

Dogs on the internet: equality and human rights

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1. Introduction

If human rights are truly universal they must apply to interactions between humans on the internet – even if one cannot know for certain who the person is that one is dealing with, even if he, she or it may be a dog.¹ On July 5, 2012, the UN Human Rights Council adopted the Resolution entitled ‘The Promotion, Protection and Enjoyment of Human Rights on the Internet’, affirming that ‘the same rights that people have offline must also be protected online’.²

It seems obvious that the same rights that people have offline must also be protected online, especially human rights. However, it is not so obvious what this means exactly, and how this might be done. Even if human rights are universal, there are major differences in the views on what these rights mean and how they should be realised, even between explicitly self-proclaimed human rights supporters such as the US, on the one hand, and European Union member states, on the other. The aim of this short note is modest: some of the major issues will be looked at to serve as food for thought on how to view the complex relationship between human rights, equality and the internet. It is argued that this rethinking is badly needed.

If equality and human rights is nothing but trouble, there is even more strife when we consider equality and human rights on the internet. Two specific characteristics of communication mediated by the internet cause major challenges for the law. The first is the possibility to be (relatively)

1 Figuratively speaking of course, and referring to the famous cartoon by Peter Steiner, published by The New Yorker on July 5, 1993. See: en.wikipedia.org/wiki/On_the_Internet,_nobody_knows_you're_a_dog.

2 UN HUMAN RIGHTS COUNCIL, ‘Resolution: The promotion, protection and enjoyment of human rights on the Internet’, UN Doc. A/HRC/20/L.13, 29 June 2012.

anonymous on the internet. The second is the internet's global character, defying territory-based jurisdiction.

Two branches of human rights will be briefly discussed here: privacy and freedom of expression. For both rights, the difference in approach between the US and Europe will be briefly indicated. It will be explained why the internet calls for a rethinking of the meaning of these rights. Next, some thoughts on the impact of the internet on equality in a broad sense will be mentioned. The conclusion will be that there is even more trouble with equality and human rights on the internet, and that this 'trouble' means challenges for legal research and practice.

2. Privacy

Every publication on privacy starts with a reference to Warren and Brandeis, who coined the term privacy and introduced the often cited 'right to be let alone'.³ Now, there is also a discussion about a 'right to be forgotten'.⁴

Privacy has a physical dimension: one's body, bed, house, and to some extent even one's workplace. Privacy also has an informational dimension. Westin first used the term 'informational privacy' for the idea that everybody should have the right to determine who knows which particular details about him or her.⁵ It is this notion of privacy that is the focus of most discussions on privacy in the information age.

Clearly, we do not have an unlimited right to determine who knows which particular details about us. The government, for one, needs to know many things about us for different purposes, and normal daily life entails that we are seen and leave both physical and digital traces.

Do we view privacy as a human right that, as such, cannot be traded by the person concerned, as is the common position in Europe? Or do we treat it as a commodity that can be sold for a discount or a 'free' service?⁶ The internet has lured us into the second, U.S. approach. Most of us use one

3 WARREN and BRANDEIS 1890.

4 See, among others, ROSEN 2012 and AMBROSE 2013. And of course Case C-131/12, *Google Spain*, [2014].

5 WESTIN 1968, at p. 7.

6 PRINS 2006.

or more social media to keep in touch with our network of friends and acquaintances, and to 'meet' new people. We accept (or cannot be bothered to refuse or delete) cookies that keep track of our online behaviour. We have allowed ourselves be persuaded to use loyalty cards in order to obtain discounts. We carry various items that have an RFID chip⁷ and most of us have a smartphone. Without too much exaggeration, we can be said to live in a 'surveillance society', where governments and private companies can keep track of everything we do. This, of course, raises concerns, also for the exercise of the right to freedom of expression.⁸

In theory, we have given permission to collect and process all of this 'data exhaust',⁹ by agreeing to privacy policies and accepting bulky general terms and conditions. Even if we cannot be bothered to read everything and thus give blanket permission for things that we cannot oversee, we are still responsible for having taken the risk of clicking 'I agree'.

Some of us may feel that we have 'nothing to hide'¹⁰ and may welcome any 'enhancement of our user-experience' by our personal data being shared by 'selected business partners'. What is wrong with that? On the internet, there is no privacy, so get over it.¹¹ Privacy is an old-fashioned notion, for old people and nerds who do not know how to have fun. Privacy advocates sometimes have difficulty in avoiding a paternalistic tone: I know you do not do so, but you really should care about your informational privacy.

However, privacy is not about hiding things that one may find embarrassing or that may be used against us. The question is not what you want to hide, but what you want others to know about you. If someone asked me what I had for breakfast this morning, my reaction would be: why are you asking? Why do you want to know? Really, it is none of your business!

7 RFID stands for: Radio Frequency Identification. RFID chips are tiny chips that may be part of various items, and that have a unique identification (thereby possibly identifying the user carrying them).

8 LARUE, F., 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression', UN Doc. A/HRC/17/27, at paras. 78-99.

9 MAYER-SCHÖNBERGER and CUKIER 2013, at p. 113.

10 SOLOVE, 2007.

11 Quote attributed to Scott McNealy, see en.wikipedia.org/wiki/Scott_McNealy.

The legal implementation of informational privacy, consisting of giving (in theory) full control and thereby full responsibility to the data subject is in urgent need of reconsideration. In an age of big data, where unforeseeable secondary use of data is of crucial value, it no longer makes sense to ask data subjects for permission. Some authors suggest that the responsibility should be shifted to the data controllers. Data controllers could be asked by law to be transparent and accountable for the use they make of personal information, and, crucially, data subjects should have the possibility of disproving any automated conclusion that affects them.¹² The upcoming revision of the EU data protection directive¹³ is a good opportunity to rethink the European approach to informational privacy.

3. Freedom of expression

Freedom of expression is sometimes considered as the cornerstone of modern democracy. Democracy presupposes the ability to make well-informed choices, which requires free access to information, the press living up to its role as a public watchdog, and an open, uncensored, unrestricted public debate. The UN Special Rapporteur on freedom of expression Frank LaRue noted: ‘The right to freedom of opinion and expression is as much a fundamental right on its own accord as it is an ‘enabler’ of other rights, including economic, social and cultural rights, such as the right to education and the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications, as well as civil and political rights, such as the rights to freedom of association and assembly. Thus, by acting as a catalyst for individuals to exercise their right to freedom of opinion and expression, the Internet also facilitates the realization of a range of other human rights.’¹⁴ Again, there is a fundamental difference in approach across the Atlantic. The US embraces the free marketplace as an ideal model, allowing for few

12 MAYER-SCHÖNBERGER and CUKIER 2013, at p. 171.

13 See Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) COM(2012) 11 final.

14 LARUE, F., ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression’, UN Doc. A/HRC/17/27, at para. 22.

restrictions to its cherished First Amendment. The idea is that ‘wrong’ expressions are best rebutted in an open discussion, rather than being repressed by criminalizing them. The European approach emphasizes that freedom inevitably comes with responsibility. Some expressions are so harmful to exhaustively listed interests¹⁵ that democratic societies need to proscribe them by law, such as hate speech and child pornography.

It is commonly accepted that sovereign states have the authority to regulate speech that can be accessed from their territory. But how can one find the author of criminal speech? And how can one enforce one’s regulations even if the author can be traced? If the author finds himself in another jurisdiction where whatever he wrote is not considered to be a criminal offence (as may easily happen), then extraterritorial enforcement comes down to the export of norms. This is called a ‘spill-over effect’, and in the context of freedom of expression a successful export of restrictions is taken to result in a ‘chilling effect’.¹⁶ An inability to enforce a state’s legitimate regulations makes the state effectively powerless, thus eroding its sovereignty.

On a more positive note, the opportunities that internet communication opens up for standing up against a repressive government are extremely valuable. Internet communication contributed to the so-called Arab Spring and enabled protesters to inform the rest of the world on what was going on.¹⁷ The empowerment of individuals and minorities is one of the good things that the internet brings. Not necessarily, though, as the well-known Chinese internet-censoring practices show.¹⁸

The internet enables people to speak their minds, including making (true or false) accusations, using abusive language and bullying. If such cases reach the courts, usually the defendant’s right to freedom of expression has to be weighed against the plaintiff’s right to privacy and a good reputation. In such cases of conflicting rights, the fact that one right outweighs the other inevitably means that, in that particular case, the ‘losing’ right is restricted.

15 Enumerated in the second paragraph of Art. 10 ECHR.

16 See www.chillingeffects.org, a website ‘monitoring the legal climate for internet activity’.

17 See, among others, HOWARD et al. 2011.

18 See, among others, MACKINNON 2008.

4. Equality

The famous cartoon referred to in the title strikingly illustrates the fact that users on the internet cannot only be anonymous, but also their location, sex, age, physical characteristics etc. can be unknown. This means that internet users have the opportunity to free themselves from some of the constraints they experience in everyday life, such as their location, sex, age and physical characteristics: empowerment, liberation and also equality in an unprecedented sense. An elderly, homosexual, shy, overweight American male can present himself in social interactions online (virtual worlds, online communities) as a young, ambitious Lithuanian businesswoman-to-be. In this sense, internet users are equal, and equally free.

The downside of an unfettered, anonymous freedom of expression is that some people may become defenceless victims of very serious forms of harassment, identity fraud and false accusations. These victims may rightly be called the 'outlaws' of modern times, as the law cannot effectively protect them.¹⁹ Some people are worse than dogs, 'homo homini lupus', and apparently this dark side of humans easily surfaces when they feel outside the reach of law enforcement.

Not every person on the planet has internet access, and not everybody who does have access is tech-savvy enough to make optimal use of it. This so-called 'digital divide' creates a new inequality, between new 'haves' and 'have nots'.²⁰ Those with no effective internet access may with good reason feel excluded, not just from niceties and extras, but also from basic facilities that are required in modern life. Maybe a right to internet access, just like a right to education, work, health-care, etc. should be acknowledged as a new human right?²¹

19 Very disturbing examples are the cases of Amanda Todd (see www.foxnews.com/world/2012/10/12/canadian-teen-found-dead-weeks-after-posting-wrenching-youtube-video-detailing/) and in the Netherlands the case of 'Freek' (see mijnkindonline.nl/freek/english).

20 See, among others, NORRIS 2001.

21 See on this issue, among others: BEST 2004 and CERF 2012.

5. Conclusion

Even if my cat enjoys playing a mouse game on the iPad, dogs can be chipped and tracked, and cows are fed and milked by automated systems, the use of the internet is reserved for humans (possibly through the use of software agents or bots). 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'²² The challenge for the law is to make this true in an environment of anonymous, global communication. Hopefully, this brief overview of some issues suffices to show that it is far from clear how human rights protection on the internet could be realised. We need a fundamental rethinking of what exactly these rights mean and how they can be enjoyed or enforced in a society where technology is everywhere. And this rethinking is a task for legal scholarship. Let's do it!

22 Article 1 UDHR.