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DIGITAL ANONYMITY AND THE LAW

Tensions and Dimensions

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Tensions and Dimensions

edited by

C. Nicoll
J.E.J. Prins
M.J.M. van Dellen

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PREFACE

The right to anonymous exchange of information as well as anonymous communication is in an odd state of paradox. While the formal legal protection of this right appears at an all-time high, developments in both the public and private sector show a growing number of legal and especially technical means to undermine anonymity. The growing interest of people in using the Internet has had a key impact on the worldwide availability of personal information. Everyday life is evidence that technological advance provides numerous opportunities to trace and track people down. They fuel the commercial interests of persons and organisations who seek to know exactly who is accessing certain digital content in order to be able to charge for it. The pressure on anonymous communication has grown substantially after the 2001 terrorist attack on the World Trade Center and the subsequent new political climate. Although it is still difficult to oversee their exact implications, measures such as the US Patriot Act, the European Cybercrime Convention and the European Union rules on data retention may perhaps be only the very first signs that the exercise of the right to the anonymous exchange of information is under substantial pressure.

These and other developments have fuelled the dialogue on the beliefs and values behind anonymous communication. Debates rage about how, by whom, and to what extent cyberspace anonymity should be controlled, for technological advance not only provides for new opportunities to trace and track people down. The possibilities for anonymous communication are enhanced by new technologies as well. Different techniques and services have been developed which make Internet activities, such as surfing, anonymous. Facilities are also available to provide individuals with a pseudo-identity. Thus, anonymous communication raises various questions, among them legal questions. What exactly do we mean by anonymity? Why would people want to communicate and transact on an anonymous basis? What are the practical and legal restraints upon anonymity when communicating and transacting with others? Where does one draw the line between anonymity as a tool, on the one hand, for citizens to protect their civil and constitutional rights, privacy and other interests and, on the other, identification as an instrument in criminal investigation, commercial marketing, social control, etc. And, aside from the ad-hoc problems that now arise under private law, criminal law, privacy law and procedural law, what is the larger landscape of the legal consequences of anonymity?

This book starts from the position that the concept of anonymity is increasingly invoked in the information society debate. The authors of the various chapters in this book give appeals to anonymity a distinct meaning by analysing ano-

nymity from various different angles, interests, responsibilities and developments. With the culmination of these reflections, the book aims to gain a further insight into and an understanding of the concept of anonymity.

Before embarking on the analysis, we wish to thank a few people. The reflections on the concept of anonymity began to concern us some seven years ago. On the basis of our first deliberations we organized, in September 2000, an international workshop, subsidized by the Globus Institute of Tilburg University. This workshop appeared invaluable to our further understanding of the developments and we benefited enormously from the discussions and arguments which we had with the participants, among them Michael Froomkin who also contributed to this book. Whereas the focus of the first years was mainly on the constitutional rights dimension of anonymity, we decided more recently to expand the scope to broader implications and the international dimensions of the theme. Thus, we brought together an international team of experts from different backgrounds and legal traditions to reflect on other dimensions of the theme. We wish to thank them all for contributing to the discussions and this book. We also wish to thank the Dutch National Programme for Information Technology and Law (part of the Dutch Scientific Council – NWO) for making the research possible. Finally, we express our gratitude to Vivian Carter and Rachel Poels for their tremendous help with the editing of this book.

Tilburg, The Netherlands
Auckland, New Zealand
1 November 2002

MIRIAM VAN DELLEN
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ABBREVIATIONS

ACLU	American Civil Liberties Union
ADACS	Activities for the Development and Consolidation of Democratic Stability
Alb. L.J. Sci. & Tech.	Albany Law Journal of Science & Technology
All ER	All England Law Reports
AOL	America Online
ARP	Address Resolution Protocol
ASs	Autonomous Systems
ATCS	Anti-Terrorism, Crime and Security Act
BBS	Bulletin Board Systems
BDSG	Bundesdatenschutzgesetz
B.U.L. Rev.	Boston University Law Review
CCTV	Closed Circuit Television
CIA	Central Intelligence Agency
CIDR	Classless interdomain routing
CLF	Common logfile format
Comp. & Internet	The Computer and Internet
Colum. L. Rev.	Columbia Law Review
Conn. L. Rev.	Connecticut Law Review
Cornell L. Rev.	Cornell Law Review
DARPA	The Defense Advanced Research Projects Agency
DHCP	Dynamic Host Configuration Protocol
DMCA	Digital Millennium Copyright Act
DP	Data protection
DRM	Digital Rights Management
DTI	Department of Trade and Industry
DuD	Datenschutz und Datensicherheit
ECHR	European Convention on Human Rights
EPIC	Electronic Privacy Information Center
Euro ISPA	European Internet Service Providers Association
FBI	Federal Bureau of Investigation
FCC	Federal Communications Commission
Fed. Comm. L. J.	Federal Communications Law Journal
FIPs	Fair Information Principles
Fla. L. Rev.	Florida Law Review
Fordham Intell. Prop. Media & Ent. L.J. Journal	Fordham Intellectual Property Media & Entertainment Law Journal
FTC	Federal Trade Commission
FTP	File Transfer Protocol
GUID	Globally-unique identifiers
Harv. L. Rev.	Harvard Law Review
Hastings L.J.	Hastings Law Journal
HTTP	Hypertext Transfer Protocol
ICRI	Interdisciplinary Centre for Law & Information Technology
IEEE	Institute of Electrical and Electronics Engineers, Inc.

Inf. Comm. Tech. Law	Information and Communications Technology Law
Int. Rev. Law Comps and Tech	International Review of Law, Computers & Technology
IP	Internet Protocol
IRS	International Revenue Service
ISPA	Internet Service Providers Association
ISP	Internet Service Provider
IT	Information Technology
IWF	Internet Watch Foundation
J. Computer & Information L.	Journal of Computer & Information Law
JILT	Journal of Information Law & Technology
JZ	Juristen Zeitung
LINX	London Internet Exchange
LPWA	Lucent Personalized Web Assistant
Mich. Telecomm. & Tech. L. Rev.	Michigan Telecommunications and Technology Law Review
MMR-Beil.	MultiMedia und Recht
MPAA	Motion Picture Association of America
NAACP	The National Association for the Advancement of Colored People
NAT	Network Address Translation
NCC	National Consumer Council
NIC	Network Interface Card
N. Cal. L. Rev.	North Carolina Law Review
NJ	Nederlandse Jurisprudentie
NJW	Neue Juristische Wochenschrift
N. M. L. Rev.	New Mexico Law Review
Nw. U.L. Rev.	Northwestern University Law Review
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
OSP	Online Service Provider
PEM	Privacy Enhancing Medium
Pepp. L. Rev.	Pepperdine Law Review
PET	Privacy-Enhancing Technology
PGP	Pretty Good Privacy
PICS	Platform for Internet Content Selection
PSP	privacy service provider
QB	Law Reports Queen's Bench Division
RIAA	Recording Industry Association of America
RICO	The Racketeer Influenced and Corrupt Organizations Act
RIP	Regulation of Investigatory Powers
Seattle University L. Rev.	Seattle University Law Review
SLAPP	Strategic litigation against public participation
SMTP	Simple Mail Transfer Protocol
SSL	Secure Sockets Layer
Stan. L. Rev.	Stanford Law Review
TDDSG	Teledienstschutzgesetz
TLS	Transport Layer Security
T.M. Cooley L. Rev.	Thomas M. Cooley Law Review
TTP	Trusted Third Party
Tul. L. Rev.	Tulane Law Review
U. Chi. L. Rev.	The University of Chicago Law Review
UNCITRAL	United Nations Commission on International Trade Law
U. Penn. L. Rev.	University of Pennsylvania Law Review
U. Pitt. L. Rev.	University of Pittsburgh Law Review

U. Pitt. J. L. & Com.	University of Pittsburgh Journal of Law and Commerce
URL	Uniform Resource Locator
Va. J.L. & Tech.	Virginia Journal of Law and Technology
Wall St. J.	The Wall Street Journal
Wash. L. Rev.	Washington Law Review
Wash. U. L.Q.	Washington University Law Quarterly
WTO	World Trade Organization
Yale L.J.	The Yale Law Journal
WWW	World Wide Web