

SWITZERLAND

Mediatization of information by private individuals via dashcams, drones, and action-camera recordings

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The advent of the smartphone has enabled each individual to become a reporter by allowing each individual to transmit information immediately or only slightly delayed, particularly via social networks or applications such as YouTube, Snapchat, Instagram or Twitter, to name some. Today, a reporter – as well as an avenger – can hide behind each individual. This trend has further increased with the introduction of new tools, such as dashcams, drones, and action cameras. Due to their configuration, these tools make it possible to film and broadcast images almost in real time.

Information contents, including images and sound, are disseminated without any verification, and it is often impossible to determine their origin.

Information mediatization through new digital tools raises many questions, not only in terms of the quality and reliability of the information, but also in terms of personality rights and data protection.

Swiss law only provides fragmentary rules and such rules do mainly not properly address these concerns.



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Dashcams, drones, and action cameras incorporate cameras that record everything that is situated in the public space. Any person, who accidentally comes in front of the camera, becomes subject to these recordings. In most cases, such person is unaware that she or he has been filmed.

While Dashcams secure evidence and may report legal offences, admitting these recordings as evidence remains controversial

Dashcams installed in vehicles (cars, motor-

cycles, trucks, etc.) record what is happening on the roads and/or in the vehicles. In principle, it is always possible to record conversations via dashcams. Originally, these cameras were installed to guarantee the safety of both drivers and third parties.

The idea was never to disseminate the information collected by dashcams; rather, dashcams were to be used to secure evidence in the event of accidents. The dashcam recordings can also be used to report traffic offences to the police.

The admission of the recordings captured by dashcams as evidence in Swiss judicial proceedings remains controversial and is not yet entirely accepted by the Swiss judicial authorities. Some argue that these recordings amount to a violation of personal rights and should not be taken into account by the Swiss authorities.

In their view, these recordings are not an appropriate tool to fight traffic offences and constitute a violation of the Swiss data protection rules.

However, some judges disagree because such dashcam recordings are often the same evidence that allows them to prosecute perpetrators of traffic offences.

The Swiss Supreme Court is called to address this issue with all due haste since it must decide this year whether it is possible to convict a driver for its driving performance based on a private video recording of that driver.

Information captured is publicly accessible on social networks - unfiltered

Today, dashcam images, which are unrelated to the purpose for which the dashcam was installed, are regularly disseminated to show activities taking place in public spaces that are unrelated to the civic purpose of a dashcam.

Thus, it is not uncommon to find on the Internet images taken by dashcams that show perfectly recognizable individuals in humorous or degrading situations.

Similarly, it is not uncommon for dashcams' images to be broadcasted by individuals on social media for the sole purpose of denouncing potentially illegal behaviors.

In all these cases, no measures are taken to protect the privacy rights of the persons involved, and the information contained in these videos is neither reviewed nor put in the right context by an independent reporter. The filmed behaviors are left for the public to judge and can therefore only be subjective.

Drones to record and broadcast live in inaccessible places – without being subject to authorization

Similar issues exist with drones. Drones can be described as small remote-controlled planes and are equivalent to model airplanes. Drones are usually used to record places that are not easily or not at all accessible by foot and are used for both private and business purposes.

They can be used to film different environments such as a private garden, a building or an office or to allow access to dangerous areas (war zones or protected areas such as military sites, airports).

The most efficient models allow live broadcasting of images. Like the dashcam, it is difficult to identify the person who is flying the drone since they operate the drone from a distance. Moreover, unlike airplanes and automobiles, drones have no registration number.

According to Swiss law, the use of drones is indeed not subject to any authorization provided its weight does not exceed 30 kilograms and the person piloting this drone has visual contact with it.

Images from action cameras include the surroundings of the user and are shared with third parties

Finally, the same applies to action cameras that incorporate digital cameras designed for recording actions while being immersed in them. By using these cameras, the user records everything that happens around the camera.

In addition, action cameras are often used to retransmit the images in real time (or with a slight delay) to third parties, via mobile phones or social networks. These devices are, in principle, fixed on the head of a person and can film the surroundings of this person.

Individuals can hardly be protected from being captured

Swiss data protection rules require that persons concerned by video surveillance be aware of such surveillance and, under specific circumstances, even consent to it.

Despite this legal framework, and in regards to dashcams, there is no obligation (or recommendation issued by the General Data Protection Commissioner) to inform that vehicles are equipped with dashcams.

This means that individuals appearing in such recordings only find this out afterwards, for example, when the recording becomes public online on social media platforms.

That being said, the affixing of a sticker “dashcams” would not effectively prevent the infringement of privacy rights.

As a matter of fact, people are, in principle, not in a position to avoid dashcams when they are walking in the street or are in public spaces; it is also, of course, difficult for them to record the registration numbers of all vehicles equipped with dashcams.

Also, with regard to drones and action cameras, it is very difficult for individuals to prevent the capture of images about them as the presence of a dashcam, in most cases, cannot be detected.

Swiss Data Protection Commissioner recommends immediate anonymization of data

Legal limitations against the intrusive recording of private behaviors by dashcams,

drones, and action cameras shall essentially be the same that apply to any kind of video surveillance by individuals. In this respect, the Swiss Data Protection Commissioner advises the users of such tools to delete or anonymize the recorded data as soon as possible (see also recommendations on www.edoeb.admin.ch).

Indeed, no data protection and privacy issues will arise if the recorded persons are not identified or identifiable in the recorded data (either by anonymization or simply because the camera did not record them in a recognizable manner).

However, such a “no risk” approach is generally difficult to enforce, because the recorded images are mainly broadcasted in real time, not allowing the broadcasted contents be anonymized or verified with regard to the truth or falsity of the contents or to the presence of recognizable individuals. And such an anonymization can also not be conducted by the media hosting.

As a result, any dissemination of dashcam, drone, and action camera contents potentially infringes data protection and privacy rules.

Involved individuals can claim against infringement

Against such infringement, involved individuals can do little. Because the identity of the person who broadcasts the images is in most cases unknown, the filmed individual may not be able to request court injunctions and stop the infringement.

Thus, individuals have no choice, but to file claims against the social media broadcasting the images – social media that are often not in the position to prevent such infringements.

Swiss criminal law prohibits the use of an image-carrying device when this amounts to the breach of secrecy or privacy (art. 179quarter SCC).

A claim against this sort of infringement will always be possible in Switzerland when the image is taken on Swiss territory or when the videos are broadcast in real time from Swiss territory since the place of commission of this offence is located in Switzerland (art. 8 para. 1 SCC). This holds true even if the images and/or videos are subsequently made available online from another country.

For all other offences, however, such as those against personal honour (art. 173ss SCC), the Swiss criminal authority will not always be competent.

Indeed, claims against these offences can, in principle, only be made in the location where the author of the offence disseminated the illegal content or, under strict conditions, where the offense is made accessible to the public.

In addition, the Swiss criminal authorities will not always be able to issue injunctions promptly, notably for server owners located outside of Switzerland.

To stop the illegal information from being shared in other countries, the victim of the offence would have no choice, but to initiate

procedures in all the different countries where such illegal content is made available.

Moreover, these broadcasts also create a serious disparity in the treatment of and liability for the dissemination of information since the publication of information by individuals is put on the same level as press publications, but without the legal framework imposed on the press and its liability for the contents on the internet (see among others Decision of Swiss Supreme Court 5A_792/2011).

Google is obliged to anonymize shots of individuals and sensitive institutions – same rules should apply for images recorded through dashcams, drones, and action cameras

It must be noted that the Swiss Federal Court has considered that Google must processes personal data in the images of the provided Street View online service; furthermore, the company infringes the image and personal rights of the persons concerned by not blurring these images.

Google is now required to completely anonymize shots of sensitive institutions, such as battered women's shelters, retirement homes, prisons, schools, and hospitals, before this data is made available online.

Faces, and other characteristics of a person, such as their skin colour, clothing, etc., also must not be identifiable and must be blurred (ATF 138 II 346).

This may lead to the conclusion that the same or similar rules should apply for all

images recorded through dashcams, drones, and action cameras and intended for use on social and other media.

Michèle Burnier is a partner and member of Pestalozzi's IP&TMT group and Litigation and Arbitration group in Geneva. Her fields of expertise include intellectual property, including geographical indications, unfair competition, data protection, advertising and e-commerce law, IT and telecommunication law, and contract law. Michèle regularly represents clients before Swiss civil, administrative or criminal courts in relation to her IP&TMT practice. She has years of experience in negotiating and drafting complex IP agreements. Michele is a member of various national and international organisations, such as AIPPI, INTA, ASA, and LES (member of the board), and she is Chairman of the first Chamber of the Swiss Commission for Fair Advertising (CSL).