

The Notion of a “New Public”  
under European Copyright  
Law as a Potential Tool for  
Regulating Privacy in Public in  
the European Union

**(re)WIPS5**

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# Revisiting the Origins of Privacy

“Any rule of liability adopted must have in it an **elasticity which shall take account of the varying circumstances of each case**, a necessity which unfortunately renders such a doctrine not only more difficult of application, but also **to a certain extent uncertain** in its operation and easily rendered abortive.”

Samuel D. Warren; Louis D. Brandeis, ‘The Right to Privacy’ *1 Harvard Law Review*, Vol. 4, No. 5. (Dec. 15, 1890), pp. 205-216

# Strange Similarities in Copyright

“For the purposes of such an assessment, account has to be taken of **several complementary criteria**, which are not autonomous and are interdependent. Those criteria must, moreover, be **applied both individually and in their interaction with each other**, in so far as they may, in different particular situations, be present to widely varying degrees”

CCJEU, Judgment in Case C-392/19 *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz* EU:C:2021:181, para. 34.

# Reasonable expectations of Privacy (REoP)

- REoP determine 'reusability' of information/data in (digital) *public* spaces
- Knowing/conscious exposure to public does not 'free'/exhaust control over information
- How can RoEP be expressed?

# Technological Barriers as Signposts

ECtHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, App no 931/13) (ECtHR, 27 June 2017)

- Use of public information restricted by technological means
- Circumvention of access restrictions breaches purpose limitation

# Parallel Developments in EU Copyright Law

- C-466/12, *Svensson*: no restrictive measures → free linking
- C-160/15, *GS Media*: lawfulness requirement, i.e. with consent
- C-161/17, *Renckhoff*: no reproductive decontextualization
- C-392/19, *VG Bild-Kunst*: TPMs as expressions of (dis)consent

# Similar Challenges

- Measured and specific assessment of ‘consent’ (no exhaustive consent)
  - TPM-signposting is dangerous (skill-based consent)
  - Consent determines public → purpose specification under GDPR (objective criteria)
- Shaping public/private spheres in ‘public spaces’

# Limits to Information

- Purpose limitations de facto restrict speech/information
  - Defining public by concepts of disclosure/communication to the public
  - Concepts that restrict ‘over-information’ and serve as pedagogical guidelines for ‘information sharing’
- Reasonable expectations of “what can be shared”



Annelies Vandendriessche & Bernd Justin Jütte,  
*Responsible Information Sharing Converging  
boundaries between private and public in privacy and  
copyright law*  
10 (2020) JIPITEC 310



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