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Benedikt Buchner*

Is there a Right to One's Own Personal Data?[1]

I. Introduction

The concept of a right to one's own personal data, whether understood as (intangible) property right or similar exclusive right, is a controversial one. It is contested in particular by those who do not see the right to informational self-determination as a simple material right, but believe informational self-determination to be a "condition for a free and democratic social order"[2] and a "right to the creation and maintaining of conditions […] allowing for a free presentation of personality",[3] and argue that it would be "reductionist and inappropriate for a democratic and social society"[4] to reduce informational self-determination to a mere right of control over data.

However, thinking a little bit more in categories of exclusive rights and leaning on regulatory structures like those of copyright does not undermine the right to informational self-determination, but rather strengthens it. In times when companies like Facebook treat personal data as a mere commodity, it is not very helpful if we still consider whether our idealistic view of informational self-determination can be reconciled with a concept of the right to informational self-determination which does not only include immaterial personal rights, but also material exclusive rights.

II. The right to one's own data as a starting point for data protection

An exclusive right to one's own data has always been a starting point for German and European data protection law. Personal data is not seen as common property; rather, it is the person concerned who decides if, by whom and to which

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1 The following observations are an extract of the paper "Eigentumsrechte an persönlichen Daten?", DGRI Jahrbuch 2011, Cologne 2012, p. 53. I would like to thank Petra Wilkins for her help with the translation.

2 Donos, Datenschutz – Prinzipien und Ziele, p. 124 ff. following Simitis in Simitis, BDSG, § 1 par. 38.

3 Trute in Roßnagel, Hdb. Datenschutzrecht, Chapter 2.5 par. 21 f.

4 Hoffmann-Riem, AöR 123 (1998), 513 (522); similar Simitis (fn. 2) Intro. par. 25 f.

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purpose, when and to what extent this data is processed. A right to one's own data is thus, first of all, nothing other than informational self-determination in the classical sense of the "Census" Decision of the Federal Constitutional Court, i. e. the decision-making power of the individual, to decide on the disclosure and use of his or her personal data.[5] The assumption of a right to one's own data should therefore be unproblematic – at least if one accepts the basic concept of informational self-determination.

III. The objection of "monopolisation"

This is not the case, however, mainly because such a starting point of a right to one's own data is viewed by many as too "monopolistic" and too "absolute". A right to one's own data is equated with an exclusive right to the own data without any exceptions. Terms such as "absolute right of control or disposal" of one's own data[6] or "right to control over separated and monopolised information"[7] have been used. This criticism and similar objections are unfounded though: even if one was to assume a subjective exclusive right to one's own data, this would not amount to a "data monopoly", leaving no room for communication and unduly restricting freedom of information. Rather, even traditional exclusive rights leave room not only for the interest of the right-holder in exclusivity, but also the interest of the general public in the general availability of certain goods.[8]

Copyright provides a good example, since it grants also an exclusive right to the so-called work, which is attributed to a certain person, the author. This always requires the work concerned to be an individual intellectual creation which stands out from the mass of everyday production. There is a distinction between public goods (general information, thoughts, ideas), which are not to be attributed to a certain author, on the one hand, and individual creative expression of such general ideas or thoughts, which may then be attributed to the respective author, on the other.[9] The conception of copyright as an exclusive right requires a definition of a "work of one's own". A certain work can only be classified as such, if the tension between common property and individual expression has been resolved. Copyright thus is faced with the same challenges as data protection law,

5 BVerfGE 65, 1 (43) – Volkszählung.

6 Vogelsang, Grundrecht auf informationelle Selbstbestimmung?, p. 141 ff.

7 Heußner, ArbuR 33 (1985), 309 (312); similar Heußner, RDV 4 (1988), 7 (8).

8 This discussion sometimes refers to the term "multi-relationality of personal data". Since personal data does not only provide information about the person concerned, but also about this person's relationship to others and his/her social environment, the data is in general "multi-relational" and cannot be attributed to this person only; cf. Buchner, Informationelle Selbstbestimmung, p. 221 ff.

9 On individuality as a central criterion for the term work see Loewenheim in Schricker, Urheberrecht, § 2 par. 23.

where, instead of the work, personal data oscillate between common property and individuality, and it must therefore be determined which data are in effect "a person's own data". The challenge is the same in copyright law and in data privacy law and there is no reason why it should only be overcome for an exclusive right like copyright, and not also for an exclusive right to one's own data.

IV. The objection of commercialisation

Another main objection to a right to one's own data argues that such a right, if it is constructed like an intellectual property right, would provide a financial and commercialisation stimulus to rights-holders, with the result that personal data would increasingly be treated like other "things". It is feared that informational self-determination will deteriorate into a right of exploitation, that the individual will be degraded to an object, relinquishing dignity and personality, and that this individual surrender would finally result in the dissolution of the communicative and disputatious democratic society as a whole since everybody would only be concerned with constructing his or her data and thus personality to best conform to the market and marketing.[10] This ubiquitous tendency towards commercialisation is without doubt a real problem. It may be questioned, however, whether this commercialisation may be prevented by defining personal rights such as the right to informational self-determination as immaterial rights which are "not for sale". The commercialisation of personal data, which may be observed everywhere, is not due to some legal construction of informational self-determination, but rather to the fact that every company, whether it is Payback, Google or Facebook, understands how to present offers for which we willingly trade our right to self-determination to obtain more or less attractive services in return. If one seriously intended to put a stop to the commercialisation of personal data, the possibility of consent would have to be removed, so that the individual would no longer be able to make a self-determined decision, for whichever motives (including those of a commercial nature), to declare his/her consent to the processing of his/her personal data.[11] This would certainly be an effective solution, but also a very paternalistic one, and it appears certain that such an approach will never be taken.[12]

10 See above all Peifer, Individualität im Zivilrecht, p. 292 ff.; cf. also Roßnagel/Pfitzmann/Garstka, Modernisierung des Datenschutzrechts, p. 95 f.; Simitis in Bäumler, E-Privacy, p. 315.

11 On consent as a gateway for the commercialisation of personal data see in particular Simitis, DuD 24 (2000), 714 (721): "The increasing commercialisation of personal data accentuates the ambivalence of consent even more. The processing companies soon realised that their objective, to utilise the data, can be achieved in a very simple way. Nothing more is required than to ask the persons concerned for their consent. If they seem unwilling, promotional gifts or a remuneration will soon change this".

12 Buchner, DuD 34 (2010), 39 (43).

V. Conclusion

The above question of a right to one's own personal data has to be answered in the affirmative. This answer may be judged unworthy of informational self-determination. Nevertheless, such a strong right providing a clear basis is necessary as long as the world of data processing is shaped by internet giants "looking forward to data treasures" and "big business opportunities in personal information"[13], and as long as there are companies like Facebook treating personal data like common property and collecting data on an unprecedented scale.

Zusammenfassung

Ein Ausschließlichkeitsrecht des Einzelnen an „seinen" Daten ist seit jeher Ausgangspunkt des deutschen und europäischen Datenschutzrechts. Personenbezogene Daten sind gerade kein Gemeingut, vielmehr ist es der Einzelne, der im besten Sinne informationeller Selbstbestimmung darüber entscheidet, ob und wie seine personenbezogenen Daten verarbeitet werden sollen. Ein solches Recht an den eigenen Daten ist allerdings keineswegs gleichzusetzen mit einem „Datenmonopol", das Kommunikations- und Informationsfreiheit über Gebühr einschränken würde. Vielmehr zeigt der Blick auf das Urheberrecht, dass selbst klassische Ausschließlichkeitsrechte durchaus genügend Spielraum eröffnen, um eine Balance zwischen den Ausschließlichkeitsinteressen des Rechteinhabers einerseits und den Freiheits- und Kommunikationsinteressen der Allgemeinheit andererseits herzustellen. Personenbezogene Daten sind schon längst zu einem Handelsgut und Tauschobjekt geworden und das Datenschutzrecht wird diese Entwicklung nicht aufhalten können. Umso wichtiger ist es, dass dem Einzelnen mit einem Recht an den eigenen Daten zumindest eine starke Verhandlungsposition gegenüber Google, Facebook & Co an die Hand gegeben wird.

13 Spiegel Online v. 19.10.2011, "Internet-Riesen freuen sich auf Datenschätze", http://www.spiegel.de/netzwelt/web/0,1518,792802,00.html.