

Post-Mortem Privacy: A phenomenon worth protecting within the EU data protection regime(s) or permitting ghosts to control our history?



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Edina Harbinja

PhD candidate, Law School, University of Strathclyde

e.harbinja@strath.ac.uk



Deutsches
Gesamthochschul-
Drama

DIE GROSSE SZENE



Johann Wolfgang von Goethe

FAUST I. TEIL

NACH EINER AUFFÜHRUNG
DES DÜSSELDORFER
SCHAUSPIELHAUSES

INSZENIERUNG:
GUSTAF GRÜNDGENS

(aufnahmebegleitend: Peter Gend)

Faust
PAUL HARTMANN

Mephisto
GUSTAF GRÜNDGENS

Margarete
KÄTHE GOLD

Marthe Schwerdtlein
ELISABETH FLICKENSCHILDT

Schüler
KARL VIEBACH

40007

BERLIN ANTIQUARIAT



roro
roro
roro

KLAUS MANN

MEPHISTO

ROMAN EINER KARRIERE





WINNER ACADEMY AWARD
BEST FOREIGN FILM

MEPHISTO



CANNES FILM
FESTIVAL WINNER
BEST SCREENPLAY

"★★★★ Brilliant"
—Richard Fawcett, NEIGHBOUR NEWSGROUPS

"Shouldn't be missed"
—David Ansen, NEWSWEEK

"Extraordinary"
—Judith Crist, SATURDAY REVIEW

"Superb! Dazzling, Sensual,
Fascinating, Brilliant."
—Steve Benson, L.A. TIMES

"An incredibly dynamic
performance,
a dazzling tour-de-force."
—Jeffrey Caruso,
NEW YORK DAILY NEWS

"This film is a
work of art."
—Miguel Benjamen

"A masterpiece!"
—Bernard S. Grey,
CANNETT NEWSPAPER

"Brilliant"
—Arthur Wintz,
NEW YORK POST

"A triumph"
—Rick Rabin

"MEPHISTO" a film by ISTVAN SZABO
Based on Klaus Mann's novel, starring KLAUS MARIA BRANDAUER, KRISTYNA JANDA,
ILDIKO BANSAGI, ROLF HOPPE. Screenplay by PETER DOBAL and ISTVAN SZABO
Cinematography by LAJOS KOLTAI. A MAFILM-OBJECTIV STUDIO Production
In cooperation with MANFRED DURNIOK PRODUCTIONS COLOR BY ANOVAS

Presented by PAUL E. COHEN • ROBERT J. KAPLAN • PAUL LEEEMAN
ANALYSIS FILM RELEASING CORPORATION
A NEW FILM DISTRIBUTION COMPANY

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The “duel of the dead” – The *Mephisto* case

- ☞ Mephisto: a 1936 Klaus Mann book portraying his former friend, Gustaf Gründgens, in the character of Höfgen—a ruthless intellectual and an opportunist, advancing his career in the Nazi regime
- ☞ When a publishing house based in Munich, announced its intention to print the novel in 1963, the adopted son and sole heir of Gründgens filed for an injunction. Gründgens had just died, while traveling to Manila (in 1949 Klaus Mann committed suicide)
- ☞ At first instance the injunction was refused, at second instance, Gründgens’s heir obtained the injunction prohibiting the publication of the book. The Federal Supreme Court upheld the decision in 1968. The publisher brought a constitutional complaint for infringement of his rights to freedom of speech [Article 5(1) GG] and to narrative artistic freedom [Article 5(3) GG]
- ☞ In 1971, the constitutional review affirmed the prior ruling. The Court *held that the human dignity of the deceased was of overriding constitutional value to the right to freedom of speech.*
- ☞ The case **established a post-mortal personality right** (*postmortales Persönlichkeitsrecht*) in Germany (based on the guarantee of human dignity under art.1(1) GG; the general personality right of a living person is based on arts 2, 1(1) GG)
- ☞ **Justice strikes back:** 18 years after Gründgens’s death, the **novel was published** in West Germany. **The film Mephisto** was also released in 1981, receiving two prizes (in Cannes and the Oscar). **A play called Mephisto** (based on the novel) opened in 2005 at the Schauspielhaus Hamburg (ironically, the director of this theatre from 1955 to 1963 was Gründgens)

Instead of introduction

- ✿ Post – mortem privacy – protection of deceased's personal data; preservation of reputation, dignity, integrity, memory of the deceased...
- ✿ Marginal interest of legal scholarship so far; sociologists, anthropologists, psychologists more interested
- ✿ However, there is a significant growth of digital natives, digital identities and personal data online - *do they want their PD protected post-mortem?*
- ✿ A phenomenon with significant conflicts and controversies:
 - Pro*: enabling the deceased to shape their image and protect their dignity; respecting wishes of the deceased, protecting mourning families...
 - Contra*: conflicts with privacy of other people, freedom of expression, media, archives and history, interests of families and society?
- ✿ Do we want to recognise it as a right? Does it sound frightening and creepy?

Current state of PMP protection

✿ **DPD does not mention the deceased, but:** a hypothetical possibility of protecting the deceased's data under the regime set by the Directive (A29 WP Opinion 4/2007 or *Lindquist* case) – fragmentation of protection?

Bulgaria (right of access to PD exercised by heirs), Estonia (consent valid 30 year after death, family entitled to permit processing of PD)

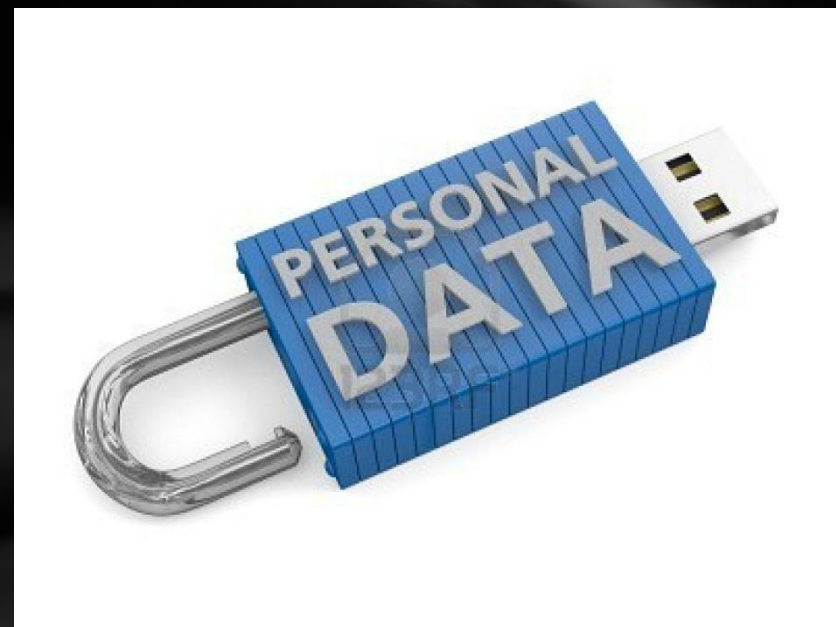
Conversely: Sweden – PD referable to a natural person who is alive; UK – PD: “data which relate to a living individual”

✿ ***Actio Personalis Moritur Cum Persona***? In common law: e.g. defamation, publicity rights (US and UK)

✿ However, civil law jurisdictions have taken different stands, see e.g. in Germany ***Mephisto or Marlene Dietrich*** case, granting protection to both non-commercial (dignity, privacy) and commercial interests of the deceased (the use of name, voice, or image), but France in ***SA Editions Plon v. Mitterand***, Court of Cassation: “the right to act in respect of privacy disappears when the person in question, the sole holder of that right, dies”



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Proposed General DPR – a step towards *propertisation*?

✚ Commodification and *propertisation* of PD in the EU?

“Our proposal starts from everybody owning their own personal data.” Neelie Kroes
personal data as “the new ‘oil’” – a valuable resource of the 21st century”

WEF predicts that “it will emerge as a new asset class touching all aspects of society.”

Consequently: increased *propertisation* of personal data in the EU (*better* control over personal data: enabling a form of transfer i.e. data portability and destruction, i.e. right to be forgotten)

✚ ***Is the new regime favourable to post-mortem privacy?*** - property entails transfer in life and on death, whereas torts and liability regimes, arguably, protect only the living

✚ However, ***proposal for GDPR does not mention deceased*** and the Council of the EU proposes an explicit exclusion

✚ A property rights model for the protection of privacy has been the subject of an extensive debate within US legal and economic scholarship (Westin, Laudon, Schwartz, Mell, Zarsky, Lessig)

Aim: enabling individuals to control the collection, use and transfer of personal data and to participate in sharing the profit resulting from the use of PD


Objection: it would encourage trade in personal data, vest even more control in data controllers and result in less privacy (e.g. Litman, Samuelson); enable control over facts, jeopardise freedom of expression; if privacy is a human right, then...?

Property, so what?

- ☞ **The right to be forgotten** – *abusus* of property (*right to destroy*)?
- ☞ Article 17, legal right? Policy goal? Value? Interest? Silly? Censorship? Utopia?
- ☞ Do dead have this right if PD are property?
- ☞ **Data portability** (Art. 18) - transfer, including post mortem, one of the essential features of property, whereas personal obligations “die with a person”
- ☞ Value of deceased’s PD?
- ☞ Do we want our PD *propertised*? Human rights approach “more human”, at least for Europe?



Conclusion – A regime for ghosts or?

Resemblance to the property base DP model 

Promoting protection of deceased's PD



Consistency in DP models



Post mortem privacy – a value worth protecting



Solution: e.g. extend data protection and/or other personality rights to protect privacy of the deceased; testamentary disposition? Intestacy?

But: allowing the ghosts and *Mephistos* to restrict our freedom of speech, artistic freedoms, history?

“What the Facebook profiles of the dead seem to suggest is that our social identities are not necessarily coextensive with the biological life of the individual human organism with which they are associated, and thus it is not the memory of the dead person that is being honoured and sustained through this form of memorialisation, but some dimension or extension of the dead person themselves.”
(Stokes, 2012) or “secular afterlife” (Harrison, 2003)



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Gartner Names Intellitar "Cool Vendor" in Emerging Technology Report

May 23, 2011

Gartner: Sandra Potts

Intellitar Breaks new ground in functionality,
performance, price, and usability for virtual
presence & interactive media creation

Next for education: Teacher avatars

April 06, 2011

Laura Devaney

Technology creates lifelike image of educators, complete
with knowledge base for student interaction.

Intellitar Puts the Person Back in Personal Communication with Intelligram

February 03, 2011

New e-Card Service Incorporates Popular Digital Cloning
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Thank you



Edina Harbinja
e.harbinja@strath.ac.uk
@EdinaRI