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# Information Technology and the Law - Privacy

Ulf Maunsbach



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# Information Technology and the Law - Privacy

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Lezioni su

## **“INFORMATION TECHNOLOGY AND LAW”**

di **Ulf MAUNSBACH**

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*Visiting Scholar presso l'Università di Macerata / Dipartimento di Giurisprudenza*

mercoledì **25 febbraio** / ore 16.00 - 18.00

**Information Technology and the Law – an Overview of Issues**

mercoledì **11 marzo** / ore 16.00 - 18.00

**Privacy and the Right to be Forgotten**

martedì **17 marzo** / ore 9.00 - 11.00

**Trademarks in Cyberspace**

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**Copyright in Cyberspace**

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**Private International Law and the Internet**

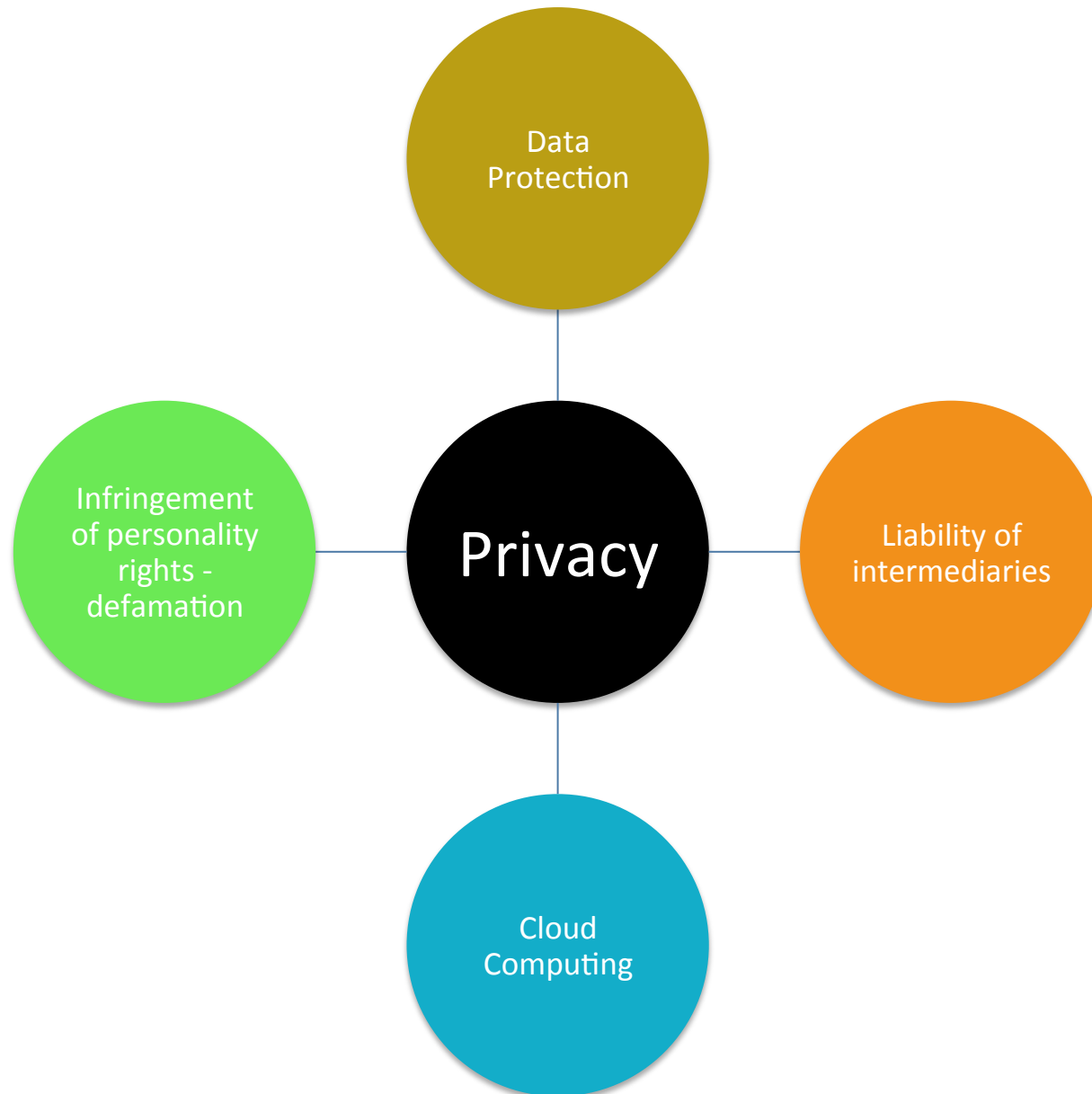
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**The Future of Information Technology – Multiplication or Simplification**

**25 FEBBRAIO - 28 APRILE 2015**

**AULA VIOLA 2 / POLO DIDATTICO DIOMEDE PANTALEONI**

**VIA PESCHERIA VECCHIA / MACERATA**



# What is it all about?

- **Privacy** (from Latin: *privatus*) is the ability of an individual or group to seclude themselves, or information about themselves, and thereby express themselves selectively. The boundaries and content of what is considered private differ among cultures and individuals, but share common themes.
- When something is private to a *person*, it usually means there is something to them inherently special or sensitive. The domain of privacy partially overlaps security including for instance the concepts of appropriate use, as well as protection of information. Privacy may also take the form of bodily integrity.

*Source: Wikipedia*

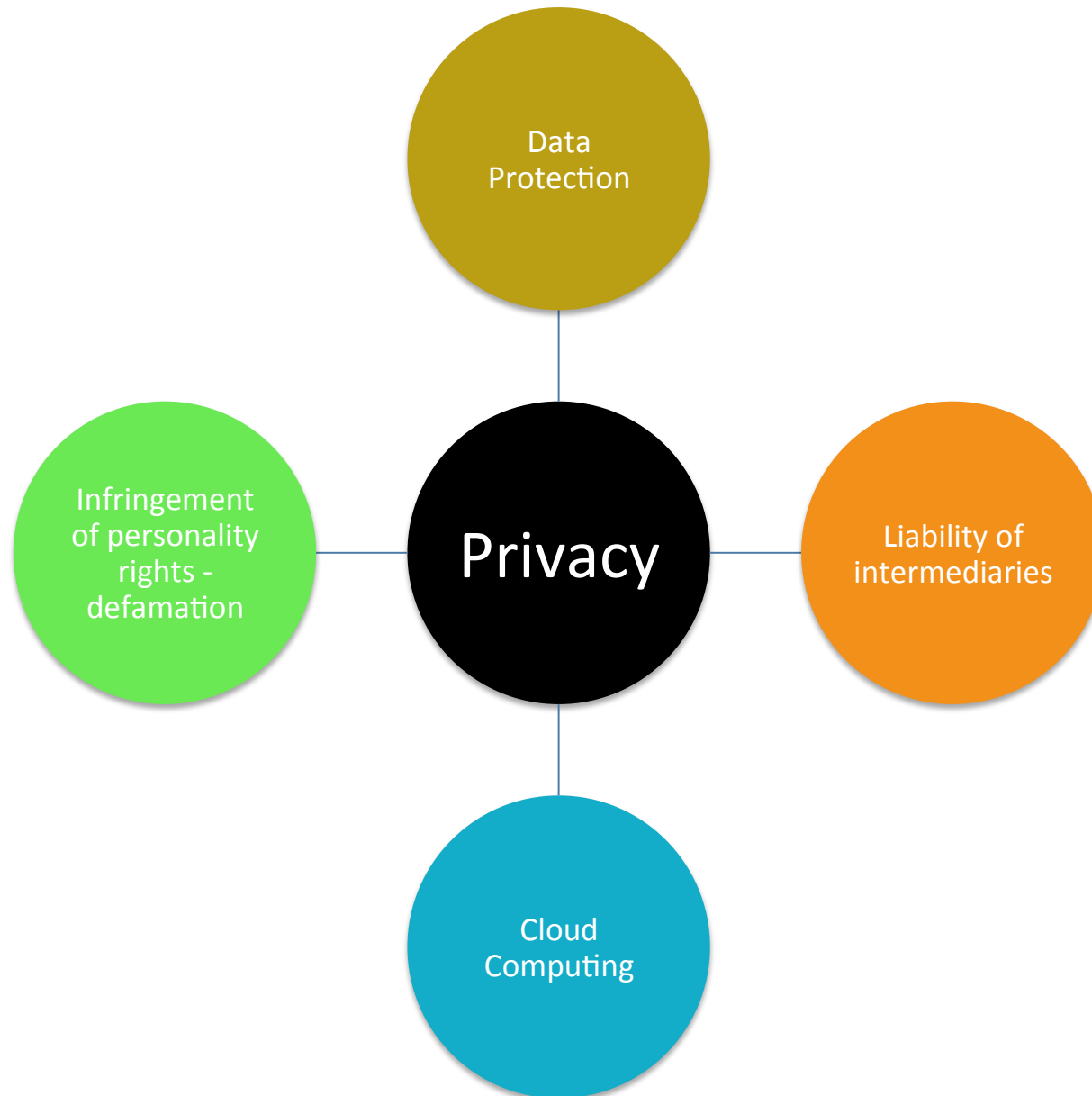
# Privacy

- Personal privacy
  - Physical integrity
- Intellectual/spiritual privacy
- Organisational privacy
- Informational privacy
  - Refers to the evolving relationship between technology and the legal right to privacy in the collection and sharing of data about one's self.

# Informational Privacy

## ... Internet Privacy, Data Privacy

- Technologies for identification
  - Cookies
  - Device fingerprinting
- Digital publication of photographs
- Search engines
- Social Media (web 2.0)
- Internet Service Providers (ISP)
- Cloud computing





# Privacy and Data protection

# Legislation on different levels

- Historical development
  - (Conflicting) Fundamental rights
  - General technology neutral legislation
  - Sector Specific legislation
- 
- Includes aspects regarding; constitutional law, public and criminal law as well as private law.
  - Privacy is ubiquitous!

# The Constitutional Level

## ...on the personal side

### **The Charter of Fundamental Rights of the European Union**

Article 7; Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8; Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

# The Constitutional Level

## ...on the professional side

### **The Charter of Fundamental Rights of the European Union**

Article 16; Freedom to conduct a business

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

Article 17; Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

# Secondary law

- Directive 95/46/EC (personal data)
- Directive 2000/31/EC (electronic commerce)
- Directive 2001/29/EC (INFOSOC)
- Directive 2002/58/EC (privacy and electronic communications)
- Directive 2006/24/EC (retention of data) (Invalid since 8 April 2014)
  - Joined Cases C-293/12 and C-594/12 (Digital Rights Ireland)
- Directive 2004/48/EC (Enforcement)

# Future developments

- The "Data Protection Reform"
- Proposals for a directive and a regulation
  - Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, COM(2012)010 final
  - Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012)011 final

Is there a difference between a  
Regulation and a Directive?

# Future developments...

- Intensive legal development...
- EU Commission on Data Protection
  - [http://ec.europa.eu/justice/data-protection/law/index\\_en.htm](http://ec.europa.eu/justice/data-protection/law/index_en.htm)
- Case C-131/12 (Google Spain) – on the right to be forgotten

ec.europa.eu/jjustice/data-protection/law/index\_en.htm — Legislation — Justice

Glossary | About this site | Contact | Cookies | Legal notice English (en)

 JUSTICE

European Commission > Justice > Data protection > Legislation

ALL TOPICS

DATA PROTECTION

- Entities collecting data
- Individuals
- Bodies
- Reform of the data protection legal framework
- International transfers
- Article 29 Working Party
- Key Dates
- Legislation
- Documents
- Programme
- Public consultations
- Events
- Related links
- Glossary

Legislation

- Charter
- European Convention on Human Rights
- Council of Europe Convention 108
- Treaty
- Directives & Framework Decisions
- Regulation
- Commission Proposals on the Data Protection Reform
- Decisions
- Communications
- Case Law

Charter

- Charter of Fundamental Rights of the EU

European Convention on Human Rights

- European Convention for the Protection of Human Rights and Fundamental Freedoms

Council of Europe Convention 108

- Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data - Council of Europe
- Explanatory Report to the Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data
- Recommendation No. R (87) 15 of the Committee of Ministers to Member States regulating the Use of Personal Data in the Police Sector (484 kB)

Policy in the making

Commissioner Jourová: Concluding the EU Data Protection Reform is essential

Mythbuster: The Court of Justice of the EU and the "Right to be Forgotten"

Factsheet: EU-US Negotiations on Data Protection

Since 29 March 2011, the European Union has been negotiating with the United States government an international framework agreement (so-called 'Data Protection Umbrella Agreement') in order to protect personal data transferred between the EU and the U.S. for law enforcement purposes. This includes cases in which personal data is sent from the EU to the U.S. for the prevention, detection, investigation and prosecution of criminal offences, including terrorism. This factsheet takes stock of the ongoing negotiations.

# Australia

- The Privacy Act (1988)
- The Office of the Australian Information Commissioner
  - <http://www.oaic.gov.au/privacy/privacy-act/the-privacy-act>

# Privacy in the US?

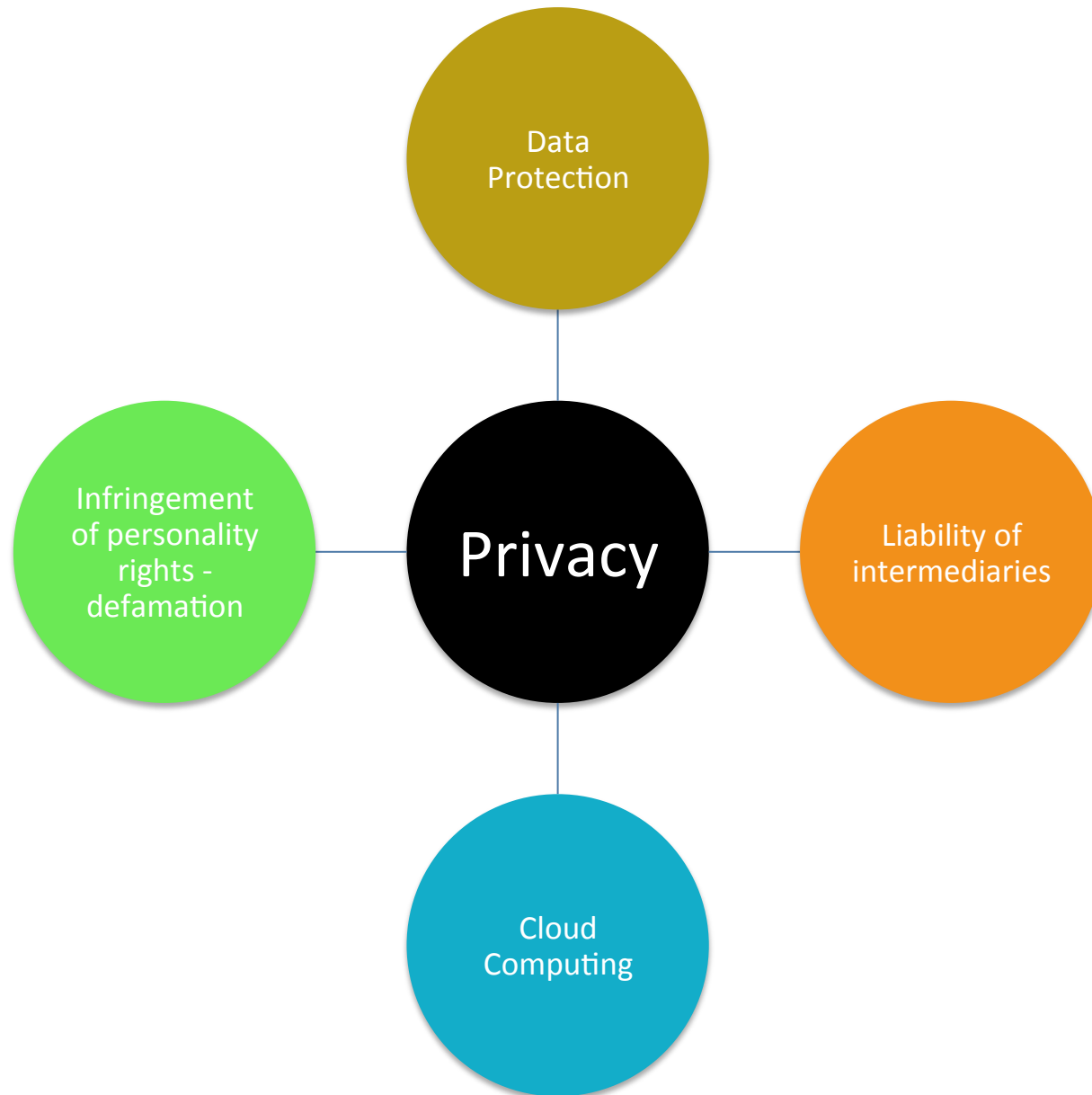
- Constitutional aspects
  - Invasion of privacy and free speech
  - Surveillance

# International

- Electronic Privacy Information Centre
  - <http://epic.org/epic/about.html>
- Privacy International
  - <https://www.privacyinternational.org>
- OECD
  - <http://www.oecd.org/sti/ieconomy/security.htm>

# Transfer of personal data to third countries

- Safe Harbour Agreements...
- [http://ec.europa.eu/justice/data-protection/document/international-transfers/adequacy/index\\_en.htm](http://ec.europa.eu/justice/data-protection/document/international-transfers/adequacy/index_en.htm)





# Liability of intermediaries

# What is an intermediary

- Internet Service Provider – ISP
- Providers of on-line services
  - Google
  - Facebook
  - LinkedIn
- User Generated Content sites
  - Bloggers and Vloggers
  - YouTube
  - Flickr
  - Instagram
- General Access Points
  - Universities
  - Hotels
  - Cafes
  - [...]

# Developments

- Early history
  - Bulletin Board Systems (BBS).
  - One way communication – no (or little) interactivity
- Limited liability
  - USA: Digital Millennium Copyright Act (DMCA)
  - EU: Electronic Commerce Directive 2000/31/EC
    - [http://ec.europa.eu/internal\\_market/e-commerce/directive/index\\_en.htm](http://ec.europa.eu/internal_market/e-commerce/directive/index_en.htm)
- Graduated response
  - Three-strikes legislation
- Filtering and blocking
  - EU; SABAM (C-360/10)
  - AU; Roadshow Films Pty Limited v iiNet Limited [2011] FCAFC 23
    - <http://www.hcourt.gov.au/cases/case-s288/2011>
- Next level!
  - Google Spain (C-131/12) – The Right to be Forgotten (RTBF)

# Directive 2000/31/EC (electronic commerce)

## Article 12

### "Mere conduit"

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

- (a) does not initiate the transmission;
  - (b) does not select the receiver of the transmission; and
  - (c) does not select or modify the information contained in the transmission.
- [...]

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

# Directive 2000/31/EC (electronic commerce)

## Article 13

### “Caching”

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

- (a) the provider does not modify the information;
- (b) the provider complies with conditions on access to the information;
- (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
- (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
- (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

# Directive 2000/31/EC (electronic commerce)

## Article 14

### “Hosting”

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

# Directive 2000/31/EC (electronic commerce)

## Article 15

### No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.
2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

# Case studies

- Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*, 16 February 2012
- Case C-131/12, *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, 13 May 2014



# How to read a preliminary ruling from the ECJ

# SABAM; Background

- SABAM – a collecting society – took action against NETLOG – A Social Media Network that allows file-sharing.
- 23 June 2009, Court of first instance, Brussels
- NETLOG objected, contrary to the charter of fundamental rights and the directive on electronic commerce.
- The first instance chose to stay proceedings and refer a question to the ECJ.

# SABAM; Relevant legislation

## The Constitutional Dimension

European Convention on the Protection of Human Rights and Fundamental Freedoms

- ARTICLE 8, Right to respect for private and family life
- ARTICLE 10, Freedom of expression

## Secondary law

- Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce);
- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society;
- Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights;
- Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data; and
- Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

# SABAM – the question

- How to balance conflicting interests?
- Is this balance struck in relation to the issuing of an injunction against intermediaries, to order a hosting service provider to introduce a system for filtering and blocking?

# SABAM – The judgement

The Directive on electronic commerce, the INFOSOC-directive and the Enforcement directive read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding a national court from issuing an injunction against a hosting service provider which requires it to install a system for filtering:

- information which is stored on its servers by its service users;
- which applies indiscriminately to all of those users;
- as a preventative measure;
- exclusively at its expense; and
- for an unlimited period,

which is capable of identifying electronic files containing musical, cinematographic or audio-visual work in respect of which the applicant for the injunction claims to hold intellectual property rights, with a view to preventing those works from being made available to the public in breach of copyright.

# Google Spain – Background

- On 5 March 2010, Mr Costeja González, a Spanish national resident in Spain, lodged with the AEPD a complaint against a Newspaper and against Google Spain and Google Inc. By that complaint, Mr Costeja González requested, Goggle to remove or alter information about him.
- By decision of 30 July 2010, the AEPD rejected the complaint in so far as it related to the Newspaper, but it was upheld in so far as it was directed against Google Spain and Google Inc.
- Google Spain and Google Inc. brought separate actions against that decision before the Audiencia Nacional (National High Court). The Audiencia Nacional joined the actions and decided to stay proceedings and to refer (a number of) questions to the ECJ for a preliminary ruling.

# Google Spain – Relevant legislation

## **The Constitutional Dimension**

## **The Charter of Fundamental Rights of the European Union**

- Article 7; Respect for private and family life
- Article 8; Protection of personal data

## **Secondary law**

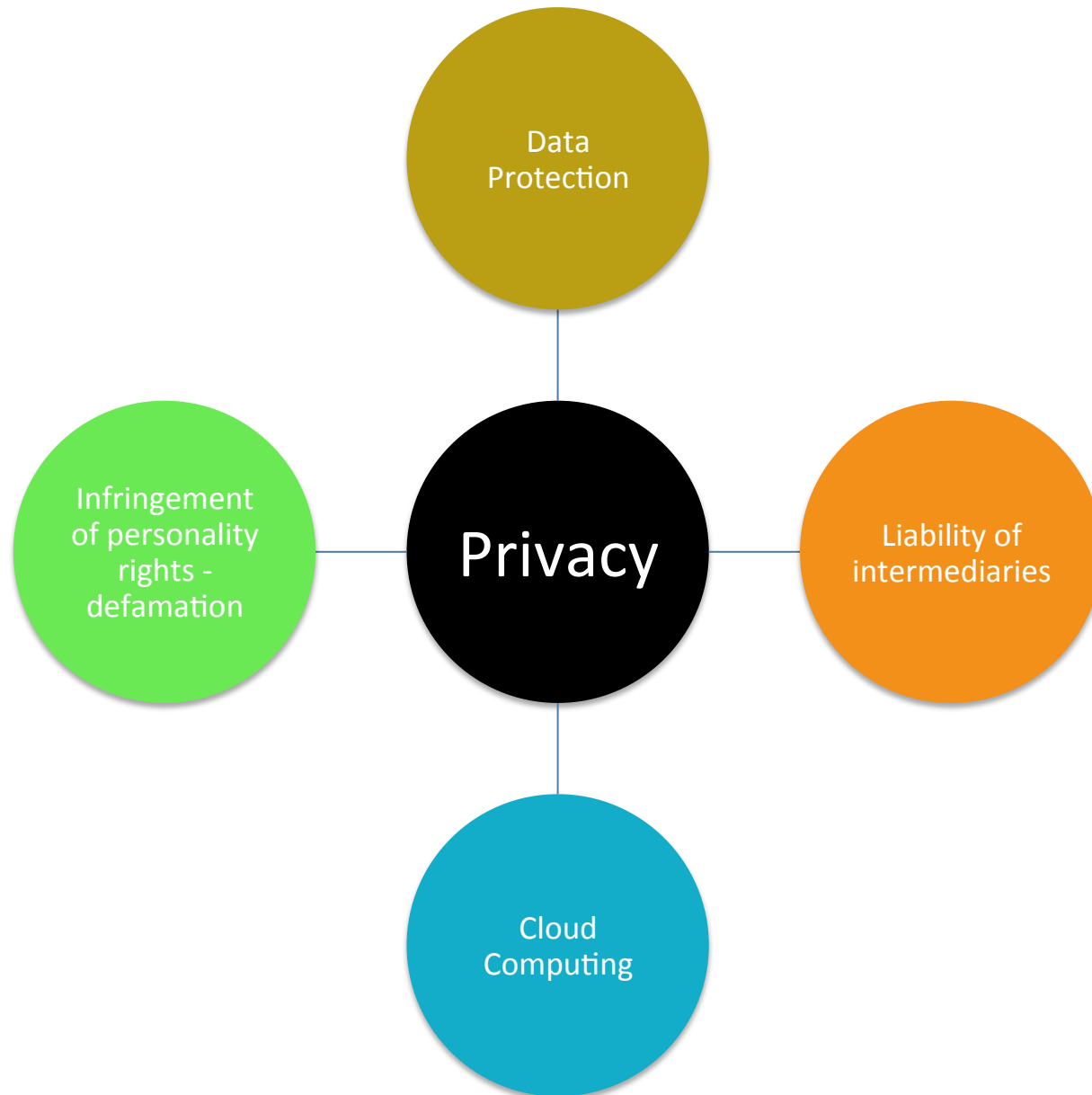
- Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

# Google Spain – The questions

1. Is the service of a Search Engine to be classified as the processing of personal data? Is the operator of the Search engine to be regarded as the “controller”?
2. Does Google carry out its activities within a Member State (i.e. Spain)?
3. Does the controller/operator have an obligation to remove personal information from the service?
4. Must the data subject show that the information included causes prejudice to the data subject?

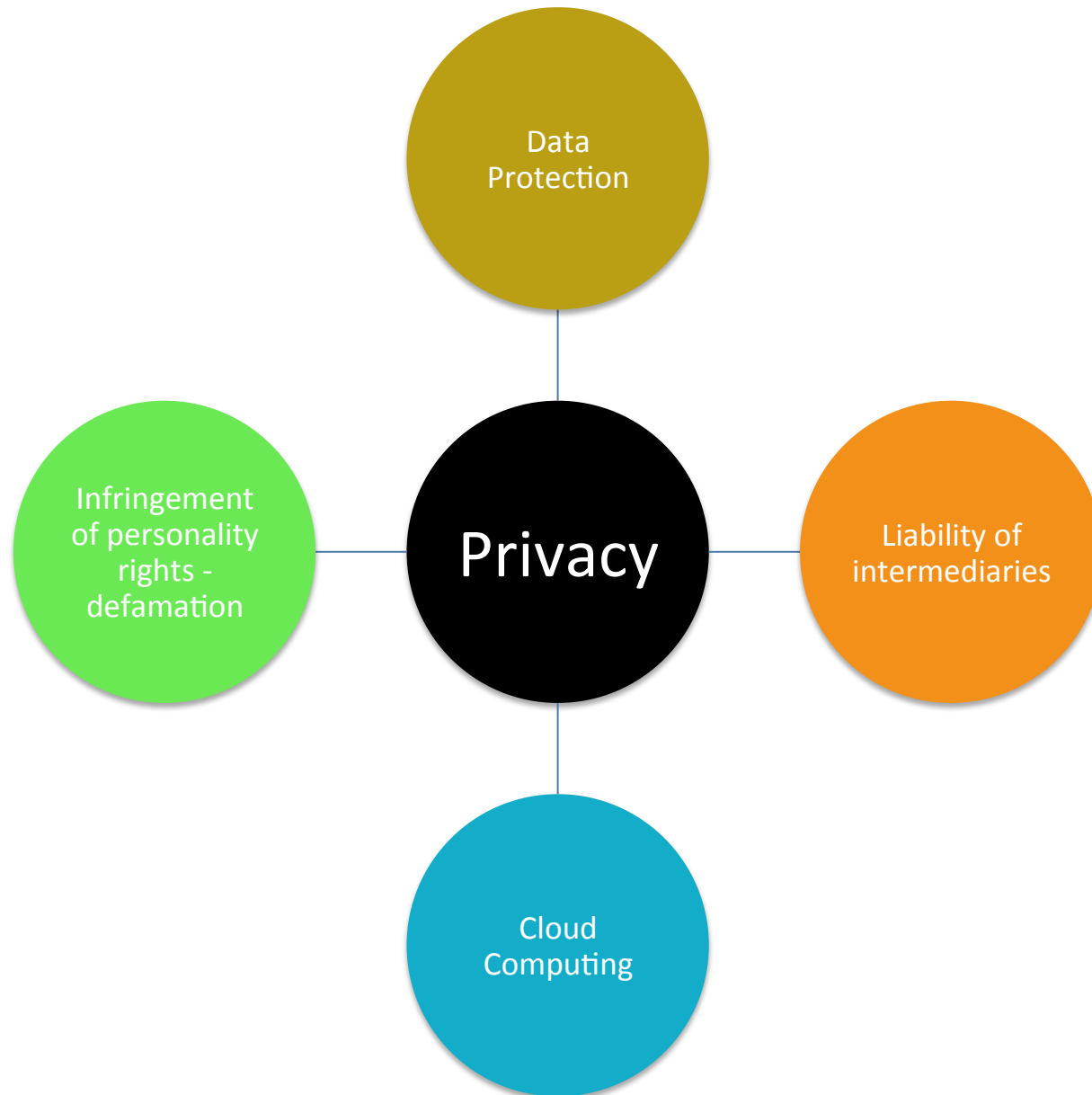
# Google Spain – The judgement

1. The activity of a search engine consisting in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference must be classified as 'processing of personal data'
2. The operation takes place in Spain
3. The operator of a search engine is obliged to remove information
4. The fundamental rights under Articles 7 and 8 of the Charter override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name.



# Infringement of personality rights - defamation

- Defamation = infringement of privacy
  - Joined Cases C-509-09 and C-161-10 - eDate and Martinez
- Particular attention as to internet related infringements
- Issues as to jurisdiction and choice of law



# Cloud Computing

- Digital Agenda: New strategy to drive European business and government productivity via cloud computing, Brussels, 27 September 2012

# References

- Andres Guadamuz, Developments in Intermediary Liability
- Sanna Kulevska, Humanizing the Digital Age: A Right to Be Forgotten Online?, Graduate Thesis, Master of Laws Programme, Lund University 2014
- International Data Privacy Law: Oxford Journals
  - <http://idpl.oxfordjournals.org>
- Harvard Journal of Law & Technology
  - <http://jolt.law.harvard.edu>
- Electronic Privacy Information Centre
  - <http://epic.org/epic/about.html>



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