Half Time Seminar: Doctoral Project in Law and Information Technology

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Date: December 3, 2014
Time: 10.00-12.00
Place: Fakultetsrummet (Faculty room), 8th floor, House C, Frescati Campus, Stockholm University

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R.S.V.P to iri@juridicum.su.se, no later than November 21, 2014

The objective of this second seminar is to discuss various aspects of the below Doctoral project. It will begin with a presentation of the overview of the project and its aims and focus. Some of the material collected thus far will be presented and aspects relating to structure and disposition will be put forward. The presentation will be followed by a discussion by participants and all comments and suggestions welcomed. Below is a very brief summary of the subject matter that the project tackles.

“A Time for Empowerment”

Presently, individuals are spending an increased amount of time in the on-line world. This is mainly due to the fact that the Internet is increasingly being used by individuals for every-day communication purposes. In addition, due to advances in technology, such as the use of smart phones and mobile applications, and together with the advent of the social media, people are connected to the Internet, in other words on-line, almost continually. This phenomenon is
commonly referred to as “hyper-connectivity”. This has had certain consequences. For example, it has resulted in the blurring of the distinction between what is considered public and what is considered private. Consequently, individuals are becoming more inclined to place data about themselves in the on-line world under the impression that it will be considered private. This can be seen in relation to the unlimited capacity provided for individuals to store data on-line.

As part of this hyper-connectivity, people are leaving behind lots of data about themselves in the “on-line world”. Some of this data is actively created by the individual himself, for example, when he creates a profile on one of the social media or fills in a web formula. Other data concerning the individual may be passively created, for example, when other people create data about the individual or when the individual himself “leaks” data without being aware of it. In addition, the use of modern technologies enables the continual surveillance of individuals’ movements in the on-line world, for example by the use of cookies or via search engine analytics. Finally, there are companies whose sole business model is the collection of data for the purpose of re-selling it to other commercial actors.

Using the above means for collecting data, commercial actors collect, mine, aggregate and store these data. All these available data concerning the individual have an enormous economic value to commercial actors, who use it for a number of purposes, such as to create new business models, pre-empt purchasing habits or individualize advertising. What is important for the purposes of this project is not the actual technology put to use for the purposes of analysing these data, but rather the effect, namely that it is used in order to create a picture of the off-line individual behind the data. In other words, a digital image of the individual is created, herein under referred to as the “on-line identity”.

There are a multitude of different names for the on-line identity, such as “digital profile” or “digital persona”. Here the notion of identity is used as it takes into account the subjective issues concerned with identity generally and highlights the fact that the on-line identity is just one of many identities that an individual may portray. The on-line identity is the individual’s identity as created by a commercial actor whom for some reason has an interest in that particular individual. It may wish to enter into an contractual relationship with the individual or regulate a current contractual relationship. The on-line identity stands in contrast to the “objective off-line identity”.

The objective off-line identity, is that identity which the individual views as being the objective or true reflection of himself, taking into account factors in the off-line world and possibly missing from the on-line identity due to the fact they are not present in the on-line
world. In other words, the on-line identity may be incomplete due to the fact that data, which the individual has knowledge of, is missing. It may also be incomplete due to the fact that it includes data that should not have been included, for example data that for some reason negates other data taken into account in the formation of the on-line identity. The main distinction between these two types of identity is the fact that the individual’s on-line identity is imposed on the individual by the commercial actor whereas the objective off-line identity is how the individual should be perceived or thinks that he should be perceived. Therefore, while the objective off-line identity, like identity in general, is subjective in the sense that it is from the individual’s perspective, it is objective in the sense that it may be more true considering the fact that the individual may possess knowledge not known to the commercial actor or that there are factors in the off-line world that should also be taken into account when forming the on-line identity.

The above can be illustrated by means of an example. An individual may apply for a loan from a financial institution. This financial institution, not having a prior relationship with the individual, needs a basis in order to make a decision. It may therefore create an on-line identity of the individual based on available data in the on-line world in order to address the request for a loan. The individual may be determined to be too risky a person for the granting of a loan, based on his on-line identity and the request for a loan may be denied. However, the individual may possess assets in the off-line world that were not taken into account in this assessment and which would have changed the outcome were they incorporated into the on-line identity calculation.

Having said this, it must also be highlighted that the on-line identity may be so accurate that it provides insight into the individual that the individual himself did not possess. While not a problem in itself, this may still be perceived by the individual as an injury as it can result in a sense of insecurity and loss of control on the part of the individual.

The on-line identity has one main use, namely, to place the individual in a category so that the commercial actor can make a decision concerning him. This categorization is something that is referred to by sociologists as “social sorting”. A commercial actor may have a number of pre-defined categories and the on-line identity will be placed in the most relevant category. Depending on the category that the individual is placed in, a certain consequence will occur. For example, he may receive a loan or the request may be denied, he may have certain tailored advertising directed towards him or he may receive offers for goods or services on-line, where the prices differ from individuals in other groups. The individual now
bears the characteristics of the entire group or category irrespective of what his actual personal characteristics are.

There are a number problematic issues. Firstly, the individual may not be aware that this categorization process is taking place. Secondly, there is nothing that an individual can do in order to move from one category to another, thereby changing the consequence. This is due to the fact that he does not know what data or mathematic algorithm comprising the on-line identity is utilized in this categorization process. As a result, there are a number of ensuing instances of injury that are legal in their nature and which are subsequently suffered by the individual. For example, there are laws concerning privacy and data protection that are relevant, there are aspects of discrimination that are triggered, the process results in the loss of the individual’s autonomy, it may damage a person’s reputation and it may result in manipulation, to mention but a few. The consequence is that the individual has lost control in relation to the commercial actor and there is no longer a level playing field in the relationship between commercial actor and individual.

The solution, it is submitted, is the application of the concept of “empowerment”. Empowerment is a process, comprising both legal and technical measures, that will firstly allow the individual to gain knowledge of the fact that a commercial entity has utilized available data in the on-line world and created an on-line identity of him. The individual may be quite pleased with the characteristics of his on-line identity, in which case there is no longer a problem. However, the individual may perceive the on-line identity to be incorrect or lacking important data, resulting in an unwanted consequence. Should the individual not agree with the composition of the on-line identity, empowerment will give him the right to have the decision of categorization re-adjudicated. In other words, the on-line identity should incorporate aspects of the off-line identity and should be more objective in relation to the individuals own perception of what factors should be included. The aim of empowering the individual, therefore, is the creation of transparency, accountability and fairness. In short, empowerment brings the on-line identity more in line with the individual’s objective off-line identity thereby reducing the instances of damage to the individual. Empowerment is not a guarantee for a different outcome. It is merely a mechanism for ensuring that all the relevant data were taken into account when a decision affecting an individual was made.

The bottom line is that modern technologies have resulted in an imbalance between the individual and commercial actors. Empowerment seeks to correct this situation by strengthening the individuals position as against commercial actors. It is submitted that
current legislation is not adequate as it does not take into account this imbalance and therefore a new approach is required.

While mention is made of certain legal areas activated by the above situation, it must be stressed that this project does not intend to produce a full-scale investigation into each of these legal spheres. The areas of law are chosen merely to highlight the limitations of the law in its present form. Neither is this list of legal areas activated exhaustive. The intention is that empowerment not be anchored to one legal area only but rather that it should be relevant in multiple situations where there is an injury to the individual and where the activated legal remedy is not effective in resolving the situation.