

Old and new rights in the digital world.  
A glance at freedom of expression, data  
protection and digital identity

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# Introduction

- digital technologies: which challenges and opportunities for a) freedom of expression b) data protection and digital identity?
  - 1) AOL Huffington Post merger
  - 2) Facebook's new facial recognition feature
    - b) →→ a)+

# 1. AOL Huffington Post merger

- Merger in early 2011: no intervention from competition and communications regulators
- Controversy: HuffPo criticised for its buyout by ‘big business’ for \$315m, esp because of contributions by unpaid bloggers to value of HuffPo

# Blogging

- Merger shows ease of co-option of blogs by corporate establishment
- Instead of contributions from unpaid bloggers subverting traditional capitalist media system, it in fact contributed to monetary value of company

# Consolidation, pluralism, expression

- Increasing focus on online (economic) consolidation and competition from competition and comms regulation e.g. EC Google investigation
- Qualitative pluralism and free expression: may be affected by increasing consolidation, as well as other developments e.g. traffic management by ISPs

## Implications for legal conception of free expression

- Large Internet corporations have power to determine what users can access over Internet, ability to assert economic/cultural dominance over medium
- Traditional conception of free expression has been as a right enforceable against gov
- Piecemeal approach to protecting users' free expression against corporations e.g. some net neutrality legislation and regulation
- Leading HR bodies have recognised these issues for online free expression e.g. Council of Europe's Council of Ministers, Special Rapporteur to UN Human Rights Council
- Other options e.g. joint civil society-corporate projects such as Global Network Initiative as interim solution for online rights protection

## 2. SNS: challenges for users' rights

### Plan:

- data protection (fundamental right after Lisbon)
- digital identity (future codified right?)
- as 'new' rights to be strengthened in online world
  - Prerequisite for the enjoyment of other rights (freedom of expression)
- Analysis takes into account:
  - Report of UN Special Rapporteur La Rue (May 2011)
  - Art 29 WP Opinion on user's consent (July 2011)
  - Eurobarometer 359/2011 (on the users' attitudes about eID)

# The Facebook case

- Fb's new facial recognition feature: main issues
  - Active *by default* on users' account
  - *Automatic* tagging system
  - Biometric data
    - a) the DP perspective
    - b) the human right perspective
    - c) the digital identity perspective



# The Facebook case (a)

## a) DP perspective

- consent (opt-out), lack of transparency
  - Art 29 WP ‘11: NO opt-out for *default privacy settings*
  - *FB*’will by default instead of *privacy by default*
  - Practice of unclear default settings
- Collection and storage of biometrics
  - EU regulators concerns: unlawful finality
  - ‘Right to be forgotten’ (eraser button exceptional)
  - Facial recognition= sensitive data?

# The Facebook case (a)

## Facebook under judicial control

- U.S. : EPIC filed a complaint to the FTC over the facial recognition function (June 2011)
- EU: protests of many DP regulators
  - Hamburg authority's decision to stop Fb's feature Disclosure of profile data to partners companies
  - Track and tracing of users through the 'I LIKE' button
  - public and public reactions:
    - Schleswig/Holstein DP (ban for institutional sites)
    - the double-clicks of Heise website

# The Facebook case (b)

## The HR perspective

- Art 8 ECHR
- Ar 7, 8 EU Charter of fundamental rights

ECtHR: unlawful unlimited storage of biometrics by States (*Marper*)

- Art 17 of the ICCPR
- UN special Rapporteur Frank La Rue
  - Obligation of the States to adopt effective laws
  - Positive interplay between privacy and freedom of expression

Lack of anonymity + States'/companies' access to users' data =  
Undermined confidence on Internet, impeding the free flow of info and ideas

# The Facebook case (c)

The digital identity perspective

- The case deals with the users' digital identity
  - UN Report 'right-to-express-oneself-anonymously'
- Current framework does not deal with identity management
  - profiling and loss of control over the *digital persona*
  - discrimination (also indirect)
  - Individual autonomy (advertises on the web pages)
  - Capability to maintain different images (*audience segregation*)
  - *Chilling* effect on other rights (freedom of expression)

# Towards a new right of digital identity?

- access to modern eIDMs without having one's identity *misrepresented* at the mercy of companies
- Create autonomously one's digital persona (control on imposed digital identity)
- Access to *multiple* e-ID through user-friendly process
- Use 'safe' interoperable eIDs, *portable* credentials across different activities and in a uniform way across states
- Right to express one's ideas without concerns ('*chilling* effect')

The lack of trust in Internet may hamper the digital economy (Eurobarometer 359/11: 40% of users abstain from e-commerce)

## Need for a comprehensive approach to e-identity

- Need to impose more transparency tools
- Need of ensure effective control over one's e-ID
  - non-‘personal’ and voluntary disclose
  - link btw profiling and the *formal* persona: >effects
  - Interoperability and user-centric IMS
    - *Identity by default* prerequisite for other rights