

Ewa Milczarek

University of Szczecin, Poland

e-mail: ewa.milczarek@usz.edu.pl

ORCID: 0000-0003-0726-0959

CONCEPTUALIZATION OF ATTENTIONAL PRIVACY

Abstract

In the twenty-first century, human attention has become the object of interest of entrepreneurs, making it an object of supply. The development of technology related to attracting the attention of recipients is becoming more and more aggravating and increasingly important in the implementation of decision-making processes. Attention, which has so far been of interest to the economy of attention, becomes the subject of a legal analysis of the protection of an individual against unauthorized interference.

The subject of the article is to define what the privacy of attention is and why its conceptualization is necessary for the proper protection of individual rights.

KEYWORDS

privacy, privacy of attention, attention economy

SŁOWA KLUCZOWE

prywatność, prawo do prywatności, ekonomia uwagi

INTRODUCTION

The universality of the classic definition of the right to privacy as “the right to be left alone”¹ has allowed it to remain valid also in the reality of the information society. However, its flexibility translates into a lack of precision. We intuitively sense what actions may constitute a violation of privacy, but it is not easy for us to determine its scope in detail.²

As Ruth Gavison points out, the definition of privacy must be consistent in three different contexts. First, we need to have a neutral concept of privacy that allows us to identify when the loss of privacy occurs so that discussions and claims about privacy are understandable. Second, privacy must be consistent as a value, because legal privacy claims are only compelling if the loss of privacy is undesirable. Third, privacy must be a useful concept in a legal context. A concept that allows us to identify those occasions where legal protection is called for, as the law does not interfere with protection against every undesirable event.³ Hence, despite the difficulties in capturing the nature and limits of privacy, it is important to conceptualize it. Some scholars develop unified theories of privacy in the form of a unified conceptual core, others offer privacy classifications that meaningfully recognize different types of privacy.⁴ The American legal doctrine introduced well over a hundred privacy subcategories, including “attentional privacy”.⁵ The concept of “attentional privacy” is signaled in the doctrine, but it has not been discussed in detail.

The research goal of this article is to provide a definition of “attentional privacy”. The research methods used in the work are the dogmatic and legal methods and the analysis of the evolution of the right to privacy.

¹ E. Warren, V. Brandeis, *The Right to Privacy*, “Harvard Law Review” 1890, Vol. IV, No. 5, p. 193.

² M. Puwalski, *Prawo do prywatności osób publicznych*, Toruń 2003, p. 13.

³ R. Gavison, *Privacy and the Limits of Law*, “The Yale Law Journal” 1980, Vol. 89, No. 3, p. 422.

⁴ B.-J. Koops, B. Clayton Newell, T. Timan, I. Škorvánek, T. Chokrevski, M. Galič, *A Typology of Privacy*, “University of Pennsylvania Journal of International Law” 2016, No. 38, p. 2.

⁵ K. Motyka, *Prawo do prywatności i dylematy współczesnej ochrony praw człowieka. Na przykładzie Stanów Zjednoczonych*, Lublin 2006, pp. 122-130; K. Motyka, *Prawo do prywatności*, “Zeszyty Naukowe Akademii Podlaskiej w Siedlcach; Seria: Administracja i Zarządzanie” 2010, No. 85, p. 35.

THE ECONOMY OF ATTENTION

The essence of the information society is the acquisition and use of information⁶ in social, cultural, economic, and political life.⁷ An abundance of information means a lack of something else: a scarcity of what information consumes, namely the audience's attention. Thus, the wealth of information creates a poverty of attention and the need to allocate that attention efficiently among the abundance of information sources that may consume it.⁸ Attention becomes a scarce resource for which enterprises compete. Michael Goldhaber defined the "attention economy" as a subfield of the "internet economy" focusing on the time-consuming dimension of information overload.⁹ The goal is to expropriate attention and commercially sell and exploit it.¹⁰

A dictionary¹¹ definition of "attention" describes it as a mental disposition characterized by the concentration of thoughts or perceptions on some object, fact, or mental experience, enabling its recognition. We deal with "voluntary attention" when someone tries to notice something or focus on something; in addition to such attention, there is involuntary attention, for which no effort is required nor is it intended. Increasing interference in the space of the individual, which absorbs his attention, is directly related to the development of technology. Williams identified three forms of attentional faculties that are the target of the "industrialized persuasion of the attention economy":¹² the ability to direct awareness and action towards tasks; greater opportunities to direct life from the point of view of higher goals and values; and basic abilities – such as reflection, metacognition, reason and intelligence. Attention is focused on mental engagement with specific information. Information comes to our awareness, we deal with it, and then we decide whether to act.¹³ Thus, the main danger posed by information abundance is not that one's attention will be occupied or consumed by informa-

⁶ A. Tofler, H. Tofler, *Budowa nowej cywilizacji. Polityka trzeciej fali*, Poznań 1996, *passim*.

⁷ K. Krzysztofek, M.S. Szczepański, *Zrozumieć rozwój: od społeczeństw tradycyjnych do informacyjnych*, Katowice 2005, p. 170.

⁸ H. Simon, *Designing Organizations for an Information-Rich World. Computers, Communication, and the Public Interest* Baltimore 1971, pp. 40-41.

⁹ M. H. Goldhaber, *The attention economy and the Net*, "First Monday" 1997, Vol. 2, No. 4, <https://firstmonday.org/ojs/index.php/fm/article/view/519/440> (accessed 1 February 2024).

¹⁰ H. Hotelling, *The general welfare in relation to problems of taxation and of railway and utility rates*. "Econometrica" 1938, No. 6(3), p. 257.

¹¹ W. Doroszewski (ed.), *Słownik języka polskiego*, Warszawa, 1996.

¹² J. Williams, *Stand out of our light: freedom and resistance in the attention economy*, Oxford 2018, p. 48.

¹³ T. Davenport, J. Beck, *The Attention Economy: Understanding the New Currency of Business*, Cambridge 2020, p. 20.

tion, but rather that the person will lose control of their own attention¹⁴ and decision-making processes.

Human attention, due to the fact that it is limited in supply, has become a valuable resource for which media and technology companies compete with each other in “attention markets”.¹⁵ The key to the process is profiling, which consists in the use of personal data to evaluate certain personal factors, in particular, to analyze or predict aspects regarding the performance of this natural person’s work, economic situation, health, personal preferences, interests, credibility, behavior, location or movement.¹⁶ Using this information, you get insight into the user’s profile, which is a prediction of his behavior, including consumer behavior. Then, the user’s attention is directed to the orientation of the architect’s preferred choices, so as to induce him to specific actions (purchases, political choices). The effect of such an action is the limitation of access to information, and thus the limitation of decision-making privacy.

The mere fact of monitoring an individual and smothering them with selected information can cause an invasion of privacy, even if no information is revealed during this process. This type of surveillance is an invasion of privacy of attention due to bringing the user into involuntary, unwanted attention.¹⁷

ATTENTIONAL PRIVACY CONCEPT

Professor Alan Westin, in his 1966 publication *Privacy and Freedom*, noted “deep concern about protecting privacy in the face of new pressures from surveillance technology”.¹⁸ The intensive development of the Internet has led to the transfer of most social and economic contacts to the Internet, thus facilitating access to information. Technological advances are opening up the possibility of

¹⁴ J. Williams, *ibidem*, pp. 15-16.

¹⁵ T. Wu, *Blind Spot: The Attention Economy and the Law*, “The Antitrust Law Journal” 2019, No. 82, p. 771.

¹⁶ Article 3.4. Directive (Eu) 2016/680 Of The European Parliament And Of The Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council.

¹⁷ A. Song, *Technology, Terrorism, and the Fishbowl Effect: An Economic Analysis of Surveillance and Searches*, The Berkman Center for Internet & Society, Research Publication No. 2003-04 5/2003.

¹⁸ A. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's. Part I--The Current Impact of Surveillance on Privacy*, “Columbia Law Review” 1966, Vol. 66, No. 6, pp. 1003-1050.

performing highly sophisticated surveillance and espionage in ways that the older rules of the game may not be enough to keep in check.¹⁹

Privacy has traditionally been understood in an informational context, in which an individual determines his own sphere of privacy and can decide what information about himself or herself is shared with others.²⁰ However, as A. Kopff points out, “personal good in the form of private life is everything that, due to the justified separation of an individual from the general public, serves him to develop his physical or mental personality and maintain the achieved social position [...] each individual should be able to independently shape own personality and destiny at will and to demand that this life should not be the subject of sensational interest by other people. Privacy is, therefore, an ontic, necessary dimension of man and thus an inalienable right of his personal nature”.²¹ Privacy in the information context is, therefore, only one of the dimensions of the functioning of privacy, which has so far enjoyed the greatest interest of researchers. The scope of the right to privacy covers the individual-general relationship, in terms of the individual’s control over information about himself, but also in the general-individual context – that is, what information an individual receives in the context of shaping his personality and fate (including attention).

The sources of “attentional privacy” should be sought in the concept of freedom of attention²² created on the basis of the judgment of the American Supreme Court. The case concerned the privacy of individuals in public spaces in the form of the right to be left alone from broadcasting on trams and buses distracting, annoying radio tunes and advertisements that were regulated by the government.²³ Currently, interference in the sphere of attention of an individual takes place not only in public but also in private spaces through the use of personal devices such as computers or telephones. Through physical access to space, in the form of advertisements, news, etc., metaphorical access is obtained.²⁴ The advent of information and communication technologies has radically changed the balance between the availability of information and the human ability to process it.

Attentional privacy is the right to leave an individual’s attention free from unwanted information and stimuli, such as emails, phone calls and advertise-

¹⁹ S. Strömholm, *Right of Privacy and Rights of The Personality a Comparative Survey; Working paper prepared for the Nordic Conference on privacy organized by the International Commission of Jurists*, Stockholm 1967, pp. 18-19.

²⁰ R. Dopierała, *Prywatność w perspektywie zmiany społecznej*, Kraków 2013, p. 25.

²¹ Z. Pniewski, *Personalizm społeczno-etyczny jako adekwatna teoria prywatności*, “Roczniki Nauk Społecznych” 1994, Vol. XII (1), p. 110.

²² W. C. Beatty, *Freedom of Attention for Transit Riders*, “Washington and Lee Law Review” 1952, No. 9(46); D. K. McKnew, *Freedom of Attention*, “Catholic University Law Review” 1952, No. 2 (84).

²³ Judgment of the Supreme Court of the United States of 3 March 1952 in the case of Public Utilities Comm’n v. Pollak, ref. 343 U.S., pp. 451, 455.

²⁴ B. Rössler, *Der Wert des Privaten*, Frankfurt am Main 2001, pp. 23-24.

ments. It protects solitude and seclusion by providing shielding from unwanted contact, such as disturbing a person's rest or interfering with a person through disruptive or unwanted marketing practices.²⁵ The right to attentional privacy is intended to protect the individual from attempts to undermine his autonomy by taking away his attention by means of stimuli.²⁶ In a positive aspect, the right to privacy of attention allows an individual to freely shape their attention by choosing such activities that suit them best, or to refrain from engaging in any activity. The negative aspect of the right to privacy of attention will consist in the legal obligation to refrain from interfering with the sphere of attention reserved for the individual.

The preservation or disruption of the privacy of attention affects other areas of privacy, including: information privacy, which is the ability to regulate the disclosure of sensitive or confidential information; physical privacy relating to being able to define private space and setting boundaries²⁷ as well as decision-making privacy regarding the ability to choose a particular course of action without interference or disruptions from others.²⁸

CONCLUSIONS

Privacy of attention is of key importance in market processes,²⁹ because access to the attention of an individual leads to sophisticated ways of promotion, primarily the use of profiling, and thus violates decision-making privacy, especially in the field of purchasing decisions.³⁰ In the attention economy, winning means getting as many people as possible to spend as much time and attention as possible on your product or service because in the attention economy, the rule is that "the user is the product". Hence, many authors indicate that instead of the "age of information", we should talk about the "age of attention".³¹

²⁵ K. Motyka, Prawo do prywatności, "Zeszyty Naukowe Akademii Podlaskiej w Siedlcach. Administracja i Zarządzanie" 2010, Vol. 85, p. 35.

²⁶ A. Puri, *The Right to Attentional Privacy*, "Rutgers Law Record" 2021, No. 48(1), p. 219.

²⁷ *Bioethics Commission, Federal Chancellery – Secretariat, Robots in the Care of Older People Opinion of the Bioethics Commission*, Vienna, Austria, 2018, p. 15.

²⁸ M. Ienca, F.J. Constantin Vică, B. Elger, *Social and Assistive Robotics in Dementia Care: Ethical Recommendations for Research and Practice*, "International Journal of Social Robotics" 2016, No. 8(4), p. 569.

²⁹ K. Motyka, Prawo do prywatności, "Zeszyty Naukowe...", *ibidem*, p. 35.

³⁰ J. Wójcik, *Prywatność jako przedmiot wymiany*, "Roczniki Kolegium Analiz Ekonomicznych" 2018, No. 49, p. 127.

³¹ J. Williams, *ibidem*, pp. 16-17.

Privacy protection is related to access control.³² Currently, the protection of the privacy of attention is only in the hands of network users, who can defend themselves against unwanted interference in a limited way by using, for example, the Adblock extension. Modern technology makes sending messages less costly by making bulk email easier, but also makes it easier to filter messages without human intervention, which lowers the cost of dealing with unwanted messages.³³ However, this protection is negligible and insufficient.

The close connection between the concept of private life and the evolution of society, which has been the subject of the attention of sociologists or historians, finds a logical extension in legal analysis since protection is determined taking into account the “predictable attitude of the majority of people to this information”.³⁴ Currently, no institutional framework has been created to strike the right balance between the interests of information providers and users.³⁵

Conceptualizing attentional privacy is essential to the legal assessment of when it has been violated and when to invoke its legal protection. This protection is another challenge faced by the legislator who should protect the individual from the violation of their rights in the online space. The experience gained so far shows that the information environment generates problems and threats that are different, more intensified than those occurring in the analog world. Therefore, this situation requires other protection tools.

REFERENCES

- Beatty W.C., *Freedom of Attention for Transit Riders*, “Washington and Lee Law Review” 1952, No. 9(46)
- Bok S., *Secrets: on the ethics of concealment and revelation*, Oxford 1983
- Davenport T., Beck J., *The Attention Economy: Understanding the New Currency of Business*. Cambridge 2020
- Dopierała R., *Prywatność w perspektywie zmiany społecznej*, Kraków 2013
- Doroszewski W. (ed.), *Słownik języka polskiego*, Warszawa, 1996
- Festré A., Garrouste P., «L'économie de l'attention» : une perspective d'histoire de la pensée économique, “OEconomia” 2015, No. 5(5-1)
- Friedman D., *Privacy and Technology*, “Social Philosophy & Policy” 2000, No. 17
- Gavison R., *Privacy and the Limits of Law*, “The Yale Law Journal” 1980, Vol.89, No. 3

³² S. Bok, *Secrets: on the ethics of concealment and revelation*, Oxford 1983, pp. 10-11.

³³ D. Friedman, *Privacy and Technology*, “Social Philosophy & Policy” 2000, No. 17, pp. 186-212.

³⁴ D. Gutmann, *Le sentiment d'identité, étude de droit des personnes et de la famille*, Année 2000, p. 228.

³⁵ A. Festré, P. Garrouste, «L'économie de l'attention»: une perspective d'histoire de la pensée économique, “OEconomia” 2015, No. 5(5-1), pp. 35-36.

- Goldhaber M.H., *The attention economy and the Net*, "First Monday" 1997, Vol. 2, No. 4, <https://firstmonday.org/ojs/index.php/fm/article/view/519/440> (accessed 1 February 2024)
- Gutmann D., *Le sentiment d'identité, étude de droit des personnes et de la famille*, Année 2000
- Krzysztofek K., Szczepański M.S., *Zrozumieć rozwój: od społeczeństw tradycyjnych do informacyjnych*, Katowice 2005
- Hotelling H., *The general welfare in relation to problems of taxation and of railway and utility rates*, "Econometrica" 1938, No. 6(3)
- Ienca M., Constantin Vică F.J., Elger B., *Social and Assistive Robotics in Dementia Care: Ethical Recommendations for Research and Practice*, "International Journal of Social Robotics" 2016, No. 8(4)
- Koops B.J., Clayton Newell B., Timan T., Škorvánek I., Chokrevski T., GaličM., *A Typology of Privacy*, "University of Pennsylvania Journal of International Law" 2016, No. 38
- Kopff A., *Koncepcja prawa do intymności i do prywatności życia osobistego*, "Studia Cywilistyczne" 1971, Vol. XX
- McKnew D.K., *Freedom of Attention*, "Catholic University Law Review" 1952, No. 2 (84)
- Motyka K., *Prawo do prywatności i dylematy współczesnej ochrony praw człowieka. Na przykładzie Stanów Zjednoczonych*, Lublin 2006
- Motyka K., *Prawo do prywatności*, "Zeszyty Naukowe Akademii Podlaskiej w Siedlcach; Seria: Administracja i Zarządzanie" 2010, No. 85
- Pniewski Z., *Personalizm społeczno-etyczny jako adekwatna teoria prywatności*, „Roczniki Nauk Społecznych” 1994, Vol. XII(1)
- Puri A., *The Right to Attentional Privacy*, "Rutgers Law Record" 2021, No. 48(1), *Bioethics Commission, Federal Chancellery – Secretariat, Robots in the Care of Older People Opinion of the Bioethics Commission*, Vienna, Austria, 2018
- Puwalski M., *Prawo do prywatności osób publicznych*, Toruń 2003
- Rössler B., *Der Wert des Privaten*, Frankfurt am Main 2001
- Simon H., *Designing Organizations for an Information-Rich World. Computers, Communication, and the Public Interest*, Baltimore 1971
- Song A., *Technology, Terrorism, and the Fishbowl Effect: An Economic Analysis of Surveillance and Searches*, The Berkman Center for Internet & Society, Research Publication No. 2003-04 5/2003
- Strömholm S., *Right of Privacy and Rights of The Personality a Comparative Survey; Working paper prepared for the Nordic Conference on privacy organized by the International Commission of Jurists*, Stockholm 1967
- Toffler A., Toffler H., *Budowa nowej cywilizacji. Polityka trzeciej fali*, Poznań 1996
- Warren E., Brandeis V., *The Right to Privacy*, "Harvard Law Review" 1890, Vol. IV, No. 5
- Westin A., *Science, Privacy, and Freedom: Issues and Proposals for the 1970's. Part I--The Current Impact of Surveillance on Privacy*, "Columbia Law Review" 1966 vol. 66, No. 6.
- Williams J., *Stand out of our light: freedom and resistance in the attention economy*, Oxford 2018

Wu T., *Blind Spot: The Attention Economy and the Law*, "The Antitrust Law Journal" 2019, No. 82

Wójcik J., *Prywatność jako przedmiot wymiany*, "Roczniki Kolegium Analiz Ekonomicznych" 2018, No. 49