



**All or nothing: this is the question?  
The application of Art. 3(2) Data Protection  
Directive 95/46/EC to the Internet**

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# Outline

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- 1) Hypotheses
- 2) Art. 3(2) of the Data Protection Directive 95/46/EC
- 3) ECJ's decision in *Bodil Lindqvist* C-101/01
- 3) Implications of *Bodil Lindqvist*
- 4) New Technologies - Social Media: social networking: weblogs, You-Tube and Web 2.0
- 5) Conclusions

# Hypotheses

1. Coherence will be sacrificed if the balance is tilted away from the fundamental principle of fairness by the extension of Article 3(2) to insulate social network spaces from the obligations under the DPD
3. Alternative governance instruments should be used to maintain an optimal balance between the rights of privacy and expression.

- **Broad or narrow interpretation of Article 3(2):**

If interpreted broadly by the national courts, the provision may enable individuals to absolve liability from the data protection principles completely. Yet, if interpreted narrowly, it can have the effect of being largely redundant and inapplicable in cases involving the publication of personal information on the internet.



# **Art. 3(2) of the Data Protection Directive 95/46/EC**

This Directive shall not apply to the processing of personal data:

- In the course of an activity which falls outside the scope of Community law, such as those provided for by Titles V and VI of the Treaty on European Union and in any case to processing operations concerning public security, defence, State security (including the economic well-being of the State when the processing operation relates to State security matters) and the activities of the State in areas of criminal law,
- **By a natural person in the course of a purely personal or household activity.**

# ***Bodil Lindqvist* C-101/01, [2004] 1 C.M.L.R. 20**

- Art. 3(2) did not apply to *Lindqvist*. ECJ held that:

The exception be interpreted as relating **only to activities which are carried out in the course of private or family life of individuals**, which is clearly not the case with the *publication on the internet so that those data are* processing of personal data consisting *in made accessible to an indefinite number of people.*



# Implications arising from *Bodil Lindqvist*

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- Differences exist between EEA Member States' approach to the **implementation** of Art. 3.2 DPD to the internet
- **Imbalance** that exists in the protection of fundamental rights and freedoms of individuals as set out in Art. 1.1 of the DPD
- Question about what is “**private**” on the internet.

# EEA Member States' Implementation of Art. 3(2) DPD

- UK



## s 36 of the DPA 1998

- “Personal data processed by an individual **only** for the purposes of that individual’s personal, family or household activities (including recreational purposes)”

- Sweden



## s 6 of the Personal Data Act 1998

- “This Act does not apply to such processing of personal data that a natural person performs in the course of activities of a **purely** private nature.”

# EEA Member States' Implementation of Art. 3(2) DPD

- Norway



## Norwegian Personal Data Act 2000

- *Pre-Lindqvist* - “Private purposes” given a broader meaning to that of the DPD
- Now interpreted in the light of *Lindqvist*
- Report to amend the Norwegian Data Protection Laws (Schartum and Bygrave, 2006)

- Germany



## Federal Data Protection 2001 (BDSG)

- Länder State Data Protection Laws
- Hesse first State to enact data protection laws in 1970
- Right to Information self-determination – *Census Decision* 1981

# Germany



**Federal Data Protection Act 2001**

**Länder State Data Protection Laws**



**Federal public bodies**  
**Private bodies**

**Länder public bodies**

# Germany



1. Baden-Württemberg
2. Bavaria
3. Berlin
4. Brandenburg
5. Bremen
6. Hamburg
7. Hesse
8. Lower Saxony
9. Mecklenburg-Western Pomerania
10. North Rhine-Westphalia
11. Rhineland Palatinate
12. Saarland
13. Saxony
14. Saxony-Anhalt
15. Schleswig-Holstein
16. Thuringia

# Federal Data Protection Act 2001 (Bundesdatenschutzgesetz)

- § 1, para. 3:

The Act shall apply to the collection, processing and use of personal data by:

Private bodies in so far as they process or use data by means of data processing systems or collect data for such systems, process or use data in or from non-automated filing systems or collect data for such systems, except **where the collection, processing or use of such data is effected solely for personal or family activities.**

- Applies to content of the webpage.
- Interpreted in the light of *Lindqvist*
- Telemedia Act 2007 applicable to content in the electronic environment – replaces the Teleservices Act, Teleservices Data Protection Act and the Federal Media Services Treaty

# Imbalance that exists in the protection of fundamental rights and freedoms of individuals

- Art. 1(1) of the Data Protection Directive 95/46/EC

“In accordance with this Directive, Member States shall protect the **fundamental rights and freedoms of natural persons**, and in particular their right to privacy with respect to the processing of personal data.”

# ***Lindqvist* C-101/01**

## **Balancing Rights of Expression with Rights of Privacy**

ECJ held (at para. 100(5)):

“The provisions of Directive 95/46 **do not, in themselves, bring about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights**, which are applicable within the European Union and are enshrined *inter alia* in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950. **It is for the national authorities and courts responsible for applying the national legislation implementing Directive 95/46 to ensure a fair balance between the rights and interests in question**, including the fundamental rights protected by the Community legal order.”

# Public/Private Access on the internet

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- “Private” – *Lindqvist* (limited to an defined group such as family members)
- Distinction between public/private spheres on the internet
- Limitations arising from the DPD (Art. 3(2) and Art. 25 DPD)



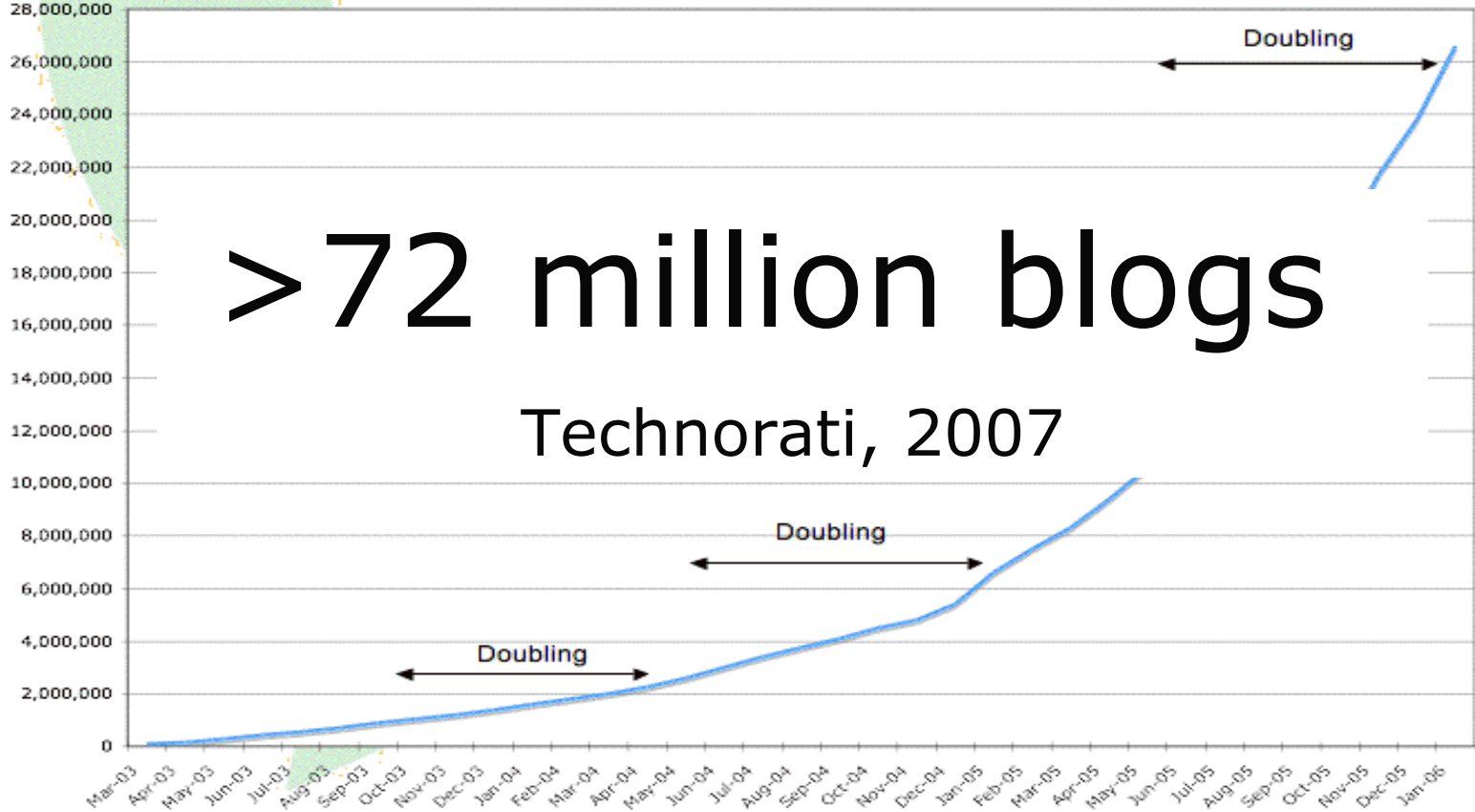
# Are Social Networks Private Spaces?

“Blogs are powerful because they allow millions of people to easily publish and share their ideas, and millions more to read and respond. They engage the writer and reader in an open conversation and are shifting the internet paradigm as we know it. On the World Live Web, bloggers frequently link to and comment on other blogs, creating the type of immediate connection one would have in a conversation they foster.”

**Source: Technorati @ <<http://technorati.com/about/>>**

# Weblogs: Figures

Weblogs Cumulative  
March 2003 - January 2006



> 72 million blogs

Technorati, 2007



# Key issues emerging under the DPD

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- **Transborder issues:** Art. 25 of the DPD in the light of ECJ's decision in *Lindqvist*
- Blogs as “**data processing**” sites
- **Balancing** rights of expression and rights of privacy – left to the national Courts
- Can or should blogs be a DPD issue?
- Code or Contract?



# Summary

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- Different interpretations by EEA Member States of Art. 3(2) of the DPD
- Narrow interpretation of Art. 3(2) of the DPD by the ECJ in *Lindqvist*
- Competing interests between the right to privacy and right to freedom of expression left to the national courts to decide.
- Application of Art. 3(2) to new technologies




# Short-Term Solution: Extending Art. 3(2) of the DPD?

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## Who does this affect?

- **Policymakers:**
  - “Regulatory creep” –
  - a. assess the context and obtain all available information and then
  - b. assess the positive and negative externalities.
- **Organisations**
- **Individuals**



# Policy Makers – Extending Art. 3(2) of the Data Protection Directive 95/46/EC

- **European Level:** short-term solution with the aim of revising the Data Protection Directive
- Proportionality – the Data Protection Directive should not be applied literally such that it can become cumbersome
- Differentiate between *bona fide* individuals processing for private purposes...
- Values and purposes of the Data Protection Directive – why this was introduced in the first instance – dealing with organisations processing copious amounts of personal information (large scale databases etc.)

# Conclusions

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- The *Lindqvist* decision illustrates the *balancing role* undertaken by Data Protection Rules.
- New communication technologies require us to *re-examine the values* that the existing European Data Protection Framework aims to protect.
- If the data protection laws are to evolve in a *coherent and principled manner*, we cannot avoid addressing the difficult questions raised by the application of Art. 3(2) in the age of increased connectivity and broadband penetration.
- *Alternative instruments*: Code, Contract and Privacy Policies



**Questions?**

