



This is a repository copy of *Ratemylegalrisk.com – The Legality of Online Rating Sites Relating to Individuals in Data Protection Law*.

White Rose Research Online URL for this paper:
<http://eprints.whiterose.ac.uk/88313/>

Version: Accepted Version

Article:

Ruhmkorf, A. (2014) *Ratemylegalrisk.com – The Legality of Online Rating Sites Relating to Individuals in Data Protection Law*. *Intellectual Property Forum* (96). 55 - 67. ISSN 0815-2098

Reuse

Unless indicated otherwise, fulltext items are protected by copyright with all rights reserved. The copyright exception in section 29 of the Copyright, Designs and Patents Act 1988 allows the making of a single copy solely for the purpose of non-commercial research or private study within the limits of fair dealing. The publisher or other rights-holder may allow further reproduction and re-use of this version - refer to the White Rose Research Online record for this item. Where records identify the publisher as the copyright holder, users can verify any specific terms of use on the publisher's website.

Takedown

If you consider content in White Rose Research Online to be in breach of UK law, please notify us by emailing eprints@whiterose.ac.uk including the URL of the record and the reason for the withdrawal request.



eprints@whiterose.ac.uk
<https://eprints.whiterose.ac.uk/>

Ratemylegalrisk.com – The Legality of Online Rating Sites Relating to Individuals in Data Protection Law

Dr Andreas Rühmkorf¹

Lecturer

University of Sheffield

Introduction

Online rating sites have become increasingly popular in recent years. What started off as the review of the quality of goods purchased on eBay or services provided by hotels has moved on to the rating of individuals. Professionals such as GPs, solicitors or teachers are now commonly rated online, often without being aware of this.

Following recent cases in Germany on teacher and medical doctor rating websites, the UK has now had its first case with the decision in *The Law Society & Ors v Kordowski*² which concerns the legality of a solicitor review website (solicitorsfromhell.co.uk). The High Court granted an injunction prohibiting the further publication of the website. However, there are numerous other rating sites online that are often seen critically by those who are subject to ratings. The recently launched UK website rateyourlecturer.co.uk has brought the topic again into the spotlight.³ It seems only to be a matter of time for the English courts to be called upon again to decide about what kinds of rating websites are legal and what kinds of websites are not.

The purpose of this article is to analyse the legality of online rating websites relating to individuals in English data protection law. This article will be structured in the following way: Following an introduction into the different kinds of rating websites that are on the market, the paper will briefly sketch out the various legal issues that they raise. The article will then turn to its main issue, the data protection aspects of rating websites that relate to individuals. The article will analyse the question if the use of the personal data and the rating of individuals who have not consented to be the subject to such online ratings is lawful. In this regard, it will be discussed how the countervailing rights to privacy of the rating subjects and the right to freedom of expression of the raters can be balanced. To that end, the article will discuss if the recent English decision about the solicitor rating website solicitorsfromhell.co.uk and German case law pertaining to teacher and medical doctor rating websites⁴ provides any guidance for the legality of other rating websites in English data protection law. The article argues that the balance between the conflicting interests of freedom of expression and privacy requires a distinction between different kinds of rating websites related to individuals: those that concern the review of professional services by individuals and those websites that review individuals in a private capacity.

Different Kinds of Rating Websites Related to Individuals

Customers commonly rate the service that they have received in restaurants or hotels on websites such as [tripadvisor](http://tripadvisor.com) or comment on the quality of goods that they have purchased on [amazon](http://amazon.com) or [eBay](http://ebay.com).⁵ However, with the increasing popularity of user-generated content there is a growing number of rating websites that enable users to rate individuals, often without the

knowledge of the rating subject. Customers can now rate their local plumber or electrician, pupils their teachers, patients their doctors, clients their solicitors and students their lecturers.

The abundance of rating websites makes it necessary for the analysis here to distinguish between different types of rating websites pertaining to individuals. Some websites purely provide rating criteria that are linked to the professional performance of individuals, for example, rateyourlecturer.co.uk gives students the chance to rate their lecturers on criteria such as teaching ability in lectures and feedback. Similarly, iwantgretcare.com allows patients to rate the performance of medical doctors and qype.co.uk allows the rating all kinds of services such as that of plumbers or electricians. However, other websites allow users to rate the character of others. An example of this kind of rating website is dontdatehimgirl.com, a US-American website which enables women to rate their ex-partners.

A further example of a website where users can rate the character of others was the US-site rottenneighbor.com. Here people could rate their neighbours. A third category of rating websites can be placed between the extremes of websites where people can only rate professional qualities and those where people can rate personal characteristics. Those websites combine the rating of the professional performance with the personality/character of the rating subject such as the German teacher rating website spickmich.de. Such websites are particularly challenging from a legal point of view.

Most rating websites also have a comment function which allows users to comment on the rating subjects.⁶ Rating websites differ in terms of the safeguards that they establish. Whilst some rating websites require their users to register with a username, password and email address before they can start rating (e.g. rateyourlecturer.co.uk), other websites provide immediate access to their platform to anyone wanting to rate someone else straightaway (e.g. ratemyteachers.com). Of particular significance for rating subjects is that the results of some rating websites appear on search engines such as Google, whilst others do not make their ratings available on search engines.

The Legality of Rating Websites in Data Protection Law

Most rating websites allow users to both rate others by giving marks and review others by writing comments. Such websites therefore raise a number of different legal issues. First of all, the rating subjects could have claims against the raters themselves such as in defamation (i.e. libel) for comments made on the rating website that are defamatory. However, the rating subjects could also have claims against the rating websites for the use of their personal data and the ratings based on data protection laws. Similarly, rating subjects could pursue the rating websites in defamation for the comments that are made on their websites.⁷

In most instances, the rating subject will be likely to make a claim against the rating website rather than the rater directly. The well-known reasons why the website is more likely to be the defendant than the rater (the user) are that the raters are often unknown as they hide behind a veil of anonymity, that the website is easier to locate (e.g. when it has a presence in the UK) and that it has better financial means than the individual rater.⁸

Whilst the legal issues which are raised by rating websites and the potential causes of actions for ratings are diverse, the focus of this article will be on the legality of the ratings in English data protection law. Rating websites particularly raise the question under what circumstances it is lawful to rate individuals who have not consented to the use of their data and the fact that they are subject to online ratings by others.

English data protection law is primarily regulated by the Data Protection Act 1998 (DPA) which implements the Data Protection Directive. Under data protection law, an individual subject enjoys protection by the DPA if their “personal data” is concerned, s.1(1) DPA. Personal data means “data which relate to a living individual who, inter alia, can be identified from those data”.⁹ Upon rating websites, the rating subjects can often clearly be identified as their name and often further information such as job title, employer and place of work is given. Importantly, personal data also includes “any expression of opinion about the individual”.¹⁰

Greater protection is provided for “sensitive personal data”. Section 2 of the DPA defines sensitive personal data as information referring to, inter alia, the racial or ethnical origin of the data subject, their political opinion, their religious beliefs, their physical or mental health or condition and their sexual life. These data are capable by their nature of infringing fundamental freedoms or privacy. The greater protection provided for sensitive personal data includes requirements for data controllers to obtain explicit rather than implied consent.

The owner of a rating website is the data controller under the DPA, as it is “a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed”.¹¹ The DPA places some obligations upon the data controller. In particular, pursuant to s.4(4) of the DPA it is the duty of a data controller to comply with the Data Protection Principles in relation to all personal data with respect to which he is the data controller.

The Data Protection Principle that is particularly relevant for rating websites is Principle 1. It stipulates that personal data “shall be processed fairly and lawfully and, in particular, shall not be processed unless (a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met”.¹²

Schedule 2 of the Data Protection Principles refers to six different conditions.¹³ One condition that gives legitimacy to the processing of personal data is the data subject’s consent.¹⁴ In the absence of such consent (rating websites will usually not have the rating subjects’ consent), the processing is necessary in a number of situations, for example, for the performance of a contract to which the data subject is a party.¹⁵ The only condition that, in the absence of consent, could justify the use of personal data for rating websites is Schedule 2 number 6. It provides a condition for the use of personal data without the data subject’s consent where “the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms of legitimate interests of the data subject”. “Necessary” for one of the specified purposes in the schedule has been interpreted as meaning “reasonably required or legally ancillary” to “the specified purpose, rather than ‘absolutely essential’” to the purpose.¹⁶ Although consent comes first in the list in Schedule 2, the DPA gives no greater weight to consent as a ground for legitimate processing than the other conditions.¹⁷

This provision with its reference to the legitimate interests pursued by the data controller or a third party as well as the rights and freedoms of legitimate interests of the data subject is rather broad in its scope and requires further interpretation. In fact, it could be subject to a balance between the right to freedom of expression pursued by the data controller and/or the users (the raters) on the one hand, and the right to privacy of the rating subjects on the other hand. This balance is a consequence of the horizontal effect that human rights have in private law.¹⁸

The question whether or not the “legitimate interests” provision in the DPA can be subject to a balancing exercise in English law has, so far, been viewed differently. In *Douglas v Hello*,¹⁹ Justice Lindsay stated that “the provision is not, it seems, one that requires some general balance between freedom of expression and rights to privacy or confidence”.²⁰ However, it is argued here that this view conflicts with the view taken by the European Court of Justice. In the reference for a preliminary ruling from the English High Court in *R v Minister of Agriculture, Fisheries and Food, ex p Trevor Robert Fisher and Penny Fisher*, the Court concluded that the data in question could be disclosed “after balancing the respective interests of the persons concerned”.²¹

Moreover, the European Commission, in its first report on the implementation of the Data Protection Directive (Council Directive 95/46) addresses this paragraph in the following manner: “The balancing criterion, Art 7 (f)”.²² And subsequent paragraphs also refer to the “balance” test in relation to Article 7. Moreover, in *Murray v Express Newspapers*²³ at first instance in the High Court, Mr Justice Patten stated that “necessary” in this context means no more than that the processing should be required to be proportionate to the legitimate interests pursued by the data controller.²⁴ His honour went on to say that “this condition seems to me to replicate the considerations which the Court has routinely to take into account under Art 8 and Art 10”.²⁵

Therefore, despite the contrary view taken in the earlier decision in *Douglas v Hello*, recent English case law seems to follow the ECJ’s view that this condition is, in fact, one that does require a balance between the countervailing rights to freedom of expression and privacy affected here. It is therefore necessary to balance the conflicting rights of the rating subjects on the one hand, and the raters on the other hand in order, to determine whether the processing of the personal data of the rating subjects complies with the DPA.

Powers of enforcement of the DPA lie with the Information Commissioner and the data subjects. The Information Commissioner is a supervisory authority who acts with “complete independence”.²⁶ The Information Commissioner can pursue administrative remedies against the data controllers, but not civil proceedings.²⁷ The powers of the Information Commissioner are therefore not a substitute for the individual rights of data subjects.²⁸

An important enforcement power in the context of rating websites is the power of the Information Commissioner pursuant to s.40(1) of the DPA to serve an enforcement notice against a data controller who has contravened any of the data protection principles. The notice requires the data controller to comply with the principle in question. A person who has failed to comply with an enforcement notice is guilty of an offence under s.47 of the DPA. Moreover, under ss.55A-55E of the DPA, the Information Commissioner has the powers to impose monetary penalties on a data controller where there has been a serious contravention of the data protection principles.

The data subject does not have a general right to prevent a data controller from processing his personal data.²⁹ Section 10 of the DPA provides the data subject with a right to require the data controller to cease or not to begin processing any personal data (in respect of which they are the data subject) on the ground that the processing of those data is causing or is likely to cause substantial damage or substantial distress to them and that damage would be unwarranted. Another remedy for data subjects is the right to compensation under s.13 of the DPA for damage that results from the failure to comply with requirements of this Act. The concept of damage includes “financial loss or physical injury”.³⁰

Given that the DPA implements the Data Protection Directive, this article will consider existing case law pertaining to rating websites from both the UK and Germany. The article will then discuss if these decisions provide any guidance for the legality of rating websites in English data protection law. In particular, the significant question is whether these cases have addressed the balance between the countervailing rights to privacy and freedom of expression with regard to rating websites.

English Law – Solicitorsfromhell.co.uk

In 2011, the English High Court decided upon the legality of a rating website in *The Law Society & Ors v Kordowski*³¹. The case concerns a rather extreme case of a rating website, as suggested by its name *solicitorsfromhell.co.uk*. The defendant said that he had created the website as an instrument for clients to name and shame solicitors. The website was used to write defamatory comments not only about alleged poor performance of solicitors, but also about alleged private details of the private lives of solicitors. The Law Society brought a representative action on behalf of all solicitors and law firms in England and Wales against the website.

The claimant applied for an injunction requiring the defendant, the publisher of the *solicitorsfromhell.co.uk* website, to cease publication of the website in its entirety and to restrain him from publishing any similar site. The causes of action relied upon are libel, harassment under the Protection from Harassment Act and breach of the DPA. The claimants argued that being listed and named on the website purporting to list “solicitors from hell” was defamatory of itself. The claimant had previously sent a letter of claim and notice to the defendants pursuant to s.10 of the DPA asking for an undertaking that the defendant cease publication of the website and remove and destroy data from the website. The postings on the website contained comments about solicitors that they were “fraudulent”, “shameless”, “dishonest” and “oppressive”. Some of the law firms affected became aware of these comments when they undertook Google searches for the name of the firm. The postings were anonymous and the firms could therefore not identify the authors of the postings.

The High Court held *solicitorsfromhell.co.uk* to be illegal. The Court granted an injunction prohibiting the defendant from further publishing the website. The order was based on breach of the DPA as well as defamation laws and breach of the Protection from Harassment Act. In so far as the DPA is concerned, the Court referred to the duty of a data controller pursuant to s.4(4) of the DPA to comply with the data protection principles in relation to all the personal data with respect to which he is the data controller. This includes the first data protection principle according to which personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met.

Here, the Court discussed if the personal data was processed lawfully. The reference to “lawfully” in the First Data Protection Principle applies to any form of conduct that is unlawful, including breach of confidence, libel and harassment. Consequently, with regard to *solicitorsfromhell.co.uk* the first principle was not complied with as there was libel. Moreover, the Court held that the claimant had a right against the defendant pursuant to s.10(4) of the DPA³² to remove the comments about the solicitors from the website. It noted that the defendant had processed the said data “in a grossly unfair and unlawful way by, in particular, publishing highly offensive defamatory allegations about these solicitors and other individuals on the website”. None of the conditions in Schedule 2 of the DPA 1998 would be met by the defendant in respect of the processing of the said of the personal data on the website.

Moreover, in breach of the Fourth Data Protection Principle, the personal and sensitive personal data about solicitors and other individuals processed by the defendant and published on the website was found to be “seriously inaccurate”. Moreover, an order was made under s.14 of the DPA requiring the defendant to block, erase or destroy the data which was subject to the action.

The decision about solicitorsfromhell.co.uk has shown that individuals can base their claims against rating websites to stop processing their data on data protection laws. In this case the Data Protection Principles were breached by defamation, harassment and the absence of any condition for the processing of personal data pursuant to Schedule 2 of the DPA. However, unlike solicitorsfromhell.co.uk, other rating websites will not necessarily contain defamatory comments in which case the conditions in Schedule 2 of the DPA, including the balance between privacy and freedom of expression, are an important issue in order to determine whether or not the particular website in question is lawful.

Germany: From Teachers to Medical Doctors

In a landmark decision on rating websites, the German Federal Court of Justice (the country’s supreme court in civil law matters) held that the teacher rating website spickmich.de was legal.³³ The case focused on data protection issues and is therefore important for the analysis here.³⁴ On spickmich.de, teachers are given school grades according to criteria such as “good teaching”, “fair marks” and “motivated” as well as “human”, “popular” and “cool and funny”. Notably, the site requires prior registration with an email address and a username. Users have to select a particular school and can only rate and view ratings of this school. Once a teacher has received 10 ratings, the average mark is calculated and displayed. The ratings are not visible on search engines such as Google.

The claimant in this case was a teacher who had received rather poor marks in the ratings. The Court rejected her claims against the internet portal operator for deletion of her personal data³⁵ and for injunctive relief to stop publishing the personal data³⁶. In its judgment, the Court held that the teacher had no claim to injunctive relief as neither her right to privacy (in tort) nor her rights in data protection were violated. The website’s usage of the teacher’s data was justified, as she had no interest worthy of protection in excluding the collection, storage or modification of her publicly available personal data.³⁷

The important aspect of the judgment for the legal analysis here is that the requirement of “interest worthy of protection” was restrictively interpreted in light of the conflicting basic rights of freedom of expression (Article 5 of the German Constitution, the Basic Law) and the right to informational self-determination or privacy, Art 2 para 1 of the Basic Law in conjunction with Art 1 para 1 of the Basic Law. Although basic rights are, generally speaking, only subjective rights against the state, they do have an indirect effect in German law between individuals in private law matters, as they provide an objective system of values.³⁸ Upon balancing these conflicting rights, the Court gave priority to freedom of expression and held that the teacher ratings were legal. Notably, the Court mentioned in its obiter that the requirements of the Data Protection Act were established when the development of the online world was unforeseeable. They would therefore need to be adjusted to keep up to web 2.0.

The case is significant as it allowed rating portals to use personal data without the consent of the data subject.³⁹ The ratings of teachers were considered to be expressions of opinion and are thus encompassed by the German Federal Data Protection Act. The Court’s careful balance between the countervailing rights to freedom of expression and privacy in the context

of data protection laws makes this decision a suitable reference point for the legality of other rating websites. The Court distinguished between different spheres of privacy. Both the German Federal Court of Justice and the Federal Constitutional Court traditionally differentiate between the sphere of intimacy, the sphere of privacy, and the social sphere.⁴⁰

The sphere of intimacy encompasses the inviolable core of the right to privacy (e.g. one's sexual orientation and inner thoughts).⁴¹ Intrusions into this sphere are not justifiable. Intrusions into the sphere of privacy (e.g. private life) can be lawful, if they are proportional, but only under strict requirements.⁴²

The social sphere, in contrast, concerns the social life (the professional environment) and therefore requires less protection.⁴³ Intrusions into this sphere are still subject to a balance between freedom of expression and the right to privacy. The Court argued here that the rating criteria on spickmich.de only affect the social (professional) sphere of the teacher. It held that, upon balance, the freedom of expression of the raters outweighed the teacher's interest to protection. The main reason for this result is that individuals have to accept criticisms or applaud about their professional conduct as they are part of a social community. This would be different with rating criteria linked to one's personality. It is therefore notable that spickmich.de had deleted the category "sexy" in the course of the lawsuit.⁴⁴

The Court held that feedback and evaluation were an important element of teaching and schools. The anonymity of the rater would not be a problem per se, as raters would often refrain from commenting when they had to fear negative consequences. Moreover, the Court held that the collection and processing of data in online rating websites would not be encompassed by the media privilege / journalistic exemption of the Data Protection Act, as the ratings would not constitute journalistic-editorial material.⁴⁵

Whilst this case was only the first decision about a rating website in Germany, it was followed by subsequent decisions about websites that enable users to rate medical doctors.⁴⁶ These websites, too, have been subject to strong criticisms by the profession such as the teacher rating website. So far, cases about such the rating of medical rating have been decided at first and second instance. They were based on claims for the deletion of one's personal data, the deletion of ratings and orders to access information about the user.

The decisions have, by and large, followed the spickmich.de case and held the medical doctor rating sites to be legal and compatible with data protection laws. The starting point for the courts' argumentation in these cases is that medical doctors are subject to selection by their patients. They are in a market and patients are entitled to inform themselves beforehand through publicly available information. As in the spickmich.de decision, the courts continued to refer to the theory of different spheres of personality when balancing the rights to privacy and freedom of expression in the context of data protection laws.⁴⁷ In particular, it was held that the ratings of the professional service of medical doctors would only affect their social sphere which enjoys a lower level of protection than the private sphere. Opinions about the performance of doctors are therefore protected by the right to freedom of expression as long as they do not amount to abusive criticisms.

The courts continued to demand a minimum of safeguards for the legality of such sites. Rules of the websites such as a code of conduct that requires users not to post defamatory or false comments were considered to be an adequate safeguard. Users would need to have to consent to the code of conduct. The fact that raters remain anonymous was again explicitly allowed in the cases. This was held to be a natural consequence of the online world. Otherwise, there

would be a chilling effect on the enjoyment of the right to freedom of expression. Medical doctors, therefore, have to accept that anonymous comments about them are published on rating websites which, in practice, reduces their ability to pursue the raters. Contrary to the *spickmich.de* decision, the issue of prior registration was approached differently: Whilst some courts continued to require users to register with a username and password, other courts did not consider registration to be necessary.

Moving Beyond the Existing Cases – The Legality of Rating Websites in English Data Protection Laws

The existing English and German cases show that rating websites are understandably a contentious issue, particularly from the point of those who are the involuntary rating subjects. Following *solicitorsfromhell.co.uk*, the recently launched site *rateyourlecturer.co.uk* has already led to disputes, including complaints to the Information Commissioner about breach of data protection laws.⁴⁸ It is therefore likely that there will be further cases about the legality of rating sites in English law soon. Against this background, the question arises under what circumstances such websites comply with data protection laws.

The key question for the legality of the rating of people on the internet is whether or not the processing of the rating subjects' data is necessary for the purpose of legitimate interests pursued by the rating site owner and the raters pursuant to No 6 of Schedule 2 of the DPA. As indicated above, this question requires a balance between the countervailing rights of privacy and freedom of expression. This balancing exercise is relatively recent in English law, following the introduction of the Human Rights Act 1998 (UK).⁴⁹ The existing judicial balances between the countervailing interests were in relation to breach of confidence.⁵⁰ The cases often sidelined data protection.⁵¹ These cases are nevertheless helpful here for the discussion here how these rights should be balanced in case of rating websites.

Notably, there is no priority given to either of the two rights.⁵² In *Re S (A Child)*,⁵³ Lord Steyn made some important comments about the balance: First, neither Articles 8 nor 10 had "precedence over the other"; secondly, where conflict arises between the values under Articles 8 and 10 an "intense focus" was necessary upon the comparative importance of the specific rights being claimed in the individual case; and, thirdly, the court must take into account the justifications for interfering with or restricting each right; and, fourthly, the proportionality test must be applied to each.⁵⁴

These general principles therefore underlie any balance between the two rights in a case. It is important to take into account that Lord Steyn emphasised the importance of the facts of each individual case. Whereas the balance in breach of confidence cases has, so far, usually addressed the protection of privacy of celebrities, the rating subjects here are usually not as well-known as celebrities. It is therefore important to take this distinction into account when balancing the rights below. However, one should nevertheless consider the following statement made by Mr Justice Nicol in *Ferdinand v MGN Ltd* about the balance:

(T)he contribution which the publication makes to a debate of general interest is the decisive factor in deciding where the balance falls between Article 8 and Article 10.⁵⁵

Whilst this comment in the judgment referred to the publication of private information about a celebrity, the emphasis placed on the contribution to a debate of general interest is nevertheless important for the subsequent balance pertaining to rating websites. At the outset of the balancing exercise, it is important to bear in mind that the internet changes our lives

and the way how we are visible online. The internet also alters our attitudes to privacy and our understanding of how we can exercise our right to freedom of expression. Whereas people used to comment on the performance of others such as solicitors, medical doctors or their local self-employed workmen in conversations on the phone, at home, in a pub or in a street, these discussions now increasingly occur online, for example on rating sites or other social media. Whilst people still ask friends or neighbours for advice, for example, when choosing a solicitor or a plumber, they increasingly rely on internet feedback. People regularly check reviews and ratings online and, equally, rate services of others as they would have previously done in conversations. Moreover, the idea of giving feedback increasingly underlies everything people do. Companies regularly ask customers for feedback on the services that they have provided. Moreover, the internet is increasingly seen by entrepreneurs as a tool to attract new business. One's ratings and written feedback are an important element of any marketing strategy. Therefore, people develop an online reputation and are conscious about their online position.⁵⁶

Against this background, the balance between the right to freedom of expression and the right to privacy in the context of rating websites raises three particular issues: First, does the balance between the countervailing rights differ according to the rating subject affected, i.e. is there a difference between the rating of a solicitor and the rating of the barrista at a local coffee shop? Secondly, does the balance need to differentiate between different kinds of rating criteria? Thirdly, to what extent, if at all, does the balancing exercise depend on the existence of safeguards such as prior registration or no search engine visibility?

Distinction between Different Kinds of Rating Subjects

First of all, although the statement made by Mr Justice Nicol in *Ferdinand v MGN Ltd*⁵⁷ that the balance between Articles 8 and 10 to a great extent depends on the contribution which the publication makes to a debate of general interest referred to publications about celebrities, it can nevertheless be used for rating websites, too. Professionals such as medical doctors, solicitors, plumbers, electricians and also teachers and lecturers have to accept that they are in the public eye and that the way how they discharge their professional duties is subject to discussions by members of the parents. Members of the public who have used or who are about to use the services of a medical doctor, a solicitor or a self-employed workman are interested in the views and experiences of others. Many professionals are in a market situation where people can choose and, therefore, try to make an informed decision. Besides, those who are self-employed often do not object to being rated per se, as it could increase their profits.

It is important to consider that some professionals seek the public eye by advertising for their services, for example, plumbers, electricians, private doctors / consultants in their private practice or solicitors. Their reasonable expectation of privacy in relation to their professional services is therefore arguably lower. Still, those who do not publicly advertise for themselves can nevertheless attract public interest due to the kinds of services that they provide. Due to changes in the funding of Universities an argument can be made that the performance of lecturers is increasingly a matter of public interest, at least from current and potential students and their parents.⁵⁸ Although teachers at state schools provide a public service they, too, attract a particular public interest.⁵⁹ Therefore, whilst some of the professions mentioned here are in a market situation and compete for business whereas others are not in that position, they all share the fact that the public has an interest in the way how they perform their job.

Arguably, there is a significant difference between the evaluation of the performance of a plumber and a teacher, as the successful and effective fixing of a problem in the household

can arguably be more easily assessed than the quality of teaching. Nevertheless, ratings which evaluate the performance of a professional do not undermine the dignity and specific characteristics of professions such as teachers, lecturers or medical doctors. Rather, these professionals, too, have to accept that they attract a great deal of public interest.⁶⁰

Therefore, the exercise of the public's freedom of expression about their performance is prima facie a significant right that deserves protection. The right to freedom of expression does not depend on how difficult it is to evaluate the performance in a specific job. The way how the public discusses the performance of these professionals has gradually changed from the offline to the online world and, therefore, now takes place on rating sites and other user-generated content sites rather than on a market square or in a pub. The rating of professionals is therefore arguably an important exercise of the public's freedom of expression. Accepting the changes caused by the internet, one has to accept that these ratings are a new instrument of how people say what they think. So, whilst not all jobs are to the same extent in the public eye, it is arguable that professional jobs such as the ones mentioned above attract such public interest for various reasons that the freedom of expression of raters outweighs the right to privacy of the rating subjects. Ratings that concern the way how people in professional jobs perform their work have become a significant source of feedback and information for the public.

This situation is different for people in administrative or, generally speaking, in supportive roles who provide services which enable other people in specific professional jobs to discharge their professional duties. Whilst employees in such roles contribute to the overall functioning of their business, the school, the University, they are not in a leadership role where they have overall responsibility for the running of the business or the teaching.

It is therefore argued here that, when balancing the right to freedom of expression and the right to privacy, a distinction needs to be made according to the professional status of the rating subjects. Those who are in a position that is of such public interest that it is subject to public discussions will have to accept that they are rated whereas those who rather act in a supportive role do not have to accept to be rated. This approach can be justified by arguing that those in a supportive role are not directing the business, as they rather support those in a more prominent position. Therefore, there is no overriding interest in identifying the receptionist of a law firm by name and in rating her, whereas the solicitor is the person who is representative of the law firm and whose performance has a direct impact on the client. Therefore, a case-by-case distinction is necessary between different kinds of ratings subjects, taking into account the general interest of the person for members of the public.

Distinction between Different Rating Criteria

Moreover, based on the approach of the English courts that neither of the countervailing rights to privacy and freedom of expression enjoys an "inherent precedence over the other"⁶¹, it is argued here that the balancing act necessitates a distinction between different kinds of characteristics. Consequently, it would be wrong to regard the right to freedom of expression to be more important than the right to privacy of the rating subjects in every kind of rating criteria ranging from subject knowledge of a teacher to this outward appearance.

Whilst it is arguable that users are protected by their right to freedom of expression to exchange views on the discharge of professional services, it is clearly not justifiable to rate private or intimate issues such as personal characteristics, looks or sexual orientation. These issues deserve particular protection. There is no public interest in discussing them. Quite to

the contrary, in so far as such rating criteria are concerned, the rating subject's right to privacy enjoys a higher level of protection. The dividing line clearly needs to be where personal characteristics or intimate characteristics are affected. Judgments about a teacher's looks are not related to the performance in the job and therefore do not deserve protection. Moreover, in some cases, such personal characteristics would also constitute sensitive data, hence requiring a higher level of protection under Schedule 3 of the DPA. The US-American site dontdatehimgirl.com would therefore not comply with English data protection laws.

Against this background, those categories that refer to the discharge of professional duties of the rating subjects mentioned above are of such public interest that the right to freedom of expression prevails. This approach mirrors, to some extent, those characteristics that fall into the social sphere of the German courts' distinction between different spheres of privacy. For teachers, those categories would be the quality of teaching, the preparation, to some extent even the humour in teaching and the teacher's clarity of expression. For medical doctors, this would be the way how they helped the patient with their cause for seeing the doctor in the first place, the clarity of explanation, the service provided, the approachability, the friendliness / level of understanding for the patient's concerns and also the doctor's organisation of his practice, including the waiting times for an appointment. Similar categories exist in relation to other professionals such as plumbers, too.

Arguably, some categories are more personal than others. Whilst intimate characteristics are protected by the right to privacy vis-à-vis the right to freedom of expression, problems arise in relation to characteristics that do not just refer to the subject knowledge of the rating subject, but to the way how he or she has discharged the service on a personal level, i.e. was the person friendly, approachable, humorous? It is such rating categories where a careful dividing line is necessary as to categories where users have a prevailing interest to rate and read ratings and those where the rating subject's privacy prevails. It comes therefore hardly as a surprise that the German teacher rating website deleted the criterion "sexy: in the course of the legal dispute."⁶² It is very likely that the court would not have found this criterion to be lawful. US-American style websites such as dontdatehimgirl.com that enable women to rate the performance of their ex-partners would therefore clearly not conform with English data protection laws. Against this background, it is understandable why Facebook was quick to remove groups in 2013 which enabled users to rate the performance of their previous sexual partners at their British University.

Does the Balancing Act Require Website Safeguards?

The third main issue for the balancing act between the right to freedom of expression and the right to privacy is if rating websites should be required to have some safeguards in place. For example, in the spickmich.de decision, the German teacher rating website required users to register, albeit only with an email address and no need to provide any ID.⁶³ However, subsequent cases about medical doctors in Germany did not require registration with an email address.⁶⁴ A further point is that the ratings of spickmich.de were not visible on Google. This example raises the question whether search engine visibility of ratings and registration with an email address can be a determinate factor in the balancing act between the countervailing rights to privacy and freedom of expression.

It can be argued that a requirement for users to register with a username and to provide an email address before they can submit ratings does not make much of a practical difference. Such a registration does not make raters identifiable. It does not enable the subjects of defamatory comments to pursue the authors. In reality, the registration with an email address

is therefore more of a symbolic act than an instrument to increase user accountability. Moreover, it is often argued that it is one of the characteristic features of the right to freedom of speech that people do not have to identify themselves when they say their opinion.⁶⁵

However, despite these points it is argued here that the registration of users with their email addresses should be required from rating websites. In fact, such a requirement strikes a fair balance: Whilst it does not deny users the right to anonymously rate and make comments, it nevertheless provides a minimum safeguard against some extreme cases of abuse of rating sites. The process of registration has two advantages. First, even though the website owner will usually not be in a position to identify the rater, they have an email address to contact the registered user in case of disputed ratings. Equally, the webhost can suspend accounts in case of (repeated) defamatory comments. Secondly, the need to register (and subsequently to login) usually prevents individual users from making multiple ratings of the same individual.

Excessive abuses of rating sites by individuals are, although not impossible, at least more difficult as users would have to create and keep track of several accounts with different email addresses, usernames and passwords. Moreover, when registering, users often have to agree to the website's code of conduct or terms and conditions.⁶⁶ The code of conduct or the terms and conditions usually establish rules for the use of the website such as the prohibition to post defamatory comments. Although the practical impact of codes of conduct / terms and conditions that users consent to by clicking "yes" may sometimes be seen as critical; they at least serve as a point of information about the website's rules, for example, to make fair and honest ratings based on one's own experiences.

The situation differs with regard to search engine visibility, however. In the German spickmich.de case, the non-visibility of the ratings on search engines was mentioned as an important factor in the balance between the countervailing rights. However, it is difficult to justify that rating websites cannot make the ratings visible on search engines when Google itself enables users to review places and professionals and links these ratings to its search results.⁶⁷ The non-visibility of ratings on search engines would therefore give Google reviews a strong competitive advantage. Plurality of rating sites is in the interest of freedom of expression; therefore, whilst rating websites should require users to register, they should not be required to hide ratings from search engines.⁶⁸ Moreover, non-search engine visibility would make it much more difficult for users to find the opinions of others.

In summary, it is argued here that the processing of data by rating websites is necessary for the purposes of legitimate interests pursued by the data controller or by third parties and that this processing, in the circumstances outlined above, does not violate the rights and freedoms of the rating subjects. Professionals in a job with some status that attracts public interest have to accept that their performance is subject to discussions by others and that these discussions, *inter alia*, are occurring through the means of rating websites. Therefore, ratings of some individuals comply with English data protection laws.

The Future Development of Rating Websites

Given that the discussion has established under what circumstances rating websites comply with data protection law, this section will discuss how rating websites are likely to develop in the future.

First of all, the more rating websites exist and the more widespread they become, the more everyone in a professional capacity will be likely to be rated. Therefore, online ratings will

inevitably lose some of their initial fascination. It can be expected that most rating subjects will eventually have both good and poor ratings. It might even become a competition to find more people to make positive ratings. Therefore, individuals are not likely to be affected as much by one or two negative ratings as they might think. In the long term, rating websites could even become less relevant as users might find it more difficult to navigate their way through the jungle of an increasing number of rating websites and to decide which site is more credible than the other. On the other hand, it is unlikely that users will have less regard for online ratings in the future. Such websites will therefore not disappear, nor will the reputational dangers for data subjects go away. Quite to the contrary, the internet is likely to be more consulted than at the moment by users before they decide where to go, whom to instruct and so forth.

However, what may happen though is that rating websites become victims of their own success due to the simple access that they provide to users. Fake ratings can make the whole system lose its appeal.⁶⁹ Genuine websites with more credibility will probably prevail in the end. This provides an opportunity for professional bodies to establish credible rating sites rather than fight this development. For instance, Universities could establish a joint rating website in competition to rateyourlecturer.co.uk. Such a new rating site could give every student access once a year at the end of the academic year (similarly to the NSS survey) in order to rate their lecturers on an anonymous basis. The higher the number of ratings the more likely it is that the results are genuine.

The Law Society could create a similar website for everyone who has used a law firm and participating law firms could provide their clients with access details for an anonymous one-off rating of their services. An attempt to create more credible ratings is pursued by three statutory health insurance companies in Germany who enable their members to rate doctors.⁷⁰ In order to access the website, the patient must provide their membership number. The raters are still anonymous, but they cannot rate multiply and they must be members of the health insurance in order to rate. Whilst this system is far from perfect, it is slightly more difficult to abuse. Moreover, a minimum number of ratings is necessary before ratings become visible.

Finally, despite all the fears and tensions about rating websites, as evident by the current lively discussions about rateyourlecturer.co.uk in the UK, one should consider that feedback increasingly underlies everything we do. It is not going to disappear. Quite to the contrary, it will become even more important and even more visible in an online world. People will therefore increasingly be aware of their online reputation. However, whilst this shows the importance of the topic analysed here, one should not exaggerate the present significance of rating sites.

Research done by the author for this article has found relatively low numbers of ratings of individuals on many websites. Whilst websites about hotels and restaurants flourish, other sites on medical doctors or lecturers had relatively few ratings.⁷¹ This outcome is particularly interesting, given that some of the rating websites accessed have been on the market for some years. This finding raises the question whether those who are concerned about such websites are perhaps overly worried. Only time will tell what the development in practice is going to be; however, rating websites are here to stay and people will have to live them as the process of rating others is, in many situations, protected by the right to freedom of expression and in compliance with data protection laws.

Finally, it also needs to be taken into account that if English data protection law were to be interpreted too strictly in this regard, there is always the chance that US-American rating

websites would fill in the gaps and cater for the English market due to the immunity provided for websites under s.230 of the Communications Decency Act.⁷²

Conclusion

This article has discussed the legality of online rating websites relating to individuals in English data protection laws. It has focused on the balance between the countervailing rights to privacy and freedom of expression in relation to such sites. Following the recent decision in *The Law Society & Ors v Kordowski*, the question is whether other rating websites would be lawful in English law. This issue is particularly topical, given the public debate that the recent introduction of a lecturer rating website has caused.

This article has argued that the balance between the conflicting interests of freedom of expression and privacy requires a distinction between different kinds of review websites related to individuals: those that concern the rating of professional services by individuals and those websites that rate individuals in a private capacity. The right to freedom of expression takes precedence where users rate professionals in their professional capacity, depending on the significance of the profession for the public debate. However, ratings of private or intimate characteristics are not legal.

It is to be expected that more case law will follow, given the increase of such websites and their potential effects on the individuals who are rated. As such websites are not going to disappear, it is suggested that professional bodies should establish credible rating websites that allow anonymous ratings, but ensure that raters are only able to rate when they have used the services of the rating subject.

¹ Lecturer in Commercial Law, University of Sheffield. The author is grateful to Lilian Edwards with whom he has given a joint paper on rating websites at the annual conference of the British & Irish Law, Education & Technology Association (BILETA) in Vienna in March 2010. The author would also like to thank Ben Latham and Laura Bösenberg for research assistance. Finally, thanks are due to the participants of the Cyberlaw section of the annual conference of the SLS in September 2013 for helpful comments.

² *The Law Society & Ors v Kordowski* [2011] EWHC 3185 (QB).

³ C Parr, "Rate Your Lecturer website scores poorly with lecturers" *Times Higher Education* (London 13 June 2013). Available at: <http://www.timeshighereducation.co.uk/news/rate-your-lecturer-website-scores-poorly-with-lecturers/2004760.article> (last visited on 27 October 2013).

⁴ See for example, the decision about the teacher rating website *spickmich.de*, BGH VI ZR 196/08.

⁵ TripAdvisor, "Fact Sheet". Available at: http://www.tripadvisor.co.uk/PressCenter-c4-Fact_Sheet.html (last visited on 27 October 2013).

⁶ For example on <http://www.rateyourlecturer.co.uk> (last visited on 27 October 2013).

⁷ L Edwards, "The Fall and Rise of Intermediary Online Liability" in L Edwards and C Waelde (eds.), *Law and the Internet* (3rd edn, Hart Publishing 2009), 51.

⁸ See also D Rowland, U Kohl and A Charlesworth, *Information Technology Law* (4th edn, Routledge 2012), 72-74.

⁹ s.1(1) DPA.

¹⁰ s.1(1) DPA.

¹¹ s.1(1) DPA.

¹² Schedule 1 "The Data Protection Principles", Part 1 "The Principles", DPA.

¹³ Schedule 2 "Conditions relevant for purposes of the first principle: Processing of any personal data", DPA.

¹⁴ Schedule 2, No. 1 DPA.

-
- ¹⁵ Schedule 2, No.2(a) DPA.
- ¹⁶ *ibid.*
- ¹⁷ C Reed (ed.), *Computer Law* (7th edn, OUP 2011), 596.
- ¹⁸ O Cherednychenko, “Fundamental Rights and Private Law: A Relationship of Subordination or Complementarity?” (2007) 3 (2) *Utrecht Law Review*, 1.
- ¹⁹ [2003] EWHC 786 (Ch).
- ²⁰ *ibid.*, para 238.
- ²¹ C-369/98 [2000] ECR I-06751.
- ²² European Commission, Commission’s First Report on the Transposition of the Data Protection Directive (16 May 2003), 10. Available at: http://ec.europa.eu/justice/data-protection/document/transposition/index_en.htm (last visited 27 October 2013).
- ²³ [2007] EWHC 1908 (Ch).
- ²⁴ *ibid.*, para 76.
- ²⁵ *ibid.*
- ²⁶ Article 28 (1) of the Data Protection Directive stipulates that “each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive”. Moreover, the Directive requires that the public authorities “shall act with complete independence in exercising the functions entrusted to them”.
- ²⁷ C Reed (ed.), *Computer Law* (7th edn, OUP 2011), 600.
- ²⁸ *ibid.*
- ²⁹ *ibid.*, 606.
- ³⁰ Information Commissioner, *Data Protection Act 1998 Legal Guidance*, para 4.5. Available at: http://www.ico.org.uk/upload/documents/library/data_protection/detailed_specialist_guides/data_protection_act_legal_guidance.pdf (last visited 27 October 2013).
- ³¹ [2011] EWHC 3185 (QB).
- ³² s.10(1) DPA, “Right to prevent processing likely to cause damage or distress”.
- ³³ BGH VI ZR 196/08.
- ³⁴ See for a discussion of the case: A Rühmkorf, “Displease Sir: Teacher Rating Legality” (2010) 20 (5) *Computers & Law*, 20-22
- ³⁵ § 35(2)2 No 1 BDSG (German Federal Data Protection Act).
- ³⁶ §§ 823(2), 1004 BGB (German Civil Code) analogous in conjunction with § 29(2) No 1 a, No 2 BDSG.
- ³⁷ Pursuant to § 29 BDSG.
- ³⁸ O Cherednychenko, “Fundamental Rights and Private Law: A Relationship of Subordination or Complementarity?” (2007) 3 (2) *Utrecht Law Review*, 1, 4.
- ³⁹ A Rühmkorf, “Displease Sir: Teacher Rating Legality” (2010) 20 (5) *Computers & Law*, 20, 22.
- ⁴⁰ See for an overview: M Prinz und B Peters, *Medienrecht: Die zivilrechtlichen Ansprüche* (Beck Verlag München 1999), 66-86.
- ⁴¹ *ibid.*, 68-72.
- ⁴² *ibid.*, 72-82.
- ⁴³ *ibid.*, 83-87.
- ⁴⁴ G Gounalakis, “Zulässigkeit von personenbezogenen Bewertungsplattformen: Die “Spickmich”-Entscheidung des BGH vom 23.6.2009“ (2010) *Neue Juristische Wochenschrift*, 566, 570.
- ⁴⁵ The teacher-claimant who lost the case subsequently lodged a constitutional complaint with the Federal Constitutional Court arguing that her basic rights had been infringed by the civil court’s decision. However, this complaint was rejected, see *Bundesverfassungsgericht - 1 BvR 1750/9*.
- ⁴⁶ See for example, *Oberlandesgericht (OLG) Frankfurt am Main*, 8 March 2012, Az.: 16 U 125/11; *Landgericht München I*, 28 May 2013, Az.: 25 O 9554/13; *Landgericht München I*, 3 July 2013, Az.: Az. 25 O 23782/12.
- ⁴⁷ *Oberlandesgericht (OLG) Frankfurt am Main*, 8 March 2012, Az.: 16 U 125/11.
- ⁴⁸ C Parr, “Lecturers take ratings data complaints to ICO” *Times Higher Education* (22 August 2013). Available at: <http://www.timeshighereducation.co.uk/lecturers-take-ratings-data-complaints-to-ico/2006669.article> (last visited 27 October 2013).

-
- ⁴⁹ See for an overview, J Cooke, *Law of Tort* (10th edn, Pearson Education Limited 2011), 479-495.
- ⁵⁰ See for example, *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. 457.
- ⁵¹ G Black, "Case Comment: Privacy Considered and Jurisprudence Consolidated: *Ferdinand v MGN Ltd*" (2012) 34 EIPR 64, 68.
- ⁵² *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. 457 [474] (Lord Hoffmann).
- ⁵³ [2004] UKHL 47, [2005] 1 A.C. 593.
- ⁵⁴ *ibid.*, [604] (Lord Steyn).
- ⁵⁵ *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB).
- ⁵⁶ S Khan, "The Threat Posed to Reputation by the Emergence of Social Web Technologies" (2012) 23 Ent. L.R., 126-129.
- ⁵⁷ [2011] EWHC 2454 (QB).
- ⁵⁸ As evidenced by the interest in studies on teaching time provided by UK Universities: G Paton, "University teaching time 'fails to rise' despite fees hike" *The Daily Telegraph* (London, 15 May 2013). Available at: <http://www.telegraph.co.uk/education/educationnews/10056751/University-teaching-time-fails-to-rise-despite-fees-hike.html> (last visited 27 October 2013).
- ⁵⁹ See for example, the following research project: L Hargreaves, M Cunningham, T Everton et al., *The Status of Teachers and the Teaching Profession: Views from Inside and Outside the Profession; Interim Findings from the Teacher Status Project, Research Report (No 755, 2006)*. Available at: <http://217.35.77.12/research/england/education/RR755.pdf> (last visited 27 October 2013).
- ⁶⁰ See N Bacon and M McCartney, "Will Doctor Rating Sites Improve Standards of Care?" (2009) 338 (7696) *BMJ: British Medical Journal*, 688-689.
- ⁶¹ *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 A.C. 457 [474] (Lord Hoffmann).
- ⁶² G Gounalakis, "Zulässigkeit von personenbezogenen Bewertungsplattformen: Die "Spickmich"-Entscheidung des BGH vom 23.6.2009" (2010) *Neue Juristische Wochenschrift*, 566, 570.
- ⁶³ BGH VI ZR 196/08.
- ⁶⁴ Oberlandesgericht (OLG) Frankfurt am Main, 8 March 2012, Az.: 16 U 125/11.
- ⁶⁵ BGH VI ZR 196/08.
- ⁶⁶ For example, users wanting to register for rateyourlecturer.co.uk must accept the website's terms and conditions. These include the following clause: "You must not use the Website unless you are a genuine user of education or a lecturer".
- ⁶⁷ See Google, "Writing and Sharing Reviews". Available at: <https://support.google.com/plus/answer/2622999> (last visited 27 October 2013).
- ⁶⁸ *ibid.* Google now also requires users who want to review a place to register for GooglePlus first.
- ⁶⁹ See also the discussions about fake reviews on TripAdvisor: D Johnson, "Businessman sets up fake restaurant to expose failings of TripAdvisor website" *The Daily Telegraph* (London, 29 July 2013). Available at: <http://www.telegraph.co.uk/foodanddrink/10208910/Businessman-sets-up-fake-restaurant-to-expose-failings-of-TripAdvisor-website.html> (last visited 27 October 2013).
- ⁷⁰ <https://arzt.weisse-liste.de/> (last visited 27 October 2013).
- ⁷¹ For example, the number of ratings about medical doctors and hospitals in Sheffield on the website www.iwantgreatcare.com was rather limited. Similarly, the number of ratings on www.rateyourlecturer.co.uk about lecturers at the University of Sheffield was also low, given the publicity that the website had caused.
- ⁷² L Edwards, "The Fall and Rise of Intermediary Liability Online" in L Edwards and C Waelde (eds.), *Law and the Internet* (3rd edn, Hart Publishing 2009). 50.