ESSAYS II/2021

OBSAH SEKCE

MARKETPLACE OF IDEAS[1]

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1. INTRODUCTION

In today's modern world we may sometimes find ourselves overwhelmed with so much information. The past twenty-five years could be characterized as a revolution when it comes to access to information. Almost gone are the times when people had to go to a library to do research for their homework. Now, all we need is a phone, a computer or another device and we find almost everything we are looking for. It can literally take seconds.

Social media platforms are very important and widely used sources of information. According to recent reports, more than half of the total

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global population is using social media.[3] There are of course many different opinions regarding the advantages and disadvantages, as well as the impact of social media. While the obvious and often accented advantage is to be able to connect with our friends and families on a daily basis and share our lives with them, many see social media sites as a place for spreading false information and harassing comments.

With so much negativity on the internet in general, the question of regulation has become more frequently discussed. However, in accordance with the concept of a marketplace of ideas, it has been advocated for years (not only by the U.S. Supreme Court) that speech should be regulated only in the most serious cases. Therefore, in this essay, I will first explain the concept of the marketplace of ideas and then examine its value and adequacy in the current world filled with fake news, disinformation campaigns and other important changes.

2. DIFFERENT OPINIONS ABOUT THE CONCEPT OF THE MARKETPLACE OF IDEAS

The marketplace of ideas refers to the belief that the test of truth or the acceptance of ideas depends on their competition with one another and not on the opinion of a censor, whether one provided by the government or by some other authority. This theory condemns censorship and encourages the free flow of ideas as a way of viewing the First Amendment of the U.S. Constitution.[4] It was perhaps for the first time explicitly stated by the U.S. Supreme Court Justice Oliver Wendell Holmes in 1919, in his dissent to a 7–2 ruling in the Abrams v. United States case involving the First Amendment, right to freedom of speech.[5] Holmes wrote

[3] Global Social Media Stats. *DataReportal – Global Digital Insights* [online]. c 2021. [cit. 2021-11-15]. Available at: https://datareportal.com/social-media-users

[4] SCHULTZ, David, (updated by HUDSON, David L.). *Marketplace of Ideas* [online]. 2017. [cit. 2021-11-15]. Available at: https://www.mtsu.edu/first-amendment/article/999/marketplace-of-ideas

[5] HOLDEN, Richard. Vital Signs: why „the marketplace for ideas" can fail – from an economist's perspective. *The Conversation* [online] c 2021. [cit. 2021-11-15]. Available at: http://theconversation.com/vital-signs-why-the-marketplace-for-ideas-can-fail-from-an-economists-perspective-140429

that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market.[6]

Since then, the marketplace of ideas metaphor has been invoked constantly by the Supreme Court justices in First Amendment cases. It has achieved genuine legal significance, particularly in rendering the entire architecture of modern free speech law reasonably coherent and stable.[7] The Justices' uses of the metaphor have been consistently accompanied by assertions that the marketplace of ideas is a vital part of a democratic society, and it must, therefore, be protected.[8]

To name a few interesting cases, in Brandenburg v. Ohio, the Court protected the racist rhetoric of the Ku Klux Klan, when it held that speech that supports law-breaking or violence, in general, is protected by the First Amendment unless it directly encourages people to take an unlawful action immediately.[9] In Texas v. Johnson, the Court protected the burning of the American Flag as an exercise of symbolic protest.[10] In United States v. Stevens, the Court struck down a federal law prohibiting depictions of animal cruelty, a law the Congress has passed in response to the horror of „*crush videos*", in which women crushed small animals with their heels.[11] To sum up, in case after case since the 1960s, the Su-

[6] ABRAMS et al. v. UNITED STATES. *LII / Legal Information Institute* [online]. [b. r.]. [cit. 2021-11-15]. Available at: https://www.law.cornell.edu/supremecourt/text/250/616

[7] SMOLLA, Rodney A., The Meaning of the "Marketplace of Ideas" in First Amendment Law. *Communication Law and Policy* [online]. 2019. 24(4), ISSN 1081-1680. [cit. 2021-11-15], p. 437.

[8] SCHROEDER, Jared, Toward a discursive marketplace of ideas: Reimaging the marketplace metaphor in the era of social media, fake news, and artificial intelligence. *First Amendment Studies* [online]. 2018. 52(1–2), ISSN 2168-9725. [cit 2021-11-15], p. 50.

[9] BRANDENBURG v. OHIO, 395 U.S. 444 (1969). *Justia Law* [online] c 2021. [cit. 2021-11-15]. Available at: https://supreme.justia.com/cases/federal/us/395/444/

[10] TEXAS v. JOHNSON, 491 U.S. 397 (1989). *Justia Law* [online] [cit. 2021-11-15]. Available at: https://supreme.justia.com/cases/federal/us/491/397/

[11] UNITED STATES v. STEVENS, 559 U.S. 460 (2010). *Justia Law* [online] [cit. 2021-11-15]. Available at: https://supreme.justia.com/cases/federal/us/559/460/

preme Court has repeatedly held that the mere capacity of speech to offend a sensible majority is just not enough to justify its abridgement.[12]

Scholar Wat Hopkins, who did an analysis on how the Court used the metaphor throughout the twentieth century, found that there has been no effort by Justices to explain why they believe the theory works. They seem to have accepted without question that the metaphor is effective because of the rationale upon which it is built.[13]

When we look at the opinions from the academic setting, they vary greatly from the Supreme Court Justices'. Various scholars hold the opinion that there is no evidence the truth will generally emerge in a competition of ideas or that there is one, objective and universal truth awaiting discovery. Also, not everyone in the marketplace has the same ability to have his messages heard by the same audiences or with the same intensity. According to the legal scholar Baker, for instance, the truth is subjective. In his opinion, to claim individuals are generally rational and able to discern truth from falsity incorrectly assumes that each person has the same opportunity to assess each idea.[14] According to communication law scholar Jerome Barron, the marketplace concept is a "*romantic conception of free expression*" which must be replaced with a more operable approach.[15]

There are two theories that have battled for ascendancy in American thinking about free speech and that is the "*order and morality*" theory and the marketplace theory. Neither theory dominates First Amendment law today. Rodney Smolla describes the current situation as a line of demarcation where on one side there is the "*open marketplace*" of American dis-

[12] SMOLLA, Rodney A., The Meaning of the "Marketplace of Ideas" in First Amendment Law. *Communication Law and Policy* [online]. 2019. 24(4), ISSN 1081-1680. [cit. 2021-11-15], p. 467-468.

[13] HOPKINS, W. Wat, The Supreme Court Defines the Marketplace of Ideas. *Journalism & Mass Communication Quarterly* [online]. 1996. **73**(1), ISSN 1077-6990. [cit. 2021-11-15], p. 40.

[14] SCHROEDER, Jared, Toward a discursive marketplace of ideas: Reimaging the marketplace metaphor in the era of social media, fake news, and artificial intelligence. *First Amendment Studies* [online]. 2018. 52(1–2), ISSN 2168-9725. [cit 2021-11-15], p. 46.

[15] BARRON, Jerome A., Access to the Press. A New First Amendment Right. *Harvard Law Review* [online]. 1967. 80(8), ISSN 0017-811X. [cit. 2021-11-15], p. 1647–1648.

course, where almost anything goes and even hate speech is free speech. But on the other side, there are special settings where not everything is allowed, which includes speech in public schools, workplaces and non-government forums.[16]

3. THE CONCEPT OF THE MARKETPLACE OF IDEAS AND SOCIAL MEDIA

The question is, on which side of the line do (or should) social media sites stand? In the recent past, social media platforms have become widely discussed for their content. High-profile scandals related to electoral interference, fake news and disinformation, violations of data privacy, and suppression of political activism by anti-democratic regimes have cast a cloud over the social media industry in recent years.[17] The influence and impact of social media are huge, with over half of the population using at least one platform. With this comes the question of regulation. Should the content on social media platforms be regulated considering fake news and disinformation campaigns? Is the broad understanding of the marketplace of ideas metaphor still valid?

According to Alex Rochefort, the question is no longer whether governments will intervene in this sector, but where, how, and with what effectiveness.[18] Jared Schroeder says that the traditional marketplace assumptions that truths will flourish and falsity will fail to gain acceptance are currently challenged by the growth of fake news mills and news-like organizations, which often employ traditional journalistic forms of information delivery, but present only rumours and carefully selected facts that support

[16] SMOLLA, Rodney A., The Meaning of the "Marketplace of Ideas" in First Amendment Law. *Communication Law and Policy* [online]. 2019. 24(4), ISSN 1081-1680. [cit. 2021-11-15], p. 469.

[17] ROCHEFORT, Alex, Regulating Social Media Platforms: A Comparative Policy Analysis. *Communication Law and Policy* [online]. 2020. 25(2), ISSN 1081-1680. [cit. 2021-11-15], p. 225.

[18] Ibid, p. 226.

pre-existing narratives from within the communities in which they operate.[19]

There is one important issue to consider when it comes to the question of the adequacy of the marketplace theory. The current marketplace gives people the opportunity to select their information from sources that align with their personal beliefs and to construct homogeneous social media networks of like-minded friends and acquaintances. That means that people increasingly live in information realities that are substantially different from those of others. The result is a vast spectrum of interest-based marketplaces, where certain ideas emerge as true in some spaces and are found false in others. Information is often readily accepted because it fits with the dominant truth narratives within the community. A side effect to the creation of such ideologically divided realities is that individuals are more likely to accept false or misleading news reports as being truthful when they encounter them within their generally intentionally formed networks.[20] Claudio Lombardi holds a similar opinion, according to him the manipulation by users constitutes an exogenous effect on the internet marketplace.[21]

Further, the internet is not merely a platform but consists of commercially designed sub platforms whose architecture creates endogenous conditions that are far from idealized market exchange. Each platform has an algorithm that utilizes many variables to predict what is relevant for each user and what he sees when browsing through the site. All the elements have the goal of creating a specific online environment aimed at serving the user news that, according to his tracked behaviour and networks, will generate more traffic. While this system claims to show us what we are more interested in, it is a far more powerful purpose to segment readers as

[19] SCHROEDER, Jared, Toward a discursive marketplace of ideas: Reimaging the marketplace metaphor in the era of social media, fake news, and artificial intelligence. *First Amendment Studies* [online]. 2018. 52(1–2), ISSN 2168-9725. [cit 2021-11-15], p. 40.

[20] Ibid, p. 43.

[21] LOMBARDI, Claudio, The Illusion of a “Marketplace of Ideas" and the Right to Truth. *American Affairs Journal* [online] 2019. [cit. 2021-11-15]. Available at: https://americanaffairsjournal.org/2019/02/the-illusion-of-a-marketplace-of-ideas-and-the-right-to-truth/

"*consumers*" and news as "*products*" used to convey advertising, ultimately putting highly reliable sources and fake news websites on the same level—and diminishing the importance of serious sources. Algorithms such as those used by Facebook and Twitter are crafted in order to show online content without selecting for the credibility of the source.[22]

This is not what the traditional marketplace theory has taken into account. The "*truth*" that has emerged in these intentional communities is not the same truth as the one the Supreme Court and others have hoped would emerge from a free exchange of ideas. The origin of the marketplace of ideas theory was around a hundred years ago, in a time when social media sites did not exist. The theory has therefore worked with mediums available at that time that worked quite differently. It has evolved in a time when people did not have that many opportunities to share information, which is one of the reasons for such an open-minded approach of Justices while deciding First Amendment cases.

Now, in such a choice-rich environment, it has become increasingly difficult for the traditional conceptualization of the theory's underlying assumptions to function. The truths struggle to emerge. This is not to say, however, that widespread truths can no longer emerge and become accepted by broad swaths of the population. The process through which they become accepted, however, has changed fundamentally. Such massive social and technological changes that the world is experiencing require a revised understanding of the marketplace metaphor.[23]

According to Lombardi, our ability to evaluate regulatory and public policy issues surrounding online speech has been severely hampered by models of the marketplace of ideas that bear little resemblance to today's information environments. The marketplace of ideas has been long thought of as a self-regulating institution that only needs the presence of diverse opinion matters to function. Such a misleading picture has long

[22] Ibid.

[23] SCHROEDER, Jared, Toward a discursive marketplace of ideas: Reimaging the marketplace metaphor in the era of social media, fake news, and artificial intelligence. *First Amendment Studies* [online]. 2018. 52(1–2), ISSN 2168-9725. [cit 2021-11-15], p. 53.

hampered the efforts of western governments to regulate the spread of information on the internet. In the present environment, it is necessary to go beyond this model if economic forces and the principles of democracy and public interest are to be reconciled.[24]

According to the free-market vision of knowledge transmission and truth creation, protecting the marketplace of ideas means ensuring a plurality of information sources so that consumers can freely choose and select the truth. But this proposition assumes that the public has access to the whole information output and that there is a rational and informed process for selecting the truth.[25] Unfortunately, social media platforms do not work this way.

4. CONCLUSION

In this essay, I examined what place the concept of a marketplace of ideas, that originated more than a hundred years ago, has in a substantially different twenty-first-century information environment.

As was said in the essay, there have been concerns about fundamental assumptions of the marketplace metaphor in the past even when social media platforms did not exist. The concerns are even bigger now. The most important thing to consider when evaluating the adequacy of the theory at present is the remarkable difference of the internet environment from mediums that were used for spreading information in the twentieth century. Now, people have the opportunity to select their information from sources that are coherent with their personal beliefs and opinions. That means that people confront themselves with a reduced number and variety of information and the "*real*" truth that the theory operates with may not rise. This is not what the traditional marketplace theory was made in mind.

[24] LOMBARDI, Claudio, The Illusion of a "Marketplace of Ideas" and the Right to Truth. *American Affairs Journal* [online] 2019. [cit. 2021-11-15]. Available at: https://americanaffairsjournal.org/2019/02/the-illusion-of-a-marketplace-of-ideas-and-the-right-to-truth/

[25] Ibid.

Based on the opinions of various authors and scholars, I came to the conclusion that the metaphor of a marketplace where ideas can compete in an unconstrained way is not adequate anymore. It directs attention to the free expression of thought and assumes equal impact in the dissemination and rationality of the receiver of information. But the platform-driven internet is a very different place, where advertising businesses are able to determine and control the spread of information.[26]

Regulation of information markets is therefore needed to aid better dissemination of news and sustain less profitable sources that have an important role in the world's democracies. In order for the truth to come to light, people should not only be able to have access to various sources of information, but more importantly use them. Societies should give importance not only to the right to free speech but also to the right to the truth.

5. BIBLIOGRAPHY

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[2] BARRON, Jerome A., Access to the Press. A New First Amendment Right. *Harvard Law Review* [online]. 1967. 80(8), 1641–1678. ISSN 0017-811X. [cit. 2021-11-15]. Available at: doi:10.2307/1339417

[3] BRANDENBURG v. OHIO, 395 U.S. 444 (1969). *Justia Law* [online] c 2021. [cit. 2021-11-15]. Available at: https://supreme.justia.com/cases/federal/us/395/444/

[4] Global Social Media Stats. *DataReportal – Global Digital Insights* [online] c 2021. [cit. 2021-11-15]. Available at: https://datareportal.com/social-media-users

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[6] HOPKINS, W. Wat, The Supreme Court Defines the Marketplace of Ideas. *Journalism & Mass Communication Quarterly* [online]. 1996. 73(1), 40–52. ISSN 1077-6990. [cit. 2021-11-15]. Available at: doi:10.1177/107769909607300105

[26] LOMBARDI, Claudio, The Illusion of a "Marketplace of Ideas" and the Right to Truth. *American Affairs Journal* [online] 2019. [cit. 2021-11-15]. Available at: https://americanaffairsjournal.org/2019/02/the-illusion-of-a-marketplace-of-ideas-and-the-right-to-truth/

[7] LOMBARDI, Claudio, The Illusion of a “Marketplace of Ideas" and the Right to Truth. *American Affairs Journal* [online] 2019. [cit. 2021-11-15]. Available at: https://americanaffairsjournal.org/2019/02/the-illusion-of-a-marketplace-of-ideas-and-the-right-to-truth/

[8] ROCHEFORT, Alex, Regulating Social Media Platforms: A Comparative Policy Analysis. *Communication Law and Policy* [online]. 2020. 25(2), 225–260. ISSN 1081-1680. [cit. 2021-11-15]. Available at: doi:10.1080/10811680.2020.1735194

[9] SCHAUER, Frederick, The Role of the People in First Amendment Theory. *California Law Review* [online]. 1986. 74(3), 761–788. ISSN 0008-1221. [cit. 2021-11-15]. Available at: doi:10.2307/3480394

[10] SCHROEDER, Jared, Toward a discursive marketplace of ideas: Reimaging the marketplace metaphor in the era of social media, fake news, and artificial intelligence. *First Amendment Studies* [online]. 2018. 52(1–2), 38–60. ISSN 2168-9725. [cit. 2021-11-15]. Available at: doi:10.1080/21689725.2018.1460215

[11] SCHULTZ, David, (updated by HUDSON, David L.), *Marketplace of Ideas* [online]. 2017. [cit. 2021-11-15]. Available at: https://www.mtsu.edu/first-amendment/article/999/marketplace-of-ideas

[12] SMOLLA, Rodney A., The Meaning of the “Marketplace of Ideas” in First Amendment Law. *Communication Law and Policy* [online]. 2019. 24(4), 437–475. ISSN 1081-1680. [cit. 2021-11-15]. Available at: doi:10.1080/10811680.2019.1660552

[13] TEXAS v. JOHNSON, 491 U.S. 397 (1989). *Justia Law* [online]. c. 2021. [cit. 2021-11-15]. Available at: https://supreme.justia.com/cases/federal/us/491/397/

[14] UNITED STATES v. STEVENS, 559 U.S. 460 (2010). *Justia Law* [online]. c 2021. [cit. 2021-11-15]. Available at: https://supreme.justia.com/cases/federal/us/559/460/

VIDEOGAME MODDING[1]

DOMINIK POŘÍZEK[2]

1. INTRODUCTION

Videogames nowadays are the biggest and the most expensive entertainment industry with more than 2.7 billion active players.[3] Ever since the beginning of videogames becoming more available to the audience, some players skilled in coding took the role of developers themselves and started creating modifications of those games. And since then, the modding scene is becoming bigger and bigger every day.

One of the first known modification was, for example, *Castle Smurfenstein.* It was a modification for the first-person shooter *Castle Wolfenstein* which replaced the Nazi enemies with smurfs.[4] Nowadays, we can find modifications for almost every released video game on PC and those modifications vary from simple visual changes (for example texture packs for Minecraft) to total conversions (for example the original Counter-Strike, which was a mod for the game Half-Life).

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[3] WIJMAN, Tom, The World's 2.7 Billion Gamers Will Spend $159.3 Billion on Games in 2020; The Market Will Surpass $200 Billion by 2023. *Newzoo* [online]. 2020. [cit. 2021-04-10]. Available at: https://newzoo.com/insights/articles/newzoo-games-market-numbers-revenues-and-audience-2020-2023/

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It all seems pretty clear on the first look – someone creates a modification; some player downloads it and that it is. But from a legal perspective, it is not that simple. Video games are intellectual property and therefore are legally protected. Changing some aspects of video games might raise some legal-related questions and later complications.

In this essay, I will look at how a modification is seen from the legal perspective and how it is with the legality of videogame modding and what legal status does the modification have. I will then focus on the problematics of ownership of the modified elements of the videogame. In connection to that, I will try to answer the question of the potential possibility of monetization of the videogame modifications.

2. LEGAL PROTECTION OF VIDEOGAMES

This chapter will briefly summarize the not so clear form of protection of video games.

Opinions on "*what a videogame is*" from a legal point of view differ all around the globe. The reason behind this is that video games are complex pieces of work that contains more different components which can be independently protected by copyright. According to World Intellectual Property Organization (WIPO), videogames are a combination of at least two main parts: audio-visual elements and software which allows users to interact with those elements and play the videogame according to their will.[5] Therefore an obvious question arises: how should be videogames protected as a whole? This issue was analysed in a study from 2013 commissioned by WIPO[6] that compared how jurisdictions of different countries approached this legal challenge. Some countries, such as Russia, China or Spain consider video games mainly as computer programs. On the contrary, Germany, Japan or USA are of the opinion that different elements should be protected separately. Only a few countries, such as Kenya or South Korea

[5] *Video Games* [online]. [b. r.]. *WIPO*. [cit. 2021-06-05]. Available at: https://www.wipo.int/copyright/en/activities/video_games.html

[6] RAMOS, A. et al. The Legal Status of Video Games: Comparative Analysis in National Approaches [online]. 2013. [cit. 22. 11. 2021]. Available at: https://www.wipo.int/publications/en/details.jsp?id=4130

consider video games to be mainly audio-visual works.[7] The authors of this study concluded that videogames are *"complex creations, composed by multiple copyrighted works (e.g., literary works, graphics, sound, characters and software) which deserve independent legal protection."*[8]

The question of the legal definition of the videogame was dealt with by the European Court of Justice (hereinafter "ECJ") in case C-355/12 (Nintendo and others v PC Box). The ECJ stated that a videogame is a complex work that includes a computer program and audio-visual elements, and those elements are therefore protected, together with the entire work by copyright within the meaning of Directive 2001/29, and not only as a computer program which is stated in Directive 2009/24.[9]

3. THE LEGAL STATUS OF MODIFICATIONS

In this main part of the essay, I will focus on the legal status of modifications. I will try to answer the question of what a mod is from a legal point of view. I will also look at the ownership of modified elements in the videogame.

3.1 LEGAL VIEW ON MODIFICATIONS IN THE CZECH REPUBLIC

What is a videogame modification? It can be a graphical improvement of the game. It can be a new car that you can drive in a racing game. It can be a new sound effect when you hit your enemy. It can basically be anything, that somehow changes the original work. Players can simply download those modifications for free from the internet and then apply or install this modification into the game. Sometimes only copying those downloaded files into the folder with the videogame is enough, sometimes players must use third-party software. Some developers are open-minded and happily support the modding of their work, on the other hand, some developers have quite the opposite approach.

[7] RAMOS, A. et al. The Legal Status of Video Games: Comparative Analysis in National Approaches [online]. 2013. [cit. 22. 11. 2021]. p. 11.

[8] Ibid p. 93.

[9] Decision of European Court of Justice (Fourth Chamber) from 23 January 2014 in the case *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl.*, C-355/12.

Those modifications are one type of user-generated content (UGC). UGC is not legally defined neither in the Act no. 121/200 Coll., on Copyright and Related Rights (later referred to as "*Czech Copyright act*") nor in the EU law. UGC is any creation by the end-user which is available on the internet for the other users. Other than videogame modifications, UGC in the field of videogames can refer to gaming videos, live streaming on Twitch or other similar platforms and so on. In other areas, UGC can refer to remixed songs or edited videos and scenes from movies.[10] The raised question is, whether using the work of someone else (in this case a videogame) and modifying it is legal or not.

Czech copyright law has a dualistic model. This means that the copyright includes two kinds of authors´ rights - moral rights and economic rights as stated in the Czech Copyright Act.

The economic right to use the work stated in Article 12 of the Czech Copyright Code allows using the work by another person within the meaning of this act only if there is a granted authorisation by the author of the original work. Creation of UGC (videogame modifications in this case) without such authorization breaches this author´s right. The breach happens specifically in the form of reproduction of the work and communication of the work to the public. According to the Infopaq case, reproduction occurs even if someone takes only a small part of the original work and reproduces it.[11] We can easily apply this to the modifications. A creator of a mod takes a specific part of the code of the original work (videogame) and alters it in some way. Communication of the work to the public occurs when the mod is posted on the internet and other users can download it.

This basically means that we cannot say whether modding itself is legal or not. It depends on the attitude of videogame developers, whether they support modding and they grant permission to do so using EULAs (see below) or not.

[10] ŠTADLEROVÁ, Brigita. *Obsah vytvářený uživateli z hlediska autorského práva.* [online]. 2018, [cit. 2021-06-07]. Master's thesis, Masaryk university, Faculty od Law, p.16.

[11] Decision of European Court of Justice (Fourth Chamber) from 16 July 2009 in the case *Infopaq International A/S v Danske Dagblades Forening,* C-5/08.

3.2 CASE LAW FROM THE USA

The doctrine on how to perceive modifications has developed a little bit differently on the United States´ soil, where modifications are seen as derivative works. The United States Copyright act defines derivative work as *"a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represents an original work of authorship, is a derivative work".* There is no legal definition of derivative works In the Czech Copyright Act. § 2 (4) only states "A *work which is the outcome of the creative adaptation of another work, (…), shall also be subject to copyright. This shall be without prejudice to the rights of the author of the adapted or translated work.*" There are three important cases from the USA considering videogame modifications in this context involved: Midway Manufacturing Co. v. Artic International, Inc. (Midway), Lewis Galoob, Inc. v. Nintendo of America, Inc. (Galoob) and Micro Star v. FormGen, Inc. (Micro Star).[12]

3.2.1 MIDWAY V ARTIC - 1982

Midway Manufacturing, the plaintiff, was an arcade videogame developer. Those games were on machines with circuit boards that caused images to appear on a television screen. Artic international, the defendant, created and sold circuit boards for use inside those machines. One of those circuits was basically a simple modification for Midway´s game Galaxian, which sped up the rate of play. Midways sued Artic for copyright infringement by selling those circuit boards. The court has ruled that circuit boards made by Artic International were derivative works and selling those boards was in fact copyright infringement.[13]

[12] LINDSTORM, Carl. Mod money, mod problems: a critique of copyright restrictions on video game modifications and an evaluation of associated monetization regimes. *William & Mary Business Law Review*. [online]. 2019-2020, vol. 11, n. 3. [cit. 2021-06-07]. p. 817.

3.2.2 GALOOB V NINTENDO – 1992

Lewis Galoob Toys created a product called Game Genie, which, while inserted into the Nintendo Entertainment System (game console produced by Nintendo), allowed players to change the way the game behaved with the use of certain cheat codes. Nintendo sued Galoob for creating and infringing derivative work. Both district and appellate courts ruled in favour of Galoob. The appellate court stated that *"a derivative work must incorporate a protected work in some concrete or permanent form"*. Game Genie could be disconnected from the NES console anytime and most importantly, it only contained instructions to the console to behave in a different way. The court also added that even if Game Genie would have created a derivative work, it would be considered within fair use, because players using Game Genie are doing so for non-commercial purposes.[14]

3.2.3 MICRO STAR V FORMGEN

Micro Star was sued by FormGen Inc. for copyright infringement when they collected user-created levels to FormGen's game Duke Nukem 3D and were selling them on CDs without FormGen's permission as a copyright holder.

Firstly, the court was dealing with question whereas Micro Star´s CDs can be considered a derivative work. The defendant argued with the Galoob case, saying that those mod files were only an advanced version of the Galoob case. The court disagreed and stated that in the Galoob case, the audio-visual displays were defined by the original game, whereas in this case the audio-visual display was described in the mod file. The court also said that those mod files infringe on the story of the Duke Nukem 3D because only the holder of the copyright is entitled to create sequels, while those mod files were certainly sequels to the story.

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[13] Midway Mfg. Co. v. Artic Intern., Inc., 547 F. Supp. 999 (N.D. Ill. 1982) [online]. c 2021. *Justia Law* [cit. 22. 11. 2021]. https://law.justia.com/cases/federal/district-courts/FSupp/547/999/1478912/

[14] Lewis Galoob Toys, Inc. v. Nintendo of America, Inc., 780 F. Supp. 1283 (N.D. Cal. 1991) [online]. c 2021. *Justia Law* [cit. 22. 11. 2021]. https://law.justia.com/cases/federal/district-courts/FSupp/780/1283/1445354/

Secondly, the court was dealing with the question of fair use. According to its arguments, Micro Star´s behaviour could not fall under the fair use doctrine, mainly because they were selling the mod files and thus used them for commercial purposes.[15]

3.2.4 OUTCOMES OF THOSE CASES

The Cases mentioned above have outlined the following: in the US video-game modifications could be derivative works if certain conditions are met. Mods there could be also considered copyright infringement, depending on the permanency of the modification and depending on the rate of interference with the code.[16] Although it brings some light to the problem, it certainly is not a clear situation. That could be very well illustrated on so-called "*total conversion*" modifications.

Total conversions modify the game in a way that the modified version has only a few features in common with the base game. It basically stands on the same basis, the core code itself could remain unchanged but the overall gameplay and look of the game are different. Some total conversion mods had even attracted the attention of developers of the original game – in a good way. Developers hired those modders and created and standalone game from their modification. A good example can be Counter-Strike, a highly popular game to this day, which originally was a modification for the game Half-Life created by Valve.

The raised question is – are those total conversions considered derivative works, in the way introduced in the Micro Star case? This probably depends on the number of assets from the original game used in the modification. If the mod differs from the original work in so many ways, that the gameplay, game setting, audio-visuals etc. are completely different, the modification should, according to the findings in the Micro Star case, not

[15] Microstar v. Formgen, Inc., 942 F. Supp. 1312 (S.D. Cal. 1996) [online]. c 2021. *Justia Law* [cit. 22. 11. 2021]. https://law.justia.com/cases/federal/district-courts/FSupp/942/1312/1884847/

[16] LINDSTORM, Carl. Mod money, mod problems: a critique of copyright restrictions on video game modifications and an evaluation of associated monetization regimes. *William & Mary Business Law Review*. [online]. 2019-2020, vol. 11, n. 3. [cit. 2021-06-07]. p. 817.

be considered derivative work. However, there are certain opinions that even a small use of copyrighted assets from original games makes the modification a derivative work.[17]

3.3 EULA

EULA, or End User License Agreement, is a license agreement, which users of certain software must agree in order to use it. Developers give users of their software certain conditions on how to use it, what they can and cannot do and so on.[18] This also applies to video games and EULA often mentions modifications to make the situation clearer. As stated above, developers can give permission to use their work to other users and basically allow creating and sharing mods with other people.

For example, Mojang´*s* EULA concerning their game Minecraft is quite clear. Developers claims they support modding of Minecraft. Creators of the modification also own this mod and are entitled to do whatever they want with it, except for selling it or using it to make money in some way.[19]

A different approach can be found in the EULA of the game Skyrim by Bethesda Softworks, respectively EULA of their software for creating mods called The Creation Kit. Bethesda here states that if someone distributes or otherwise makes available new modifications, the rights to it are automatically granted to Bethesda. Creators of the mod basically do not own it, according to the EULA.[20]

4. MONETIZATION OF MODIFICATIONS

There are certain possibilities of how one could make money from modifications. Direct selling to end users is probably the first method, that comes to mind. With everything mentioned above, that modifications are basically

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[17] Ibid, p. 828.

[18] *End-User License Agreement (EULA)* [online]. 2016. *techopedia*. [cit. 2021-06-07]. Available at: https://www.techopedia.com/definition/4272/end-user-license-agreement-eula

[19] *MINECRAFT END USER LICENSE AGREEMENT* [online]. [b. r.] *Mojang*. [cit. 2021-06-07]. Available at: https://www.minecraft.net/en-us/eula

[20] *The Creation Kit EULA* [online]. [b. r.]. *Steam*. [cit. 2021-06-07]. Available at: https://store.steampowered.com/eula/eula_202480

derivative works, and they are copyright infringing, and that EULA will most certainly forbid this, we can easily strike out this solution. Or can we?

4.1 SELLING WITH A SHARED INCOME

Let´s shortly return to Bethesda and Skyrim. Skyrim is a game with one of the biggest number of mods available. Skyrim is, played on PC using Steam, a digital game distribution platform by Valve. On Steam, modders can upload their mods for certain games to the Steam Workshop, if developers support it, the players can then download those mods from there for free.

In 2015, Bethesda and Valve have decided that they will offer certain mods for players to buy. Bethesda would make 45 %, Valve 30 % and modders only 25 %. This whole business was a huge failure, the majority of the gaming community was not supporting it and a short time after, Valve removed the possibility of buying mods from the Steam workshop.[21] Sometime after, Bethesda introduced an alternative in the form of the Creation Club. On this platform of their own, Bethesda together with other modders (who were accepted by Bethesda) offered some additional stuff for their games. It is basically selling modifications with developers' approval and with sharing the income between them.[22]

4.2 DONATIONS

Another, less violent way to make money from modifications is through voluntary donations. Users of mods, which are available to download for free, can donate certain amounts of money to the modder without any counterclaim. Mod creators can, for example, post their PayPal account on the site where they are posting the modifications and whoever wants can send them some money to support them. This behaviour should not violate any EULA provisions, even if the EULA forbids modders to make money

[21] MAKUCH, Eddie. *Bethesda Talks Skyrim's Paid Mods Controversy* [online]. 2015. Gamespot. [cit. 2021-06-07]. Available at: https://www.gamespot.com/articles/bethesda-talks-skyrims-paid-mods-controversy/1100-6428952/

[22] *Creation Club* [online]. c 2021. Bethesda. [cit. 2021-06-07]. Available at: https://creationclub.bethesda.net/en

from it. After all, the end-user does not donate the money in order to download the mod. It is not a condition. They are doing so because they like the mod and just want to support its creator.

The situation can be quite different if the mod creator is using a donation platform like, for example, Patreon.[23] Principles of how Patreon work are the following; A person, who is asking for donations, sets certain donation limits (5 euros, 10 euros, and so on). If someone donates the amount of money that is the same or higher as one of those limits, he will receive something in return – in this case, it would be some modification. This is something that would most likely not be in accordance with the provisions in most of EULAs. It would basically mean that the modder is selling the mod.

5. FINAL THOUGHTS AND CONCLUSION

The legal situation around videogame modifications as one kind of user-generated content is certainly not clear. Modifications are basic works that infringe on the copyright of authors of the original videogame if this author does not permit to alter his work.[24] Situations are handled by developers using the End User License Agreement – EULA. In the EULA, there are usually clear conditions on what mod creators can do, to whom the ownership of the modification belongs and if modders can offer their creations for sale. There is a lot of cases when developers do not give this permission expressly but lots of mods are available on the internet and even when the creators of these mods are breaching the copyright laws, it is not usually enforced in any way. One could say that some mods are in a certain legal grey area. The situation is a little bit different in the United States copyright system, where the doctrine was developed by the three cases mentioned above.

[23] LINDSTORM, Carl. Mod money, mod problems: a critique of copyright restrictions on video game modifications and an evaluation of associated monetization regimes. *William & Mary Business Law Review*. [online]. 2019-2020, vol. 11, n. 3. [cit. 2021-06-07]. p. 838.

[24] BAXTER, Edward. *Thinking Before Modding—Players Don't Own What They Make* [online]. 2020. *Koburger Law*. [cit. 2021-06-08]. Available at: https://www.koburgerlaw.com/blog/2020/7/29/thinking-before-moddingplayers-dont-own-what-they-make

What position should game developers take, in relation to modifications, according to my opinion? One thing must be clarified in the first place. Mod creators make modifications in their spare time. They are doing so because it's their hobby and they, most likely, want to provide other players with a better experience of the original videogame. They are doing so although they are not entitled to a reward. And the fact, that there is a huge modding community around certain games, is something that the game developers benefit from. I am, once again, forced to mention the game Skyrim as an example. The game was released in late 2011 and to this day, its player base is quite big.[25] There is a big mod community around it, without a doubt thanks to which the numbers of active players are still quite big.

Developers should, in my opinion, support mod creators as much as they can. After all, they themselves benefit from it the most. I also think that developers should not be so strict with their EULA provisions and should be more liberal with the possibility of making money for modifications. I am fully aware that this is quite a controversial topic in the gaming community, but, as stated above, modders are creating mods in their spare time and their final creations are quite often superior to DLCs (downloadable content), which are basically modifications created by developers themselves that are not available for free. I see no reason why modders should not be entitled to a reward if they create quality work. This could also raise the motivation of mod creators to create those mods. And in the end, it will be the game developers who will benefit from it. More quality mods mean more active players which means a longer lifespan of the game and overall higher popularity of the developers. But of course, there is possibly a risk of the quality free mods disappearing, if this was the reality.

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[25] *The Elder Scrolls V: Skyrim – player chart* [online]. c 2021. *SteamCharts*. [cit. 2021-06-08]. Available at: https://steamcharts.com/app/72850

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[13] *The Elder Scrolls V: Skyrim – player chart* [online]. c 2021. *SteamCharts*. [cit. 2021-06-08]. Available at: https://steamcharts.com/app/72850

[14] Decision of European Court of Justice (Fourth Chamber) from 23 January 2014 in the case *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl.*, C-355/12. ECLI:EU:C:2014:25.

[15] Decision of European Court of Justice (Fourth Chamber) from 16 July 2009 in the case *Infopaq International A/S v Danske Dagblades Forening,* C-5/08. ECLI:EU:C:2009:465.

[16] Midway Mfg. Co. v. Artic Intern., Inc., 547 F. Supp. 999 (N.D. Ill. 1982) [online]. c 2021. *Justia Law* [cit. 22. 11. 2021]. https://law.justia.com/cases/federal/district-courts/FSupp/547/999/1478912/

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SURVEILLANCE GAP: CAN NOT HAVING A DATA TRACE BECOME AN ISSUE?[1]

DARIA SHYLOVA[2]

1. INTRODUCTION

In the modern world, the right to privacy is recognized under both international law and domestic legislation. Numerous conventions and treaties were enacted to protect individuals from unlawful intrusion into their daily lives by governmental entities and non-state actors.[3] Indeed, being able to enjoy privacy is a cornerstone of human development essential to shaping our identities, as the right to privacy is closely connected to other principal rights and freedoms such as the freedom of thought and expression. One will not be wrong to submit that being able to enjoy privacy is what allows individuals to live as their true selves without having to assume (at least in certain situations and social settings) a false image in order to conform to and/or comply with what is perceived as 'normal' in a particular community. Furthermore, privacy is what makes people feel less vulnerable and exposed to the omnipresent eye of not only the State but all technological advancements that surround us in general.

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[3] At the international level: Convention on the Rights of the Child (CRC), Article 16; International Covenant on Civil and Political Rights (ICCPR), Article 17; Universal Declaration on Human Rights (UDHR), Article 12; At the regional level: American Convention on Human Rights (ACHR), Article 11; European Convention on Human Rights (ECHR), Article 8.

With the ever-growing criticism of what was identified as "*surveillance capitalism*" by Shoshana Zuboff,[4] the fight to protect what was considered "*private*" has become fiercer than ever before. However, as with everything, balance is key. As Rebecca Green rightly observes, privacy is a double-edged sword.[5] Sometimes, the excess of privacy may be equally (if not more) harmful than the lack thereof. Furthermore, it may subsequently lead to what is known as 'data discrimination' of the less protected social stances and marginalized groups, making their lives more miserable than they were during the pre-technology era.

This essay examines the notion of the "*surveillance gap*" and situations when not leaving a digital trace may prove detrimental. Further, potential solutions for bridging the surveillance gap and helping the disadvantaged groups overcome extreme privacy are discussed.

2. THE SURVEILLANCE GAP AND ITS RESIDENTS

While many would agree that not possessing what Rebecca Green calls a "*conventional paper trail*"[6] is troublesome, few realize that not having enough digital presence is becoming an increasingly bigger issue entailing serious consequences, especially for the socially disadvantaged.

Even though we currently live in the era of a "*surveillance state*",[7] wherein the State is free to deploy (both legally and illegally) a variety of resources and technologies to monitor its citizens, primarily under the pretext of pre-

[4] ZUBOFF, Shoshana, Big other: Surveillance Capitalism and the Prospects of an Information Civilization. *Journal of Information Technology* [online]. 2015. 30(1), 75–89. ISSN 0268-3962. [cit. 2021-11-15]. Available at: doi:10.1057/jit.2015.5 ; STERLING, Bruce. Shoshanna Zuboff condemning Google „surveillance capitalism". *Wired* [online]. 2016. ISSN 1059-1028. [cit. 2021-11-14]. Available at: https://www.wired.com/beyond-the-beyond/2016/03/shoshanna-zuboff-condemning-google-surveillance-capitalism/

[5] GILMAN, Michele and Rebecca GREEN, The Surveillance Gap: The Harms of Extreme Privacy and Data Marginalization. *42 New York University Review of Law and Social Change* (2018). [online]. 2018. [cit. 2021-11-15]. p. 287.

[6] Ibid. p. 254.

[7] WATT, Eliza, 'The right to privacy and the future of mass surveillance'. *The International Journal of Human Rights* [online]. 2017. 21(7), ISSN 1364-2987. [cit. 2021-11-15]. p. 773-799. ; GIROUX, Henry A., Totalitarian Paranoia in the Post-Orwellian Surveillance State. *Cultural Studies* [online]. 2015. 29(2), ISSN 0950-2386. [cit. 2021-11-15]. p. 108-120.

serving public order and tackling terrorism, there still remain people who purposefully choose to or are forced to remain off the radar.

Generally, the "*surveillance gap*" can be described as the state of extreme privacy, wherein no digitalized or otherwise any personal data can be found about a certain individual. This can happen for a variety of reasons, but most commonly the State either purposefully pushes a person into a surveillance gap by developing discriminatory policies and welfare distribution algorithms or the person makes a conscious choice to remain untracked for fear of being persecuted by the authorities.

Both of the scenarios are equally bad, as the first means that the State is trying to punish its citizens or preclude them from exercising certain rights and enjoying social benefits because they do not deserve them e.g., by virtue of being a racial/ethnic minority member or an ex-convict or, alternatively, the person opts out of the benefits themselves. After all, they are afraid to come in contact not only with governmental institutions but also with hospitals, schools, community and social welfare centres, shelters etc. (this is especially common among illegal migrants who are afraid to be discovered by the authorities, as for many deportation means separation from the rest of the family, being subjected to degrading or inhumane treatment in the detention centres and back home, starvation or even death).

Life in the surveillance gap can lead to people losing the social and economic support they could have otherwise enjoyed, however, even more, alarming is the fact that those living in the surveillance gap are left with no means to defend themselves legally, as they usually have no recourse to qualified legal aid and sometimes even no laws in place to protect them. As prof. Green observes, "*Life in the surveillance gap can be isolating, stigmatizing, dangerous, and harmful to a person's physical and mental health.*"[8]

Among those living in the surveillance gap are illegal migrants, people of colour or members of ethnic minorities, homeless, ex-convicts, undocumented workers and those from a low-income urban household with a poor social

[8] GILMAN, Michele and Rebecca GREEN, The Surveillance Gap: The Harms of Extreme Privacy and Data Marginalization. *42 New York University Review of Law and Social Change* (2018). [online]. 2018. [cit. 2021-11-15]. p. 255.

background. The State, private sector and society in general prefer to neglect and ignore them because they have little to no say in the governmental or political affairs, hold no official offices or positions and for most of the time choose or are forced to remain invisible to the public. Collecting and storing their personal data is simply not worth the effort. As is the case with illegal migrants, the State is more motivated to track them, but not to restore their rights or reward them with benefits (as they are usually entitled to none), but to proceed with incarceration and deportation.

Prof. Green refers to the surveillance gap as the "*phenomenon of the uncounted*" which can be observed during the US census.[9] The "*differential undercount*"[10] which occurs during the census is exactly what happens when certain classes of people are pushed into the surveillance gap. The State and non-state actors are not interested in the personal data of such individuals because, ultimately, there is nothing to gain from it and nothing to achieve by accumulating such data, as opposed to the data on wealthier and more influential citizens living what can be considered "*normal*" lives. Because the majority of those living in the surveillance gap are barred from exercising their right to vote, they cannot be considered members of a democratic society in a true sense of the word in addition to having no representation in the government and thus no opportunity to draw the public's attention to the hardships they are experiencing.

Furthermore, implementation of the ever-developing information technologies into virtually every aspect of human life, including the development of the so-called "*e-governments*" and increasing automatization of the State apparatus can cause the surveillance gap to become even wider. As the State relies more and more on the citizens' "*digital identity*" in exercising its functions, those unable to keep up with the change – the elderly living without a guardian, visually and mentally impaired, households with the income rate ranging below the poverty threshold – will be eventually thrown out of the game and forced to enter the surveillance gap.

[9] Ibid, p. 257.

[10] STANSBURY, Shane T., Making Sense of the Census: The Decennial Census Debate and Its Meaning for America's Ethnic and Racial Minorities. *Columbia Human Rights Law Review*. 1999. 31, p. 403-404.

3. BRIDGING THE SURVEILLANCE GAP: POSSIBILITIES AND SOLUTIONS

Among the solutions proposed by the Census Bureau in an attempt to tackle the differential undercount was a suggestion to encourage respondents to use the internet and other communication technologies.[11] Besides being utterly useless in bridging the surveillance gap, such an approach, if adopted, will push even more people in.

In theory, every person is entitled to digital identity. In her article, Clare Sullivan submits that the right to identity provided for in such international instruments as ECHR and ICCPR essentially extend to the digital identity as well.[12] However, how many can actually exercise this right? In order to create a digital identity, one would first need a device with access to the internet in addition to at least an intermediate level of computer literacy. This might sound redundant until we take into account the fact that the majority of senior citizens, especially in rural areas, are still using brick phones, if any.

In America, one of the world's wealthiest nations, only 42 % of the populace in the age 65+ own a smartphone, with the percentage of citizens in their 80s being merely 17 %. In addition, 20 % of US citizens in the age range 65+ do not own any phone at all.[13] Furthermore, the average monthly cell phone bill in the US starts from approximately USD 127 which accounts for USD 1524 per annum. Not everyone can afford to pay such a high price, and so the number of people who are able to access e-governments will not amount to the entire populace of the given country. Under such a scenario, what will happen to the less privileged? They will most likely be forced to enter the surveillance gap or be subject to data discrimination.

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[11] U. S. GOVERNMENT ACCOUNTABILITY OFFICE. *High-Risk Series: Progress on Many High-Risk Areas, While Substantial Efforts Needed on Others* [online]. 2017. [cit. 2021-11-14]. p. 42.

[12] SULLIVAN, Clare, Digital citizenship and the right to digital identity under international law. *Computer Law & Security Review* [online]. 2016. vol. 32, n. 3. [cit. 2021-11-15]. Available at: doi:10.1016/j.clsr.2016.02.001

[13] ANDERSON Monica and PERRIN Andrew. Technology use among seniors. *Pew Research Center: Internet, Science & Tech* [online]. 2017. [cit. 2021-11-14]. Available at: https://www.pewresearch.org/internet/2017/05/17/technology-use-among-seniors/

In order to tackle the surveillance gap, the State must first stop pushing more people in. Automatization of the state apparatus does have its benefits and has the potential to ease many complicated procedures, but only for those who can afford to exercise their right to digital identity. In order for the transition to happen more smoothly and with fewer "*sacrifices*" along the way, the State should provide support (both in monetary and non-monetary form) to those who require it e.g, dispatching volunteers to help the elderly and provide computers with internet access to community and welfare centres.

Secondly, because it is much easier to prevent people from entering the surveillance gap rather than lure out those who have been living there for years, the State will do well to educate people about the gap, its dangers and its implications. The people should understand that disclosing a portion of their personal data and voluntarily submitting it to State monitoring is in their best interest as it will do them less harm than living in the surveillance gap without access to any social services, education and healthcare, and where their lives are exposed to constant danger. Non-state actors and volunteer organizations can be engaged in the campaign.

Additionally, the entire perspective on state surveillance should be changed. Rather than perceiving it as something that intends to infringe their privacy and thus should be avoided, citizens should view it as something that was put in place to ensure their safety and protect them from certain acts such as terrorism.

Lastly, an effort should be made to extract as much data as possible from whatever non-digitalized sources are available – paper records at the town halls, court archives, etc.

4. CONCLUSION

While it will not be possible to bridge the surveillance gap completely within a mere few years, some positive action towards its extermination may happen as soon as today. However, because attempting to close the gap is time-consuming and will require an abundance of monetary, human and other resources on behalf of the State, it is unlikely that the gap will be extinguished

so long as the State supports its existence, inter alia, by enacting discriminatory laws and policies aimed at forcing certain disadvantaged groups to enter the gap.

At present, bridging the surveillance gap does not align with the political agenda of the States where such a problem exists.

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PRIVACY FOR SALE: HOW TO DETERMINE FAIR COMPENSATION FOR PRIVACY INTRUSION?[1]

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1. INTRODUCTION

In the age of big data, data subjects are giving up parts of their identity until it no longer belongs to them. In the cloud, there is personal information, something data subjects own. In the strictest sense of the word, a fingerprint. One should question, who owns those fingerprints? Data retention has become a controversial matter within the EU policy frame and also throughout the international field, creating frictions between both personal freedom and security rights.[3] While EU policies have advanced towards a future with more privacy protection, there are still significant interests at stake in the negotiations on the ePrivacy Regulation.

In the past 20 years, with the significant increase in data collection and privacy intrusion, a hard to answer question has popped up in the field of privacy and data protection. Which type of harm is done when a breach of privacy occurs? When no property is stolen or information is shared with third parties, the question pops up, what harm is done by companies accessing your personal data or by the government accessing your phone?

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[3] JUSZCZAK, Adam a Elisa SASON, Recalibrating Data Retention in the EU: The Jurisprudence of the Court of Justice of the EU on Data Retention – Is this the End or is this only the Beginning? *eucrim - The European Criminal Law Associations' Forum* [online]. 2021. ISSN 18626947. [cit. 2021-11-13]. Available at: doi:10.30709/eucrim-2021-020

The question is getting increasingly difficult to answer as data collection and processing projects have grown in scope, focusing on broad groups or society as a whole rather than individuals. The international field has recently seen claimant solicitors exploit the interdependence of privacy rights and data protection to file a claim based on the same set of circumstances but on multiple grounds: misuse of private information and breach of data protection responsibilities.[4]

Pundits are examining the controversy on whether the immaterial harm of privacy should be protected under the privacy laws. Under this rationale, one can pose the question of whether the harm that is measurable and quantifiable in monetary terms (economic harm) should also be considered? These sorts of privacy intrusion will be covered throughout this essay, as well as the steps taken when privacy intrusion is committed and how compensation has been established thus far. Concluding finally with an overview of the controversy on whether privacy intrusion should be quantifiable by money.

2. PRIVACY

We must first examine the concept of privacy in order to calculate acceptable compensation for a privacy breach. According to Roger Clark, the term "private" has many different interpretations, ranging from philosophy to economics, politics to sociology, and so on.[5] It has multiple dimensions as well; nevertheless, as for this essay, I place a high value on the privacy of personal information and the right to be unbothered in both virtual and physical spaces.[6] A large part of society claims that data about them should not be made automatically available to other people or organizations and

[4] LANIUK, Yevhen, Freedom in the Age of Surveillance Capitalism: Lessons From Shoshana Zuboff. *Ethics and Bioethics (in Central Europe)* [online]. 2021. 11(1–2), 67–81. [cit. 2021-11-13]. Available at: doi:10.2478/ebce-2021-0004

[5] CLARKE Roger. *What's Privacy?* [online]. 2006. [cit. 2021-11-13]. Available at: http://www.rogerclarke.com/DV/Privacy.html

[6] The European Court of Justice protects privacy under four different rationales; home, family life, correspondence and private life. See more in *European Convention on Human Rights. [online] 1994. [cit. 2021-11-15]. Available at: https://www.echr.coe.int/documents/convention_eng.pdf*

that even if that was the case, the individual should have a significant amount of control over it and how it is used. This is also known as 'information privacy' or 'data privacy'. According to the UDHR,[7] people require privacy because they require private space, a free place in which to form social bonds, a free space in which to innovate, and a free space in which to think and act.[8] Privacy has turned into both a basic right and a low-cost convenience for businesses. There appears to be little to no chance of it changing, however alien it may appear to us. We will be trading information for the foreseeable future, therefore it is critical that we start thinking about the consequences now. If governments and companies are willing to sacrifice peoples' private lives on behalf of profit. It is worth considering what information is exchanged, how the information and data are being processed and what are people getting in return.

On the international level, laws concerning privacy and privacy intrusion differ greatly from country to country. The European Union has its standards way high when we discuss fundamental privacy and data rights[9]. The issue is a well-worn one; privacy advocates argue that states' collection of data and retention regimes have gone too far, becoming so indiscriminately intrusive as to violate fundamental EU privacy rights. Yet, states argue that in order to promote national security and fight against state threats such as terrorism, they need to collect and retain citizens data.[10] The aforementioned rationale changes in every country.

3. BIG DATA AND SURVEILLANCE CAPITALISM

Surveillance capitalism, according to Zuboff, is the unilateral claim of private human experience as free raw material for behavioural data

[7] Acronym standing for Universal Declaration of Human Rights.

[8] CLARKE Roger. *Privacy Introduction and Definitions* [online]. 2016. [cit. 2021-11-13]. Available at: http://www.rogerclarke.com/DV/Intro.html

[9] Article 7 and 8 of the [online]. 2012. [cit. 2021-13-11]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT

[10] LOMAS, Natasha. Mass surveillance for national security does conflict with EU privacy rights, court advisor suggests. *TechCrunch* [online]. 2020. [cit. 2021-11-13]. Available at: https://social.techcrunch.com/2020/01/15/mass-surveillance-for-national-security-does-conflict-with-eu-privacy-rights-court-advisor-suggests/

translation. These data are then processed, packaged, and sold into behavioural futures markets as prediction products.[11] With the fast developments of big data, the international field is experiencing a different style of a new notion of harm and the problems coming along with it. We can take a simple example of a study done in Oxford regarding the harm data is provoking in society. Individuals or groups of individuals are frequently unaware of the amount of personal data collected by governments through smartphone interactions or cookie tracking. Big data companies utilize plenty of information in their frameworks to upgrade tasks and client support, produce designated advertising efforts, and take different exercises that can bring income and productivity up.[12] At this point in history, it is clear that the Silicon Valley giants are attempting to do so possibly to gather as much data as possible, making us humans the product of the contemporary society of the 21st century. As Shoshana Zuboff argues in her book of Surveillance Capitalism, that people, as data subjects, are always monitored, implying that big data is in control of us and that we have no privacy. On a regular basis, our lives have become a daily invasion of our privacy but at what cost.[13]

Yet, national security and state interests are also at stake when we analyse surveillance. Until which point can state surveillance and our lack of privacy be tolerated? Does our protection come to the detriment of our security in the midst of fear like Covid-19? Surveillance in the public interest such as security at airports, public spaces, among many others are necessary tools that do indeed favour society, but we should keep an eye on the edge between the line from trespassing personal freedoms or state se-

[11] LAIDLER John. Harvard, Harvard professor says surveillance capitalism is undermining democracy. *Harvard Gazette* [online]. 2019. [cit. 2021-11-13]. Available at: https://news.harvard.edu/gazette/story/2019/03/harvard-professor-says-surveillance-capitalism-is-undermining-democracy/

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curity rights. The debate on morality begins there. Both rights are important, yet they are frequently conflicted because assessing which one is more important normally creates controversy. As countries throughout the world consider or legislate means to digitally track the whereabouts of persons afflicted with the coronavirus using smartphone apps, the issue of safeguarding privacy is becoming increasingly important. In general, a broader net of national security measures can uncover xenophobes and racially or religiously motivated criminals and intervene before they damage others. The thin line between personal privacy and national/state security is in constant change. According to the information's potential contribution to a more secure world, governments can and will intrude on our privacy which will contribute to a more secure world.[14]

4. PRIVACY INTRUSION COMPENSATION

It is critical to grasp the rules governing privacy intrusion and compensation in today's world. Humans are living in an age of daily intrusion in the age of surveillance capitalism. Monitoring facial-recognition cameras throughout the cities, phones being tracked, among many others are just a few examples of how we have everything except for privacy. The more technology has grown, the more self-control of privacy has been lost.[15] To sue big data companies is not a simple task. Even though the situation has created people's daily lives a marketplace. It is worth mentioning the great influence and power these big companies possess in regards to governmental control. In the last decade, governments have failed to address the concerns on big data and privacy. In fact, is it said that governments have used big data companies to enhance themselves i.e., unwanted mass surveillance.[16]

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[14] PEREZ, Talia Klein, Does National Security outweigh the right to privacy? *theperspective.com/* [online] 2020. [cit. 2021-11-13]. Available at: https://www.theperspective.com/debates/living/national-security-outweigh-right-privacy/

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Trying to place a monetary value on privacy invasion is a difficult task. To begin, how did our capitalist-centred society grow to the point where the government or any other institution may compensate people for any harm they have caused? Will a monetary compensation be able to pay for any harm caused by the abuse of power? Secondly, will governments or entities be safe knowing a single price will be paid if one discovers a privacy intrusion? Will any of this somehow regulate future actions? A brief example is Facebook and its multiple allegations of privacy intrusion, after the Cambridge Analytica scandal, Facebook was allegedly accused of using the data of 89 million Facebook users improperly. The fine? 5 billion USD, accounting for the biggest fine imposed for violating consumers privacy.[17] Yet, we all know Facebook is and will keep on doing its thing but as an individual, there is not much, we can do.

The fact that data regulation is complicated to achieve does not mean the governments should not pay attention to it. Monetary compensation is the acceptable economic way for privacy intrusion. Yet, it leaves aside multiple aspects and harm such as emotional and psychological. Privacy evolved to be both a component of freedom and personal life. Even with the privacy regulations within the international field, yet the big data companies seem to be untouchable by the law, putting individuals' privacy at stake.

5. CONCLUSION

The effect big data companies have on privacy is pretty much noticeable from within the society. Markets have developed, rather than us being the buyers, we have turned into the ones being bought by the big tech organizations, which gather information in sums we will not comprehend. An event occurring in front of our eyes and with our consent. Given the global reach of big data collecting systems, it is naive to think that re-

[16] BERG, Alice, The dark side of Artificial Intelligence and Facial Recognition. *Big Data Made Simple* [online]. 2019. [cit. 2021-11-13]. Available at: https://bigdata-madesimple.com/the-dark-side-of-artificial-intelligence-and-facial-recognition/

[17] BBC, Facebook to pay record $5bn to settle privacy concerns. *BBC News* [online]. 2019. [cit. 2021-11-13]. Available at: https://www.bbc.com/news/business-49099364

strictions enacted in a single jurisdiction will be sufficient to keep it under control. Likewise, much of the data that organizations work with has been collected from citizens in countries that have limited or no data privacy legislation.

The most common form of recompense for intrusion has been monetary. The topic of how to calculate reasonable compensation for privacy invasion necessitates an examination of the political power and authority that these companies wield over us, rather than just an economic one. Our right to privacy and our privacy are not for sale, and they never should have been. Companies and enterprises who violate these rights will only consider violating those rights as an economic matter if they follow this logic, and unfortunately is what has been occurring so far.

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[7] KAVENNA, Joanna, Shoshana Zuboff: 'Surveillance capitalism is an assault on human autonomy'. *The Guardian* [online]. 2019. ISSN 0261-3077. [cit. 2021-11-13]. Available at: https://www.theguardian.com/books/2019/oct/04/shoshana-zuboff-surveillance-capitalism-assault-human-automomy-digital-privacy

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