Chapter 2

The Right to Privacy and the Right to Identity in the Age of Ubiquitous Computing: Friends or Foes? A Proposal towards a Legal Articulation

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ABSTRACT

Identity and privacy are often intertwined and, as a result, the significance of the distinction between the two concepts has been overlooked by law. This paper sheds some light upon the worrying indeterminacy between the concepts of privacy and identity in legal terminology, underlining the negative consequences that the lack of clarity and coherence in articulating the rights to privacy and identity will create in the forthcoming age of Ubiquitous Computing. In its proposal for a legal articulation between both rights, the article distinguishes between personal information that qualifies alethically (from αλήθεια [aletheia], the Greek word for truth) from the one that does not. It is based upon whether personal information represents or conveys a true fact or a truthful aspect concerning a given individual (depending on whether it has an alethic value or not) that the distinction between and the application of the rights to privacy and identity shall be determined. As a way to test the usefulness of the alethic criteria, the article looks into the main challenges posed by the vision of a Ubiquitous Computing world upon the rights to privacy and identity. In this context, the paper devotes particular attention to the implications of automated profiling technologies, arguing that the conceptual clarification of both the rights to privacy and identity will be crucial in order to protect and promote the autonomy and self-determination of the human person.

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INTRODUCTION

The incessant digitization of information concerning the human person, derived from technological developments – especially since the creation and diffusion of the Internet towards the so-called age of Ubiquitous Computing (Greenfield, 2006) - are challenging the legal conceptualization and protection of different (although not easy to separate) aspects of the human personality, such as identity and privacy. This technological trend affects the human person so intimately that many scholars go beyond the mere digitization of information to the outright per se digitization or informationalization of the human person. In this sense, Roger Clark talks of the “digital persona” (Clarke, 1994), while Luciano Floridi refers to the “inforg” (Floridi, 2007) and Stefano Rodotá alludes to the idea of “networked persons” (Rodotá, 2009, p. 81).

In this way, different facets of one’s personality are perceived, established and projected through information and communication technologies that mediate human interaction. Different aspects of one’s personality are reduced to bits and bytes, being managed, transferred and represented through algorithms and other computing processes. With the consolidation of the information revolution and the move towards full data-based societies, everything has become a question of data, information and knowledge, including the protection of one’s privacy and the definition of one’s identity. Such a phenomenon leads to the complex blurring of these concepts, making sharp distinctions difficult to draw between the right to privacy and the right to identity.

This article sheds some light upon the worrying indeterminacy between the concepts of privacy and identity in legal terminology, underlining the potential negative consequences that the lack of clarity and coherence in articulating the rights to privacy and identity will create in this age of Ubiquitous Computing. It purposely resists the blurring of these legal concepts and rights, drawing the attention to the pressing need to provide a clear demarcation between the right to privacy and the right to identity. The first section of the paper provides a brief sketch describing the history of the legal conceptualization of the right to privacy, listing the main definitions of the privacy concept that have characterized its long and rich evolution. The article argues that the overly broad definition of privacy has undermined and overlooked the concept and right to identity. The relentless inflationary trend in the conceptualization of the right to privacy, as argued in the initial part of the paper, is presented as the main reason behind the need to articulate in a coherent manner the rights to privacy and to identity.

The second section of the article strives to clarify a number of misunderstandings usually made in the articulation between the legal concepts of identity and privacy. In this account, the paper demonstrates the ambiguous and dynamic relationship between privacy and identity, providing examples of how the former might favour or hinder the latter, according to the context in question. Contrary to the consensual view, proposed by Agre and Rothenberg (1997) and according to whom the right to privacy is the freedom from unreasonable constraints on the construction of one’s own identity, the paper draws the attention to the fact that privacy may obstruct identity, while identity may also undermine privacy. Furthermore, the paper observes that the concordant privacy-identity nexus, advocated by the two previously mentioned scholars, conflate and blur the concepts of privacy and identity, overstretching the former and understating the latter.

The third section of the article focuses upon the common roots of the rights to privacy and identity, emphasizing the fact that they both relate to the individual’s right to dignity and self-determination. Departing from their common legal ancestors, namely from the so-called rights of personality (droits de la personnalité), the article specifies the main (and often overlooked) differences between the right to privacy and identity, describing in detail how each of them relate to a