
Junges Digitales Recht | Young Digital Law

Hamburg 2022

Kuhlmann | De Gregorio | Fertmann | Offerdinger | Sefkow [Eds.]

Transparency or Opacity

A Legal Analysis of the Organization
of Information in the Digital World



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Foreword

This volume collects the contributions to the second conference of the research network Young Digital Law (Junges Digitales Recht), which took place at the University of Hamburg on 22 and 23 July 2022. The conference was held in a hybrid format, in person and online. In the pursuit of fostering a broad, international debate, presentations were held either in German or in English by contributors who come from two continents and eight countries.

The conference theme for 2022 was “Transparency or Opacity”. While this dichotomy in itself predates the legal debates stirred by the digital transformation, recent technological and legal innovations invite us to revisit it: If knowledge is power, the question of who gets to know what is inherently political, even more so in the age of the infosphere, where hopes of an egalitarian access to information for all have been frustrated by the recognition that actionable knowledge requires organization. The technical and business architecture that empowers the infosphere – and the organization of said knowledge – is thus one of fundamental informational asymmetries. These asymmetries are neither inherently good nor bad, but: influential.

The contributions of this volume join the larger debate among legal scholars on how transparency shall be understood, whether it shall be granted, under which conditions and with which modalities. To find answers to the debate topics the contributors take into account to which extent existing concepts are applicable to new technologies and functions and if needed suggest new approaches to fill in observed blank spaces or inadequacies. What (and whose) purpose does transparency serve? In which constellations does opacity actually hold value – for example by protecting data, by preventing an informational overload, structuring interactions, enabling intra-institutional functioning or ensuring due process? The instrumental nature of transparency to enable potential actions, means that our allocations of it reflect notions of individual and collective agency and rationality that otherwise often remain implicit in legal discourse. It enables us to question which actor is presumed when knowledge is made accessible.

Given the conference series’ goal to enable exchanges on the law of digital transformation across the traditional dividing lines between the different fields and sub-disciplines of the law, the contributions in this

volume cover a wide range of subject areas. Across them, the concept of transparency rises as independent from the ones of information accessibility or explainability, and yet with them deeply intertwined; it emerges as inherently contextual, and yet universally necessary to foster trust and allocate responsibilities among the stakeholders of the digital world.

The relation between transparency and opacity is addressed in four sections: (i) state, regulation, and administration; (ii) algorithms and automation; (iii) transparency in health care; and (iv) transparency in the financial system. In the first section, Prof. Dr. Thomas Wischmeyer investigates the nature of the relation between transparency and opacity in the realm of state secrecy; Dr. Jonas Botta and Dr. Gordian Ebner complete the discourse of the role of transparency in the public sector by focusing on, respectively, the digitalisation of public administration and data protection. In the second section, Jun.-Prof. Dr. Elena Freisinger and Jun.-Prof. Dr. Juliane Mendelsohn explore the interplay between algorithms and consumer protection; Marco Billi and Alessandro Parenti offer a case-study to enhance transparency in Smart Legal Contracts; Kostina Prifti, Joris Krijger, Tamara Thuis, and Prof. Dr. Evert Stamhuis analyze the transparency obligations set out by the GDPR in the context of the digital ecosystem of trust; while Dr. Tobias Mast closes the section weighting the differences between machine and human decision-making. In the third section, transparency in healthcare, both authors focus on the practitioner-patient relationship: Paul Nolan discusses the function of transparency, and David Schneeberger tackles the role of AI. Finally, in the fourth section, the two contributions by Dr. Christopher Rennig, and Patrick Raschner demystify the transparency of two modern financial tools: respectively, decentralized finance and robo-investing.

Believing in the utter importance of the topic, we organized the conference and edited this volume. The insights of the contributions exceeded our most optimistic hope and we are humbled to host such an interesting debate: thus, we would like to sincerely thank all contributors. Our deep gratitude goes to Centre of Law in Digital Transformation (ZeRdiT) and the Project “The Law and its Teaching in Digital Transformation” as well as the Leibniz-Institute for Media Research | Hans-Bredow-Institut (HBI), whose support was indispensable for the conference, and there especially to Prof. Dr. Hans-Heinrich Trute and Prof. Dr. Wolfgang Schulz. We also thank Nomos and in particular Dr. Marco Ganzhorn for their support in putting the conference on track and publishing this volume. Lastly, we owe a great thanks to the staff of University of Hamburg, including the academic personnel, the professors and the students, who showed unwavering support to YDL 2022, both intellectual and practical. More

specifically, thanks to Hauke Varoga and Florian Lucks, without whom this conference would not have been possible.

Hamburg, October 2022

Dr. Simone Kuhlmann
Fabrizio De Gregorio
Martin Fertmann
Hannah Offerdinger
Anton Sefkow

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