

Protecting Individual Privacy in the Web 2.0 Era

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IGF Hyderabad, 2 December 2008

Introduction:

1. “The right to privacy” was the title of a scholarly article in the Harvard Law Review of 1890 (written by Samuel Warren and Louis Brandeis), which proclaimed such a right in view of the rapid expansion of print media that sometimes published pictures of private individuals. More than a hundred years later, anyone of us in this room can take pictures with a mobile phone or digital camera and put them into the World Wide Web.

2. When we speak of the “Web 2.0”, we have in mind this kind of communications network which allows everyone to publish and share text, sound and images. Chat rooms, Blogs, Wikis, open collaborative networks and the like are on the rise and lead to marvellous international contacts and co-operation at individual level.

3. So far, media content has been produced by journalists and media staff with editorial responsibility and ethical codes of conduct. But what are the standards for the common users of the Internet, whether young or old, educated or not, wherever they live in this world, and World Wide Web? Do we want to limit this new and seemingly endless freedom in cyberspace?

4. The World Wide Web is often characterised as a wonderful space which is open to everyone and creates its own new rules. Such glorifications are probably naïve, because the technology may be extremely good, but we human beings using this technology are still the same.

Privacy as a human right:

5. The right to privacy – or the right to respect for private and family life, home and correspondence – is a fundamental human right under Article 8 of the European Convention on Human Rights.

6. The United Nations International Covenant on Civil and Political Rights guarantees in Article 17 that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.

7. These provisions not only prohibit states from interfering in this right of individuals, they also require states to enact laws that protect privacy against interference by other private individuals. National parliaments must therefore fulfil their role as legislator. But the technology is typically too fast and complex to be understood easily by legislators around the world.

8. Privacy is recognised differently around the world. In the UK, privacy is part of the Human Rights Act, but otherwise not strongly protected. In France, an infringement of privacy is a criminal offence. In Germany, even a right to “informational self-determination” has been recognised, which allows everyone to know and control personal information stored by third parties whether they are private or public entities. A harmonisation of such laws is not feasible and probably not desirable at global level, but the cited UN and Council of Europe texts provide for a common and universal minimum standard.

The implications of Web 2.0:

9. I cannot attempt to provide answers to all questions concerning privacy on the Web 2.0, but I draw attention to a few relevant issues which may serve as a basis for further discussions:

- a. Privacy laws should apply in a technology neutral manner, because in principle it does not make a difference whether your private picture is published in a newspaper or on the Internet.
- b. It may make a difference, however, whether your privacy was infringed for commercial purposes, e.g. by a newspaper or Website trying to increase sales, rather than by a private person with no financial interests, e.g. publishing it in a chat room.
- c. A publication on the Internet may stay on the Web 2.0 for an indefinite time, while a printed publication will be out of circulation after a while and pictures broadcast on television will be available for a moment only. Images of child pornography victims have, for instance, been notoriously circulating on the Internet and the victims or their families could do little to stop this.
- d. The Web 2.0 also allows everyone to open up his or her own privacy, for example by publishing personal data or even naked pictures. Can the right to privacy be waived, for instance by minors? Does human dignity prohibit a total waiver of privacy?
- e. For many, it has become normal to “Google” persons by their names before they meet them. Commercial firms are offering profiles of individuals via the Internet, ranging from professional backgrounds to criminal registers, from private information to family

and business relations, from birth notices to death notices. Are individuals an “open source”, or should they be protected? Does anything published on the Internet become part of the public domain, or is it still private?

- f. The World Wide Web allows us to act anonymously or use different names and even identities. On the other hand, each move on the Web leaves an electronic trace. Anonymity may be a safeguard for one’s privacy, but it may also pose a higher risk of criminal activity. In any case, the traceability of users is much greater. Does privacy include a right to remain anonymous on the Internet? A technology neutral approach may also be helpful in this case. On a physical highway, you are not obliged to identify yourself unless you violate the law applicable on that highway or pursue an activity with potential liabilities. The same may be applied to the data highway.
- g. The right to privacy includes the right to secrecy of correspondence. Emails are not specific to the Web 2.0. On the contrary, the Web 2.0 follows the notion of openly accessible communications. Nevertheless, one must respect the secrecy of correspondence or communications, if the author so wishes. This right is, of course, not absolute, but can be restricted for the prevention of crime, for example.
- h. Since users of the Web 2.0 create voluntarily their own virtual spaces and realities, they can also create additional social or ethical rules for their relations among themselves. Those self-imposed rules may be stricter in protecting the privacy of their users. The latter is particularly helpful for chat rooms for minors.
- i. The right to privacy applies not only to individuals, but also to legal entities such as commercial firms. This is particularly relevant with regard to client and business information of such firms. The Web 2.0 may open up new opportunities for everyone to start their own business – and commercial privacy may be worth a lot.
- j. Despite its inherent openness, the Web 2.0 may also be affected by intrusions and hacking. This is regarded as a criminal offence under the international Cybercrime Convention produced by the Council of Europe:

<http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm>

10. As a Council of Europe representative, I would like to refer also to the other relevant instruments developed by this organisation. You may judge for yourself, how far they could also apply on your continent:

- a. The Parliamentary Assembly of the Council of Europe adopted in 1998 a Resolution on the right to privacy (Resolution1165), which tried to define this right and, for example, proposed that it should be possible to take an action under civil law to enable a victim to claim possible damages for invasion of privacy. It also recommended that the media should be encouraged to create their own guidelines for publication and to set up an institute with which an individual can lodge complaints of invasion of privacy and demand that a rectification be published.

<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta98/ERES1165.htm>

If we apply the latter to the Internet, self-regulatory bodies of the Internet could be helpful in this respect.

- b. In 1999, the Committee of Ministers of the Council of Europe adopted (Recommendation (99) 5) Guidelines for the protection of individuals on the Internet, which list a number on precautionary principles for users and ethical standards for Internet Service Providers:

[http://www.coe.int/t/e/legal_affairs/legal_co-operation/data_protection/documents/international_legal_instruments/Rec\(99\)5_EN.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/data_protection/documents/international_legal_instruments/Rec(99)5_EN.pdf)

It is probably necessary to adapt these Guidelines to the Web 2.0, but they may still be largely valid.

- c. The Council of Europe also produced the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. This convention is also open for signature by non-European states:

<http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm>

- d. The ultimate yardstick for Europe is, of course, Article 8 of the European Convention on Human Rights. Privacy cases involving the Web 2.0 have obviously not yet found their way to the European Court of Human Rights in Strasbourg. But I am sure some will do in the future.

Conclusion:

11. Where does this leave us? I believe parliamentarians should take steps to learn more about privacy problems on the World Wide Web – version 1.0 and 2.0. This can best be done by comparing international ideas and experiences and learning from good and bad experiences of other countries.