

STRATEGIC LITIGATION

Case study – Right to privacy

Milan Antonijevic

made for ABA

What is strategic litigation?



What is strategic litigation?

Strategic litigation is much more than simply stating your case before a judge. This section introduces some of the broader goals of strategic litigation, as well as some of the more important considerations that should be addressed before entering the courtroom.



THE RIGHT TO PRIVACY

The right to privacy, one may say, is within the mere heart of human freedoms. It is inextricably linked to the character of the political system of a particular society. Societies based on the ideas of the rule of law and human freedoms are generally at the forefront of respecting the privacy of citizens.

Conversely, in societies where there are tendencies towards authoritarian forms of government, various mechanisms are applied aimed at violating the private life of citizens

In this context, privacy is akin to the concept of personal autonomy and freedom of choice, which is commonly associated with independence in making decisions about one's own body and the expression of one's own identity. Also, the „private“ can be seen as the opposite of the public. Within the private sphere, the individual is free from the influence and interference of others, left to himself, his feelings and needs. This understanding of privacy implies the establishment of physical boundaries for the entry of third parties into the personal space of an individual. For more info you may follow: <https://www.coe.int/en/web/data-protection/covid-19-data-protection>

Principles - short introduction

Privacy is often discussed in the context of the processing of personal data and our right to have our data processed:

- lawfully
- to have the processing adapted to the purpose of the processing
- to keep the processing secure with established accountability mechanisms for those processing the data,
- that the circumstances of the processing are known to the data subject

These are principles that were introduced into Serbian legal system by the adoption of the Law on Personal Data Protection in 2008, and additionally established by the (new) Law from 2018.

For more details follow:

<https://www.researchgate.net/publication/329804694> How the new European data protection regulation affects clinical research and recommendations/figures?lo=1

COVID19 pandemics and new challenges

The year 2020 was marked by the COVID19 virus pandemic, which, in addition to the obvious consequences for health, also affected the way we think about and shape interpersonal relationships, but also the relationship between the state and the individual, between the individual and the collective. The fight against the virus has brought new challenges for privacy and data protection, primarily through the establishment of extensive databases on infected and sick citizens, as well as citizens who have entered the vaccination process.

Along with the problems and challenges related to the privacy of citizens in the context of the pandemic, during 2020, long-standing problems continued to appear, both in relation to the shortcomings of the legal framework in the field of privacy and in the application of regulations guaranteeing privacy.

Monitoring – ideas for projects in respective countries

○ Group of NGOs in Serbia started the process of monitoring of the breach of the right to privacy in Serbia.

○ Listed cases of breach of the right are available online on the address:

○ <https://monitoring.mojipodaci.rs/> and it will be open database for future research and monitoring of trends in this area.

○ Continuous monitoring of privacy violations and illegal processing of personal data. Data is important for several reasons. It first gives an insight into the current situation or changing certain trends, which allows them to see the risks situations that need attention.

○ Further, in cases of serious or significant violations, information collected on this way can initiate or facilitate the conduct of strategic litigation in areas of personal data protection.



Linking EU integration process with strategic litigation

For Serbia, it is important to note that the EU enlargement process has in its essence right to privacy and data protection. Namely, in the point of the revised action plan for Chapter 23 from July 2020, there is an obligation of Serbia to analyse sectorial legislation and rulings and to adjust it with the new Law on Data Protection.

Countries members of the Council of Europe, have a set of other tools that has to be analyzed prior to starting strategic litigation cases.

When building up a strategic litigation case in other countries, not members of the Council of Europe, nor on the path towards EU integrations, one should document and create a case, despite legislative or international obligation deficiency.

LESSON – TAKE AWAY

File and document. One may never know when details from court cases may be needed.

Strategic litigation is a longlasting process, not a battle to win in a year.

Additional lessons

File the cases and build up a database, with personalised responses of specific judges. These databases of misdoings should be highly protected, not stored only on computers etc.

Naming and shaming is a methodology that is quite often used in strategic litigation.

Task: Do you know that naming and shaming is? In your own words, please do describe.

Usage of media in strategic litigation

- Independent media

Conduct the assessment of media that will be your allies

- International media

- Social media



Definition of strategic litigation

Strategic litigation, sometimes also called impact litigation, involves selecting and bringing a case to the courtroom with the goal of creating broader changes in society. People who bring strategic litigation want to use the law to leave a lasting mark beyond just winning the matter at hand. This means that strategic litigation cases are as much concerned with the effects that they will have on larger populations and governments as they are with the end result of the cases themselves.

Goals of strategic litigation

- Building up a case and defending concrete person/institution
- Change practice of institutions, including judiciary as a longterm advocacy goal
- Change of the legislation, if needed.

If successful or present in media, strategic litigation case will provoke others to report, start cases and thus exercise further pressure to courts and institutions.

Additional steps of successful litigation

Collection of court practice, first domestic, if existing than international, ECHR and similar international insgtitutions, including European Court of Justice.

While preparing for this lecture, I have found quite a good material of Serbian court practice analisys for data protection, criminal act of Unauthorised personal data protection, with charts, pies etc. I will not share it here with you, but I hope that in your countries you may find similar research.

Task2

Find these reports, if existing, if not, it looks like a good thing to do in the future.

Case law on dana protection: https://edps.europa.eu/data-protection/our-work/subjects/case-law-and-litigation_en

This court case analysis will be a good ground to see if there is space for strategic litigation, if the successful court cases are common, that we may say that someone already took all the glory and that there is no need to lead a strategic litigation, but just to follow existing court practice and standards already used by those that were faster than you. In Serbian case, as I conducted quite a number of interviews with stakeholders, while preparing for this lecture, there are no significant strategic litigation cases for data protection, so I would advise considering that. that I advise as a good resource of material, on English too, as well as other free legal aid providers.



Assessment of the legal actions and remedies while planning a strategic litigation has to include:

Domestic

International

On the first place, European Court on Human Rights
International bodies that receive complaints include the treaty bodies, or committees, which are established to oversee implementation of the core international human rights treaties, such as the International Covenant on Civil and Political Rights. It is important to check with the relevant state has accepted the jurisdiction of such bodies to receive complaints.



COALITION BUILDING

Around some of the future cases, it is to form a wide coalition, from scholars, academia, both domestic and international, with researchers, media and NGOs, with a bit of politics. We do not want our strategic litigation case to end up as a single party issue.

Final instance court decision is the only one to be looked as a relevant, other instances may be misleading.

Special attention should be also on the national Constitutional Court.

For those countries that are on its path towards EU, rulings of the European Court of Justice should be also the place where one may search for the practice.

An illustration on a teal background featuring a magnifying glass with a wooden handle over a document with horizontal lines. To the right, there is a yellow pencil with a red eraser and a blue pencil. A red sticky note with wavy lines is also present.

Case Study

1
NUMBER

CASE STUDY

Video surveillance - general view

The development of face recognition technology threatens to suppress traditional methods used by states, and primarily law enforcement agencies, to improve the safety of citizens. In addition, these technologies affect our daily lives and the subjective experience of the freedom we have as individuals within the community in which we live. When someone observes us, there is psychological pressure on the individual to feel less free. In an age when many feel that privacy is outdated, international and domestic regulations have yet to provide adequate responses to the challenges of technological development.

Read the article: <https://digitalfreedomfund.org/facial-recognition-virtual-design-jam-brainstorming-litigation-to-challenge-use-of-facial-recognition-software/>

○ Camcorders with facial recognition technology have been used for the last ten years in the world, by China, Great Britain to America. Although conceived as an additional tool to protect people and property.

○ more efficient apprehension of perpetrators of crimes, the question arose the real effectiveness of such video surveillance systems, as well as the abuse of which can be created using these technologies.



For more data you may consult: <https://emerging-europe.com/news/privacy-advocates-sound-the-alarm-as-thousands-of-chinese-facial-recognition-cameras-head-for-belgrade/>

While much attention is being paid to advancing these technologies in hardware and software terms, less seems to have been done to develop rules and procedures that will ensure the legal and ethical use of video surveillance systems. Negative examples from around the world, primarily from China, show that these technologies can be used as a tool for mass surveillance and control of citizens. Also, reports related to the efficiency of video surveillance systems show that these technologies are not really reliable enough, and that they cannot replace the traditional way of detecting perpetrators of criminal acts.



A 2018 Big Brother Watch study, conducted by requesting free access to information of public importance to police departments in the UK, showed that software cameras face recognition, however, are not an effective tool for identifying perpetrators. According to this research, on average (depending on which police management is the word) as much as 95% of the "matches" caused by the use of technology for face recognition misidentified the perpetrator of the criminal act. In addition to issues of efficiency, these technologies have a potentially negative impact on our rights and freedoms, primarily the right to privacy of individuals and other rights such as freedom of assembly, freedom of speech, etc.

An illustration on a teal background featuring a magnifying glass with a wooden handle over several white documents with horizontal lines. To the right, there is a yellow pencil with a red eraser and a blue pencil. A red sticky note with wavy lines is also present.

Case Study

2
NUMBER

CASE STUDY: Belgrade CCTV Huawei system

In the last two years, the Republic of Serbia has also started the processes for the procurement of video surveillance technologies with face recognition programs. Examples of actions of public authorities in planning and establishing surveillance systems show lack of awareness of the importance of personal data protection, lack of knowledge of regulations and obligations of authorities regarding personal data protection when establishing surveillance systems, as well as lack of accountability when it comes to the violation of the Law on Personal Data Protection.

The common conclusion of the Analysis is that the assessment of the impact of the Ministry of the Interior does not fulfill either formal or material conditions prescribed by the Law on Data Protection of persons, and that the Ministry of the Interior should suspend it until further notice

Introduction of a smart video surveillance system

Some of the questions to pose prior to starting strategic litigation:

The basic question that arises in the case of smart video surveillance is its

- necessity,
- proportionality
- efficiency, having in mind the invasiveness of this measure.

Therefore, the data controller, ie the Ministry of the Interior, has an additional obligation to prove the necessity of introducing such a measure, its proportionality in relation to the purpose to be achieved, as well as the efficiency in achieving the objectives of data processing. " To this day, the public has been denied these answers, and in the meantime, the installation and use of these systems by the Ministry of the Interior has begun.

COURT CASE

Will a court case be needed is an open question related to the surveillance system in Serbia and do follow it in upcoming years, as it may end up in European Court on Human Rights.

Independent institutions:

Commissioner for Free access to information and data protection supported questions raised by CSOs and sent questions and asked for clarification, using its highest authority.

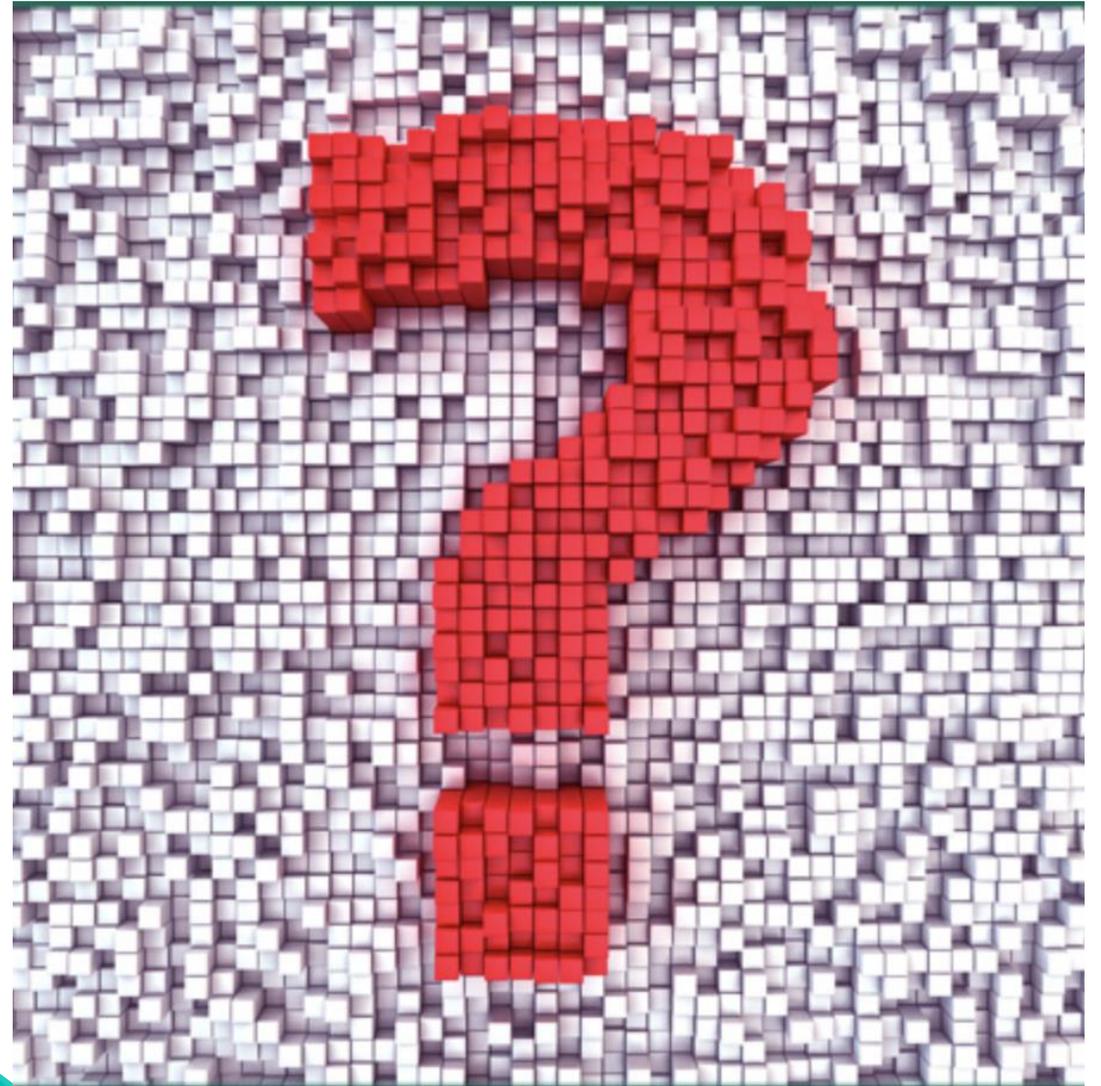
State institutions:

At the moment we have a response from Serbian police with open questions on procurement, as issues with data protection are often linked with contracts that are not publicly published.

QUESTION TO POSE, BEFORE STARTING A STRATEGIC LITIGATION CASE:

Is the court competent, independent
and impartial?

Are the institutions that are dealing
with the issue competent,
independent and impartial?



COVID and data protection

The CORONA19 virus pandemic has caused the need to collect and process data on a large number of citizens in order to suppress the virus, including health data that are of particular importance in this context. This significance is based on the fact that health data are necessary for institutions whose task is to "fight" the pandemic. However, from the point of view of citizens, they represent particularly sensitive data, which are in a stricter regime of legal protection. During the pandemic in Serbia, the possibility of mass electronic processing of such data and creation of unique databases came to the fore. First, the Government of the Republic of Serbia has established a special information system, IS Covid-19, which should contain complete data that are important for monitoring the epidemiological situation, including sensitive health data of all citizens who are in any capacity in the system of epidemiological surveillance.

Also, the existing e-Health portal, which in regular circumstances serves various purposes within the health system, as the primary online system of communication between citizens and health institutions, has received new purposes (including participation in self-assessment tests or receiving virus test results).



The operation of these online platforms is without exception and restrictions in the regime of protection and assessment of legality according to the provisions of the Law on Personal Data Protection LPDP. However, in their functioning, the obligations imposed by this Law have not been fully respected, primarily in the part concerning transparency and respect for the principle of integrity.



As for the legal framework itself that regulates collection and processing data by state and health authorities and institutions during pandemic, in principle it could be said that it is satisfactory. However, the conclusion is primarily based on the fact that the LPDP has taken over all relevant standards and rules of the GDPR

This will be, long term speaking a solid base for research and eventual strategic litigation.

Advantages and Disadvantages of Strategic Litigation

When run well and in the right circumstances, strategic litigation can create significant systemic change that can have a positive impact on a large number of people. However, litigation is not the only tactic or indeed the most appropriate strategy in all circumstances.

Advantages:

- Strategic litigation can be a key tool in changing the law by setting important legal precedent;
- The incidental effects of strategic litigation, such as heightened media coverage and placing an issue in the public forum, can be significant, even if the case itself fails.

Disadvantages:

- Litigation is costly and can be a huge strain on resources. It may also result in an unsuccessful applicant having to pay the legal costs of the opposing party;
- By its nature, litigation is uncertain and therefore does not guarantee a successful outcome for the applicant;
- An unsuccessful case may generate negative publicity that may be damagingly channelled towards the organisation or applicant personally;
- Limitations of appropriate cases, or forums in which to bring them in, may mean strategic litigation is not appropriate for all cases.



Lessons Learned

Periodically conduct the assessment of the strategic litigation case, stakeholders and legal instruments, as well as the final assessment once the case is finalised. This assessment should include steps taken, successfullness as well as possible changes that may led to more visibility and more effective advocacy.



CONCLUSION

Despite the fact that in the last decade the issue of personal data protection has been in the focus of the European Union and the Council of Europe, the General Regulation on Data Protection of the European Union (GDPR) has been adopted, which puts the individual in the foreground.

Having in mind all the above regarding the actions of courts and public prosecutor's offices, it can be concluded that at this moment in Serbia there is no adequate legal protection for victims - victims of misuse of personal data. Criminal protection of victims of the criminal offense under Article 146 of the Criminal Code is neither efficient nor effective. No criminal report filed by the Commissioner in the previous five years has received its epilogue. This is also the main reason why the case law for Article 146 of the CC has not been developed.



For comparison, it is important to note the ECtHR's approach to this topic, the way in which that court considers complaints submitted in violation of Article 8 of the Convention and the standards set by that court in relation to these violations of rights. Thus the ECtHR in the judgment in *Laskey, Jaggard and Brown v. The United Kingdom*, in § 46, in conjunction with Article 8 of the Convention, stated as follows: "When deciding whether to prosecute or not, the State authority is empowered to take into account not only the existing seriousness of the evil committed ... which could potentially be caused in part. "



In this way, the obligation is imposed on states to consider not only the fact whether a person has already suffered harmful consequences, but also to pay special attention to potentially harmful ones when considering whether a person's right to respect for private and family life has been violated. Possessions that can occur.

Also, with regard to this article, the ECtHR has imposed positive obligations on member states to respect private and family life.

The Grand Chamber of the ECtHR, in the judgment of *Dickson v. The United Kingdom* stated the following in §70 of the judgment: “In addition to the primarily negative, there may be positive obligations of the state inherent in the effective respect of private and family life. These obligations may include taking measures aimed at ensuring respect for private and family life in the relations of individuals themselves.



These are just two of a number of ECtHR judgments that have described violation of the right to privacy of individuals. The standards imposed by that court, the way in which this issue needs to be approached and the context in which it is necessary to consider the existence of a violation of an individual's rights go far beyond what is taken into account in Serbian courts. It is important to note that the ECtHR also pays great attention to civil proceedings that have as their subject compensation for violation of the right to privacy of citizens, pointing out that criminal protection is not the only legal path that is considered effective and efficient. The set standards regarding the protection of the rights of the injured party change in relation to the type of procedure in which protection is sought.

On the contrary, that court does not make any distinction when it comes to the standards that must be met in criminal or civil proceedings, but insists that the injured party obtain all the guarantees provided by Article 8 of the Convention, to the extent and in a way that reasonable doubt, may conclude that the protection provided was effective and efficient. Based on all the data that I collected while preparing for this lecture, it seems that the competent authorities (Ministry of Interior and Public Prosecutor's Office) are not too interested in prosecuting the perpetrators of this crime. If this practice continues, the absence of pre-investigation and investigative actions, non-undertaking of legal obligations for the purpose of criminal prosecution of perpetrators and passive attitude of institutions will certainly lead to systemic violations of the right to protection of private and family life of individuals due to ineffective and ineffective investigations.

The practice of misdemeanor courts in the application of the new Law on Personal Data Protection has yet to be developed. The practice of the Commissioner in the first year of implementation of the new LPDP was more focused on the education of taxpayers, relying on warnings when the application of competencies reveals irregularities in the application of LPDP. We believe that this approach was justified in principle, taking into account that the culture of personal data protection has not yet taken root in Serbia, and that lawmakers had less time to harmonize than was the case in the European Union, after the adoption and until the beginning. application of the General Regulation on Data Protection. However, as a year and a half has passed since the beginning of the implementation of the new ZZPL, and there are fewer and fewer reasons to call the law "new", but also due to the fact that the matter regulated by ZZPL is not new in the Serbian legal system.

During the period, the practice of the Commissioner should be more oriented towards initiating misdemeanor proceedings, ie punishing in cases when violations of the Law occur. Despite the low penalties provided, we believe that putting penalties in place can create an additional reason to improve the situation in this area, both in the public and private sectors. Regarding the application of regulations in practice, there is a complete lack of respect for the principles arising from the concepts of "privacy by design" and "privacy by default ". Therefore, it is necessary to insist on the idea that respect for privacy, and in connection with that, protection of personal data, is not only the fulfillment of legal formalities, but that it is necessary to essentially integrate privacy as a value in every action of the competent authorities.



In that sense, one of the explanations for this situation is certainly that this topic is still not close enough to the employees in the relevant institutions (both among the issuers of bylaws and employees working on their implementation).

Therefore, in this area, we should work on raising awareness, but also education on specific topics, depending on the work that each employee within the system performs.



While developing a strategic litigation case of data protection, one can rely on principles and refer in the writing material submitted to courts or relevant institutions:

1. Restrictions in relation to the purpose of processing, in conjunction with the principle of minimization
 2. Violation of the principle of storage restrictions,
 3. Honesty and transparency
 4. The principle of integrity and confidentiality
- 

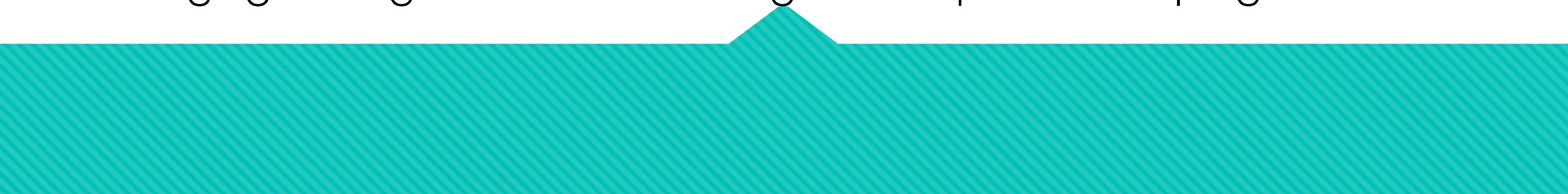
TASK 3

Work in groups, create a personal data protection case and get back to the lecturer with at least two strategies how to build up a case.

TASK 4

Further correspondence on any of the medias, starting from email milan@antonijevic.eu or via twitter @antonmilan or even instagram, the very same @antonmilan is more than welcomed.

MULTIPLE CHOICE QUESTION:
STRATEGIC LITIGATION IS:

- A. Shortterm litigation aimed at helping a person in need
 - B. Longterm litigation aimed at helping larger groups that are endangered or may be endangered by the breach of the law without changing the legislation
 - C, Longterm litigation aimed at helping larger groups that are endangered or may be endangered by the breach of the law with changing the legislation as the final goal and public campaign.
- 

Additional literature, reading material:

<https://digitalfreedomfund.org/facial-recognition-virtual-design-jam-brainstorming-litigation-to-challenge-use-of-facial-recognition-software/>

<http://www.a4id.org/wp-content/uploads/2016/04/Strategic-Litigation-Short-Guide-2.pdf>

Not to forget:

- Creativity, fast and adequate reaction, as well as the periodic assessment of the case is a precondition for a successful strategic litigation case.

“

THANK YOU FOR YOUR ATTENTION

BE CREATIVE

Milan Antonijevic

milan@antonijevic.eu tw: @antonmilan