

47th EPRA Meeting
Luxembourg, 23-25 May 2018

Ad hoc Working Group III
New Challenges for Privacy
Introductory paper
(draft version of 16 May 2018)
Emmanuelle Machet, EPRA Secretary

"You have zero privacy anyway. Get over it." Scott McNealy, Chief Executive, Sun Microsystems (1999).

"Concern about privacy is nothing new. It seems to swell and erupt each time a new means of perceived invasion is introduced. The use of photography by the press was an initial inspiration for Brandeis's call to re-evaluate the idea of a constitutional right to privacy. The introduction of the telephone brought similar fears and was described in Ambrose Bierce's Devil's Dictionary as "an invention of the devil which abrogates some of the advantages of making a disagreeable person keep his distance." The advent of the computer catalyzed a privacy protection movement beginning in the late 1960s, and in July of 1970 a cleverly illustrated Newsweek cover demanded, "Is Privacy Dead?" Ideas about privacy evolve as society changes. In recent years, however, the understanding of privacy has been transformed beyond mere adjustments to a few novel inventions". Debbie V. S. Kasper; The Evolution (Or Devolution) of Privacy (2005)

" ... in the last 5 or 6 years, blogging has taken off in a huge way and all these different services that have people sharing all this information. People have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people. That social norm is just something that's evolved over time." Mark Zuckerberg (2010)

"Mr. Zuckerberg, would you be comfortable sharing with us the name of the hotel you stayed in last night?" (2018) Senator Dick Durbin asks Facebook CEO Mark Zuckerberg whether he'd be comfortable sharing the name of the hotel he stayed in last night, a way of pointing to the broader concerns he has over what privacy Facebook users can reasonably expect when they use the platform. <https://www.youtube.com/watch?v=rTIKWURvbQ4>

1. Introduction

This selection of well-known quotes illustrates some of the heated debates that have taken place over recent years on the right to privacy in an increasingly digital environment. This is against such background that several member authorities have suggested including an ad hoc Working Group in [EPRA's Work Programme for 2018](#) with the aim to explore changes in the meaning of privacy and to see whether such changes have an impact on the regulation of content and the practice of regulators.

The first time that EPRA addressed matters of privacy was in 1998 [in Aachen, Germany](#). This was a first attempt to gain insight on the role played by broadcasting regulators in Europe and on common issues of concern. In [Stockholm in 2004](#), the focus of the plenary session on privacy shifted to where

to draw the line between privacy and public interest, with a background document¹ prepared by *Dunja Mijatović*, then Vice Chairperson of EPRA. Interestingly, the keynote² of *Pär-Arne Jigenius*, Commissioner of the then Swedish Broadcasting Commission and former Press Ombudsman ended on the influence of Internet on traditional media: *“We know that many serious cases of invasion of privacy in regular media are inspired by or originating from obscure websites. From the point of view of the Broadcasting Commission and the Press Ombudsman there is an obvious risk of contamination from internet to regular media”*.

Despite interesting exchanges between member authorities on that topic, it took full 12 years to have privacy issues back on the EPRA agenda. In [Barcelona in May 2016](#), privacy-related issues were addressed by two parallel Working Groups. One group focused on *“The participation of minors in Reality and Talents shows”*, and discussed some landmark cases notably around the notion of consent³. The other group, *“Data Protection & Big Data - What impact on media regulation?”*⁴ aimed to raise awareness as to why media regulators should care about the use of massive data and consider their possible impact on freedom of expression, pluralism of information and editorial independence and responsibility. In 2017, concerns about right to privacy were indirectly addressed by two plenary sessions, [in Edinburgh](#) on Algorithms and [in Vienna](#) on News in the Digital Age, even though the focal point was the impact on pluralism. In view of the above, it is thus timely to devote a working group to current challenges for privacy.

2. Aims of the Working group

1) 20 years after the topic was first discussed in EPRA, the spring ad hoc group of EPRA **will revisit issues pertaining to the right to privacy on Audiovisual Media Services**. The session, which is incidentally taking place on the day of the coming into force of the EU General Data Protection Regulation (GDPR), will also tentatively explore areas where concerns about privacy and data protection might meet.

2) Participants of the ad hoc group will be encouraged to discuss **current issues of concern for broadcasting regulators with regard to privacy matters in the linear and non-linear world**. In particular, the group will debate whether there is a **shift in the concept of privacy** - as a result of societal changes, the growing importance of social media and the popularity of some formats such as Reality TV. Can we find empirical support for the often-made claim that the concept of privacy is evolving in meaningful ways? Regulators will also discuss whether such changes have an impact on how they balance public interest, the right to freedom of expression and the right to respect for private life.

¹ https://cdn.epra.org/attachments/files/920/original/Stockholm_EPRA_2004_02.pdf?1328779215

² <https://www.epra.org/attachments/stockholm-plenary-1-matters-of-privacy-keynote>

³ Of particular interest was Ofcom’s “Blinging Up Baby” case, on the occasion of which the broadcaster was found in breach of a relevant rule for not taking due care of the child’s welfare and dignity, irrespective of the consent given by the child’s mother. For more information, see the comparative background paper:

<https://www.epra.org/attachments/barcelona-wg2-case-study-on-the-protection-of-minors-focus-on-reality-and-talent-shows-background-document>

⁴ <https://www.epra.org/attachments/barcelona-wg3-data-protection-big-data-introductory-document>

Note also that this Working Group, run in cooperation with the European Audiovisual Observatory, was a follow-up of the 2nd EPRA - Observatory Workshop [“The grey areas between media regulation and data protection”](#) which took place on 11 December 2015.

3) Finally, the group will tease out **specific privacy-related questions** that EPRA could potentially address in the future or **specific activities** that EPRA could valuably undertake in this field.

3. Balancing public interest, right to freedom of expression and right to respect for private life

Privacy is widely recognised as a fundamental human right, guaranteed by Article 19 of the Universal Declaration of Human Rights and by Article 8 of the European Convention on Human Rights.

Article 8 of the Convention – Right to respect for private and family life

*“1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*

When handling privacy cases, courts and broadcasting regulators need to carefully balance public interest, the right to freedom of expression and the right to respect for private life.

In cases which require the right to respect for private life to be balanced against the right to freedom of expression, the ECHR⁵ considers that the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the news report, or under Article 10 by the publisher. Indeed, **as a matter of principle these rights deserve equal respect.**

Accordingly, the margin of appreciation should in theory be the same in both cases. The relevant criteria defined by the ECHR case-law are as follows:

- contribution to a debate of public interest,
- the degree of notoriety of the person affected,
- the subject of the news report,
- the prior conduct of the person concerned,
- the content, form and consequences of the publication, and, where appropriate, the circumstances in which the photographs were taken.

4. Methodology of the Working Group: Introducing the World Café format

This ad hoc group will provide an opportunity to experiment a new form of interaction within EPRA, the interactive **World Café format**.

The aim is to encourage the active participation of delegates in a collaborative dialogue on core content issues – an area where regulators have a lot of experience. The debates will address two themes in parallel: The evolution of the concept of privacy in traditional TV and emerging privacy issues in a non-linear environment.

The audience will be divided in **four thematic discussion groups gathered around a table**,

⁵ Guide on Article 8 of the Convention – Right to respect for private and family life, European Court of Human Rights 7/104, Last update: 30.04.2017; https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf

Each of the groups will have a “**Table Host**” who will steer the debates in the table (helped with a list of questions) and act as a **rapporteur** at the end of the two rounds of discussion.

5. Structure and time-line

14: 30 - 14:35	<i>Welcome, introduction to topic</i> by WG Chair Emmanuelle Machet (5 min)
14:35 -14:40	<i>Concept and structure of World Café</i> by WG Facilitator Maja Cappello (5 min)
14:40 - 14:55	Prologue/setting the scene presentations Case-study 1: Kerstin Morast, SPBA (SE) Case study 2: Tony Close, Ofcom (GB)
14:55	World Café on Privacy
14:55 - 15:35	<i>Round 1: Thematic table debates:</i> (40 min)
15:35 -16:00	<i>Round 2: Participants (except table host) swap table</i> (25 min)
16:00 -16: 20	Reports by table hosts (20 min – 5 min each)
16: 20 -16:30	Conclusions (10 min) <i>Discussion on privacy-related questions that EPRA could potentially address in the future or specific activities that EPRA could engage in.</i>

6. Thematic Tables and list of indicative questions

Table 1: the evolution of the concept of privacy in traditional TV: Trends & current issues of concern

(Blue table, Table host: **Damir Hajduk**, AEM - HR)

- 1) Do you receive **many complaints** relating to issues related to privacy (compared to other types of complaints)?
- 2) Is there a trend towards **an increase or a decrease** in the number of privacy-related complaints? or was there no noticeable change? Do you have any **recent landmark case** to report?
- 3) What are the **current issues of concern in your country**? Are the concerns linked to a particular **type of programme format**? (e.g. Reality shows, investigative programmes)

Table 2: the evolution of the concept of privacy in traditional TV: Analysing changes

(Green table, table host **Ciarán Kissane**, BAI - IE)

- 4) Could you notice **any shift in the concept of privacy** over time, for instance as a consequence of the development of social media or special format?
- 5) Could you notice **any change of perception from the public** with regard to privacy issues? What about regulatory expectations from the audience regarding privacy matters?
- 6) Do you feel that **the way your authority handles cases related to privacy has evolved over time**? If so how? Are there new aspects or new criteria to be taken into account when

carefully balancing public interest and right to freedom of expression and the right to respect for private life?

Table 3: Privacy issues in non-linear environment - mapping cases & emerging challenges

(Yellow table: table host: Ľuboš Kukliš, CBR – SK)

- 1) Are you aware of recent privacy cases in the **non-linear environment or involving a non-linear element**? (e.g. TV broadcast of footage taken from social media, targeting of advertising on linear TV, addressable TV etc.)
- 2) If so, what are the **challenges** that your authority is currently facing?

Table 4: Privacy issues in non-linear environment - GDPR and impact on broadcasting regulators

(Orange table: table host: Paul Canessa, GRA – GI)

- 3) Has your authority had internal discussions on the **impact and relevance for media regulators of the implementation of GDPR**?
- 4) Is any **regular interaction between your authority with the data protection regulator in your country**? Has there been any recent meeting/event with the data protection regulator concerning the GDPR and its impact?