

Chapter 76

Human Enhancing Technologies and Individual Privacy Right

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ABSTRACT

This chapter provides a legal perspective on the application of Human Enhancing Technologies (HET), in particular on Brain-Computer Interfaces (BCIs), emphasizing threats they bring to individual privacy. The author discusses the geographical, political, and cultural differences in understanding the individual right to privacy, as granted by human rights treaties and customary international law, and confronts them with the threats brought about by HET. The era of globalized services rendered by transnational companies necessitates an answer to the question on the possible and desired shape of effective individual protection of human rights from the threats brought about by advancing HET. Be it biomedical or geolocalisation data, when fueled through the Big Data resources available online, individual data accompanying the HET becomes a powerful marketing tool and a significant national and international security measure. The chapter aims to identify the privacy threats brought about by the HET and proposes a business-ethics based solution.

INTRODUCTION

The focal point of the analysis provided is the ineptitude of the contemporary international legal system to effectively protect individual privacy. Yet the changing economic models and the development of the globalised world shift the burden of human rights protection from national authorities to international companies, including HET based service providers. In 2006 the European Parliament emphasized the need to respect high ethical principles in protecting individual privacy by all parties involved in HET including the private sec-

tor and re-addressed that need in its latest 2008 report. The growing role of self-regulation and business ethics in respecting individual privacy was also well envisaged in the 2009 European Commission's code of conduct for responsible nanosciences and nanotechnologies research. The author argues that the contents of the human right to privacy, well recognized in human rights law since 1948 is becoming more of an ethics based standard than a legal construct. The potential advantages but also the threats of the HET application add to this evolution. National authorities can no longer effectively protect individual privacy,

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while private parties operating the technologies are often well equipped to do so. As UN Human Rights Commission's Special Rapporteur Frank LaRue emphasized in his latest report it is the private sector that will now bear the burden and the responsibility to protect human rights in the globalized international society (LaRue, 2011). Endeavors such as the Global Network Initiative aim to help service providers meet the international standards of privacy protection, regardless of national authorities' involvement. Academics aid companies in the better recognition of their users' needs aiming at a stronger market position, since privacy is a strong currency in the information based economy. Providers of HET services need to recognize this specific of the hybrid economy we are witnessing and shape their privacy policies accordingly. Therefore the chapter aims to define the privacy challenge behind the HET and propose its business-ethics based solution.

PRIVACY OVERVIEW

The concept of privacy, although well present in the international human rights catalogue, is still undefined. International forums shy away from defining the term crucial to enjoyment of family life, domestic peace and individual security, as its meaning and scope evolve alongside the social and technological progress. The notion of privacy covers information pertaining to "family and home life, physical and moral integrity, honor and reputation, avoidance of being put in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, as well as protection against misuse of private communications, protection from disclosure of information given and received by the individual confidentially" (Council of Europe, 1970; Kuner, 2009). According to the US Supreme Court privacy protection ought to be granted against unjustified searches and seizures by state authorities, over personal contraception and procreation choices

as well as raising offspring (Kuner, 2009). The broad notion of privacy is strongly rooted in national regulations dealing with either civil law protection of personal rights or criminal prosecution in defamation laws (Anderson, 2012). While it generally covers any information that refers to an identifiable individual, the scope of such data and limits of its needed legal protection vary tremendously throughout world's legal systems. That is justifiably so, since privacy has been a controversial issue since its inception. Even when attempting to decide on its origins, one is left to struggle between the works of U.S., German and French legal writers. Most English language authors identify Warren and Brandeis (1890) as the authors of the privacy concept in their 1890 article on the "right to be let alone," as the origin of the term (Leebron, 1991). Yet "privacy" appeared in the German writings of Kohler (1900) and French jurisprudence roughly around the same time (Falk & Mohnhaupt, 2000; Bertrand, 1999). While U.S. courts were initially reluctant to grant the "right to be let alone" (Brandeis, 1928) within less than 60 years the notion of privacy became a hard-law concept rooted in numerous international law human rights documents, with the 1948 Universal Declaration on Human Rights (UDHR) paving the way (Griswold, 1961). It might seem, when looking at the stipulations of the 1973 International Covenant on Civil and Political Rights (ICCPR) that the scope of individual privacy is well defined. Both: Article 12 UDHR and its mirroring image in Article 17 ICCPR disallow for anyone to be subjected to "arbitrary" interference with their privacy. The term "arbitrary" may be defined in the context of Article 29 UDHR, which includes a delimitative clause for, among others, the individual right to privacy. According to its stipulations this right may only be subject to "such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." Limita-

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