *Privacy, Law Enforcement and National Security*. 2014, Wolters Kluwer Law & Business, 978-1454861539, 233 p.
 - SCHNEIER, Bruce. *Data and Goliath: The Hidden Battles to Collect Your Data and Control Your World*. 2016, W. W. Norton & Company, 978-0393352177, 448 p.



Surveillance then and now

Quick recap:

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“ / „minitrue“ / „what is not on the menu?“)
 - control over individual - capacity for discrimination / normalization / manipulation

Surveillance

What does it mean?

- *„close observation, especially of a suspected person“*
 - *Concise Oxford Dictionary*

X

- *„systematic investigation or monitoring of the actions or communications of one or more persons“*
 - *Roger Clarke, 1997*

X

- *„the use of technical means to extract or create personal data“*
 - *New Surveillance – G.T.Marx 2004*

Technology and surveillance

New tools = less privacy?

- **surveillance** = ever present part of social organisation – need for information / control
- changes in **form and content**
 - tax surveillance
 - religious surveillance
 - political surveillance
 - policed society surveillance
 - work/market/medical surveillance
- self-surveillance X outside surveillance
- direct X indirect surveillance
- **New tools and techniques => new countermeasures** = constant struggle
 - observation X closed door / eavesdropping X coded language / wiretapping X encryption

Big data and surveillance

How did modern ICT change surveillance?

- **electronic communication = exponential increase in data =** new information potential
- **Dataveillance**
 - *"systematic use of personal data systems in the investigation or monitoring of the actions or communications of one or more persons"*
 - Roger Clarke, 1997
 - significantly less expensive - can be **automated** => mass scale surveillance
 - wide range of techniques
 - Front- End Verification (transactions)
 - Computer Matching (big data combination)
 - Profiling (categorisation)
- => **Data Trail** = person's informational tracks in cyberspace



Chilling effect

National security and state interests in surveillance

For the greater good – justification of state surveillance?

- **surveillance in public interest**
 - airport security / public places / counter-terrorism / data retention / public health / social unrest
- **surveillance = tool**
 - **morality depends on the one who wields it**
 - NSA PRISM (counterterrorism surveillance program)
 - China - Xinjiang region – Uighur minority normalisation
 - X
 - Energy distribution efficiency – Smart grid
 - Environmental monitoring
 - Optimisation of public services
 - Epidemiological disease monitoring

Panopticon

State's watchful eye = good citizens?

- *Panopticon prison as "a mill for grinding rogues honest"*
 - Jeremy Bentham (1748-1832)
- **you never know, if someone is not watching**
 - mass surveillance
 - omnipresent surveillance in public places
 - monitoring of employees through ICT
 - surveillance through private online activities
- impact on behaviour = **chilling effect**
 - social conformity = normalisation / preemptive self-regulation / suppression of individuality / no space to revolt

Mass surveillance and data retention

Wider net = better catch?

- **targeted surveillance** – wiretapping / observation
 - criminal procedure – court order – limited to suspect
- X
- **mass surveillance** - data retention tools
 - *systematic use of personal data systems in the investigation or monitoring of the actions or communications of groups of people.*
 - **Non-discriminatory** retention of data
 - **Preventive** = not based on suspicion/investigation
 - **Full-scope** = collect first – sort out later
 - **Evidence into the past** = continuous process

Data retention vs. Privacy

How to find the balance?

- **Data retention** = panopticon of public surveillance
 - combating terrorism x orwellian society
- **Surveillance slack** = differentiation between potential of the tool and its actual use
 - consideration of practical limits = budget / manpower / focus / priorities...
- **legal challenges to data retention through protection of privacy**
 - retention by providers + access by criminal investigation units
 - need for proportionality = effective tools + minimal intrusion
 - **Data Retention Directive 2006/24/EC – invalidated 2014**
 - CJEU 2014 – case **Digital Rights Ireland** - C-293/12
 - CJEU 2016 – case **Tele2 Sverige** - C-203/15
 - National constitutional courts => modified data retention approach
 - retention within limits justifiable by service provider interests (technical/billing)
 - access limited by court order / supervision + list of criminal offences

Legal framework for surveillance

Public oversight through transparency vs. enforcement efficiency?

- **Standard surveillance** = e.g. security check on airport
- X
- **Hidden surveillance** = secret services/national security agencies X whistleblowers

- European legal framework
 - complex / state specific – conflicting interests
- Explanatory example
 - [ECHR case of Big Brother Watch v. UK](#) (Applications nos. 58170/13, 62322/14 and 24960/15) - 13 September 2018 (212) pages

Surveillance in the workplace

Employer's assets vs. Employee's privacy?

- justifiable interest X appropriate means
- Grand Chamber judgment - *Bărbulescu v. Romania* (application no. 61496/08) - 2017
 - **proportionality criteria**
 - i) preceding notification about monitoring
 - ii) adequate limitation of scope
 - iii) legitimate interest
 - iv) level of intrusion in private sphere
 - v) capacity to achieve the goal
 - vi) adequate guarantees for employees interests and rights



New surveillance

Surveillance capitalism

Do you like the likes?

- **Freemium business model**
 - profit seeking + information asymmetry + unclear value of personal data
- Early internet = encouraged model – infant industry protection
 - X current situation changed – „puppy“ => „beast“
- **New challenges**
 - **omnipresence** = big data = profiling
 - **informational bubble effect** = polarization and fragmentation
 - **manipulative power** = marketing x fake news x propaganda
 - increasing importance of **individuals virtual identities** =>
 - abuse of the tools = hate speech / cybercrime / cyberstalking / identity theft
 - modification of personal perception = self-identification with virtual profile => impact on personality development – habits, opinions, preferences, choices
- **New tool of social control**
 - China/Tencent – Social credit system => reward system for „good citizens“

Belly of the big data beast

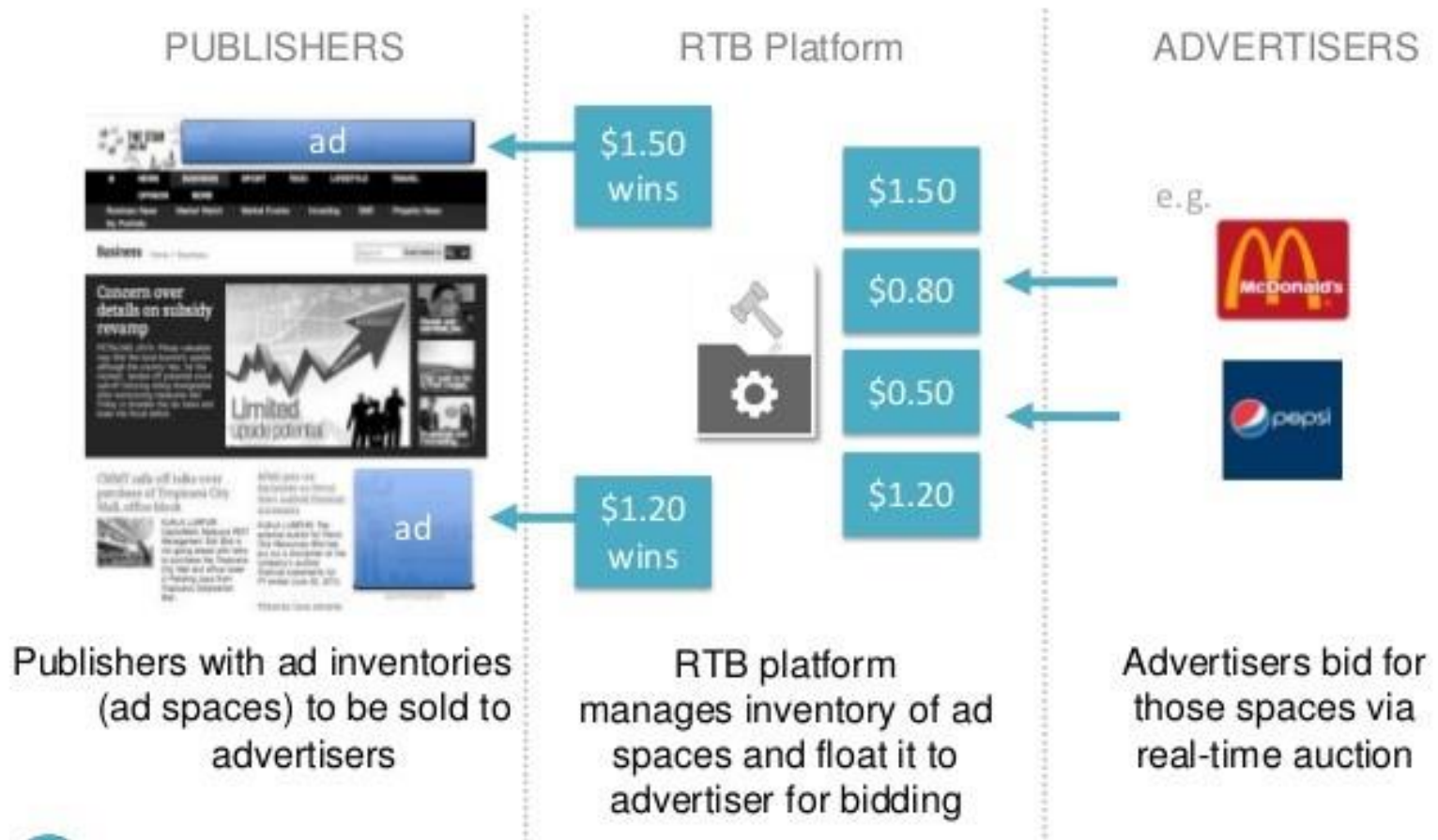
How does the freemium business model generate profit?

- **Metadata => profiling => targeted advertisement**
- *„Half the money I spend on advertising is wasted; the trouble is I don't know which half.“*
 - John Wanamaker (1838-1922)
- **Indirect payment for the services** = illusion of „free“
 - Just access to internet? Income inequality x we all „are data“
- Complex system = big data – max. revenue from available information
 - Invisible infrastructure = [trackers and cookies](#)
 - Algorithmic marketing tools = [profiling + real time bidding](#)

The magic that makes it work



How does RTB work?



MARKETING TECHNOLOGY LUMAscape



Denotes acquired company Denotes shuttered company

Regulation of cookies

How to tame the cookie monster?

- **ePrivacy directive = transparency**
 - informed consent – opt in (X Czech opt-out)
 - right to refuse
 - cookie policy - data minimisation + privacy by design
- X regulatory gap behind technology
 - **new forms of cookies**
 - zombie cookies / flash cookies / ever cookies
- **Proposal of ePrivacy Regulation**

Platforms and illicit content

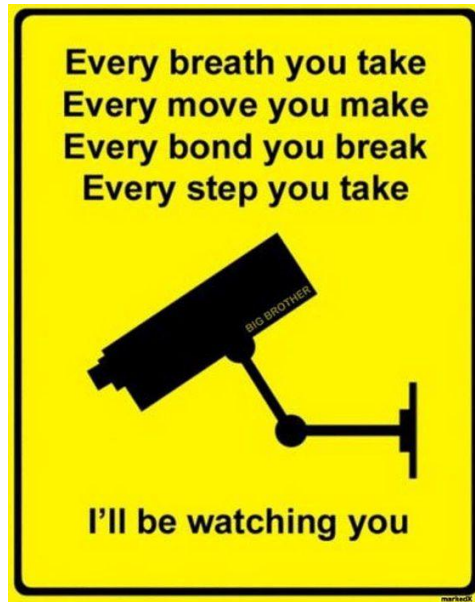
Private censorship vs. protection from „info-pollution“?

- **ISP liability – eCommerce directive**
 - notice and action
 - no obligatory general monitoring of content
 - terms and conditions
 - supranational entities - conflicting obligations
 - privacy vs. surveillance (EU vs. US laws)
- terrorist propaganda, hate speech, fake news
 - **legal tools** X state enforcement in cyberspace
 - **technical tools** X enforcement through private entities
- **cooperation in criminal matters** – access to data
- **notice-and-action framework** = delegated enforcement
 - adjudication of content through private entity X court remedy available
 - urgent issue = search for least imperfect tool that is effective

Future of surveillance – Smart everything

New tools = less privacy - ver. 2.0?

- internet of things / smart city / ambient intelligence
 - **ubiquity** – „nowhere to hide“
 - new countermeasures = privacy as commodity
 - **ambience** – „everyday surveillance“
 - new social standard = change in the concept of privacy?
 - **automated profiling** – „you are your data“
 - individualisation of offer (services, goods) and opportunity (actions, decisions, rights)
 - **enhanced reality** – merger of the real and virtual identity
 - creation of new social gap? freedom on the fringes of society?
- dystopian scenarios (cyberpunk) x solution to everything
 - past as guidance X certain aspects enhanced by new tech reality



Thank you for your attention!

Questions?

Ideas?

Answers?

Looking forward to your essays!