



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

# **Privacy & the media. Traditional and emerging protections in an online world.**

**IP/IT MEDIA & TELECOM - Workshop:**

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**National Report of Argentina**

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## 1. Privacy rights

Under Privacy right, we understand the right not to have information about a person to be disclosed to other persons without consent of the person which the information refers to.

- 1.1. Are privacy rights statutory rights or are these case-law based? Privacy rights are governed by several laws and regulations, including the Argentine Constitution, international treaties with constitutional hierarchy, and several local laws.
- 1.2. What type of information (including pictures, sounds, etc.) would be covered by the concept of “privacy rights” in the legal system of your country? The Argentine Supreme Court of Justice determined that Article 19 of the Argentine Constitution *“...affords legal protection to a sphere of individual autonomy comprising the feelings, habits and customs, family relationships, economic situation, religious beliefs, mental and physical health, and –in brief– the acts, events and data that –based on the life styles accepted by the community– are reserved to the individual, and whose knowledge and release by third parties would entail an actual or potential danger for the individual’s privacy. Strictly speaking, privacy rights comprise not only the domestic sphere, the family group and friends of an individual, but also other aspects of the individual’s spiritual or physical personality, such as physical safety and image, and no one may trespass the private life of an individual or publish areas of the individual’s activity that should not be released without the individual’s consent or the consent of the family members authorized to do so. Any such publications may only authorized by law, on proviso that there is a higher interest to safeguard the freedom of third parties, to protect the society and good manners, or to punish criminal acts...”*<sup>1</sup>
  - 1.2.1. Would the information included in that concept, or the extent of the privacy rights, depend upon the celebrity of the person, or upon other elements? Please describe briefly. The protection afforded is greater if the subject to libel and slander is not a celebrity. Indeed, as decreed by the Argentine Supreme Court in re: “*Costa*”,<sup>2</sup> “ordinary” people are more vulnerable than public officers or

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<sup>1</sup> Fallos: 306:1892.

<sup>2</sup> Fallos 310:508.



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celebrities (models, actors, etc.), because the latter have an easier access to the media to reply to potentially false allegations.<sup>3</sup> Furthermore, for public officers, the legal protection could be even looser on the ground that there is a legitimate public interest to know some affairs of the people in charge of the government.

1.2.2. Would privacy rights also apply in relation to legal persons (vs. physical persons)? **Although legal persons have no privacy rights, they have rights to economic secrets and to confidentiality pursuant to Law No. 24.766, Executive Order No. 667/2001, and the Criminal Code.**

1.2.3. Would privacy rights encompass private information made available only to some chosen persons (authorized recipients)? So, for instance, can disclosure to third parties, by one of the authorized recipients of the private information, be part of the privacy rights (e.g. disclosure of private correspondence, private phone calls, information shared on social media, etc.) **Yes, please refer to the answer to question 1.2.**

1.3. Is there a specific status for “fictional use” of information related to an individual? And are disclaimers sufficient to allow such use? **The uses of information are governed by the ordinary legal provisions in force in our country. In principle, a disclaimer would be enough for fictional use of the information.**

## 2. Freedom of speech

2.1. Is there a on the one hand a statutory/treaty based freedom or constitutional recognition of “Freedom of speech” or on the other hand is that freedom based on case-law. **Freedom of speech is regulated by the Argentine Constitution, by the international treaties with constitutional hierarchy, and by several laws.**

2.2. If it is a statutory/treaty/constitution based freedom, is it based on domestic or supranational law? **Both.**

2.3. Describe the main characteristics of the “freedom of speech” as recognized in your jurisdiction:

2.3.1. Beneficiaries: **every inhabitant of our country, and all foreign citizens.**

2.3.2. extent of the freedom of speech: **while there are no absolute rights in our country, the extent of the right to freedom of speech is ample, censorship prior to**

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<sup>3</sup> Vibes, Federico. *Alcances y límites de la libertad de expresión en Internet*. LA LEY, February 14, 2013. LA LEY 2013-A, 805. AR/DOC/197/2013.



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publication is strictly banned, and censorship should be applied reasonably. This must be extended to the expression of information, ideas, and opinions. If a third party feels affected by somebody else's statements, he/she may bring lawsuit to resolve upon the liability of the person who pronounced them.

2.3.3. Exceptions: protection of lower rights and overtly illegal cases, among others.

2.3.4. specific status for press (including online press)? The Argentine Supreme Court of Justice has issued two judgments regarding freedom of speech. The doctrine in "*Campillay*" sets forth that a member of the press releasing information that could be deemed slanderous shall not be liable thereof in the following cases: 1) if it does not reveal the identity of the potential individuals accused; 2) if it uses verbs in the conditional; or 3) if it attributes the content of the information to the relevant source. In the second judgment, the Supreme Court presented the doctrine of "real malice", whereby the plaintiff must prove that the defendant acted with awareness of the falsehood or with gross want of care, and that in these cases, a distinction must be drawn between public officers and celebrities on the one hand, and private individuals, on the other. For the former, the factors for attribution of liability and, consequently, the assignment of tort liability are limited to those which may be comprised by the concept of "real malice", with exclusion of factors such as strict liability and assumptions of guilt. When the prejudiced party is a private individual, liability shall be determined under the general rules set forth by the Civil Code.

3. Hierarchy between Freedom of Speech on one side and privacy rights on the other side.

3.1. Under the law applicable in your jurisdiction, is there a clear hierarchy between freedom of speech on the one hand and privacy rights on the other? While both rights have the same hierarchy, we may say that freedom of speech prevails over the right to honour and to privacy, subject to the outcomes of the lawsuit to determine liability that might be subsequently brought.

3.2. What would be the most significant criteria allowing freedom of speech or privacy rights to prevail over the other (e.g. public interest argument)? Freedom of speech would prevail over inalienable and truly personal rights in the analysis of the acts of public officers. Conversely, the latter would prevail in the defence



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of the rights of minors or in cases of overtly illegal contents (such as child pornography).

4. Remedies available in your jurisdiction to protect individuals against disclosure of information belonging to their privacy

4.1. Are there pre-emptive remedies to avoid disclosure of such information before disclosure occurs? Describe briefly the main remedies available. These remedies are not specifically regulated, but they are available. Please refer to the answer to question 4.2 herein.

4.2. Are “gagging orders”<sup>4</sup> or “super injunctions”<sup>5</sup> as known in the UK known under the legal system of your country? Describe briefly their main characteristics. Although they are not expressly regulated, precautionary measures and injunctions aim at avoiding the injury through a court order that would prevent the damage from being caused, or else, to cause the damage to cease. Injunctions are those that entail the final satisfaction of the requirements of the claimant (on which ground it is deemed an autonomous measure), and their validity and continued enforcement do not depend on the simultaneous or subsequent filing of a complaint. This court measure is aimed at affording the injured party an immediate restraining protection, which in this particular case, has the purpose of ceasing the illegal act of search engines which, voluntarily or involuntarily, contribute to the worsening of the damage sustained by the victim. The requirements to admit injunctions established by legal scholars and by most of the court precedents are as follows: (i) immediacy of the need for legal protection; (ii) the right invoked must be highly substantiated; and (iii) the claimant must deposit a surety to guarantee the rights that might potentially be impaired. Precautionary measures require the existence of a probable danger that the final legal protection that the claimant awaits from the judgment in the main proceedings shall not be indeed realized (*periculum in mora*); in the case of injunctions the same applies, in terms of the patent immediacy of need for legal protection. The purpose is to prevent that the delay in the final judgment may frustrate or minimize the right at issue during the proceedings to substantiate the enquiry and to punish the behaviour that is objected to at the court. As known, in precautionary measures, the *fumus bonis iuris* entails the proof of the probable legal bases of the rights invoked by the claimant, which in this case only requires “basic general proof through an

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<sup>4</sup>See for details: [http://en.wikipedia.org/wiki/Gag\\_order#United\\_Kingdom](http://en.wikipedia.org/wiki/Gag_order#United_Kingdom).

<sup>5</sup> See for details: [http://en.wikipedia.org/wiki/Injunction#UK\\_superinjunctions](http://en.wikipedia.org/wiki/Injunction#UK_superinjunctions).



information process.” This is so because precautionary measures per se do not require the final and full proof of the rights invoked. However, because injunctions require urgent protection and force the court to resolve upon the issues in an expedite fashion, the rights invoked must be highly substantiated and there must be a high probability that the claim will be admitted (emphasis added).<sup>6</sup>

- 4.3. Are there other post-disclosure remedies, such as for example damage claims, rectification claims, right of answer? Describe shortly. Yes, damage claims may be brought by the claimant together with the complaint. In order for claims for material damages to be admitted, the claimant must prove the unlawful behaviour, the factor for the attribution of liability, the existence of an actual damage, and an effective causal link between the act and the damages claimed. The claimant may also petition the publication of the court decision by one of the public media. The proceedings are initially brought before a first-instance court, which shall issue its decision after the evidentiary period. The first-court decision may be appealed before the Federal Court of Appeals in Civil Matters, which shall uphold or overturn it. The appeal decision may be in turn appealed before the Argentine Supreme Court of Justice, which shall analyze whether certain requirements are met for the examination of the appeal. The right of reply to inaccurate and offensive statements is afforded by Article 14 of the American Convention on Human Rights, which has constitutional hierarchy and is incorporated into the Argentine Constitution. It may not be exercised if someone merely disagrees with an opinion or idea.
- 4.4. In the case of damages, how are they calculated? The damages are estimated by the claimant upon bringing lawsuit and are determined by the Court based on the proofs available in the proceedings, as well as on the analysis made by the court when entering judgment on the scope of the damage. The amount of the damages shall be associated with the scope, the dissemination and the permanence of the information, and with whether it impaired property or non-property rights. For property rights, the damage sustained must be fully proved, whereas non-property rights are subject to more flexible proof.
- 4.5. In case of disclosure of private information, who can be held liable for damages, especially online? In our country, the owner of the website posting the information online shall be held liable; in

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<sup>6</sup> Vibes, Federico. *Medidas autosatisfactivas y derecho al honor en Internet*. LA LEY, February 24, 2014. 9 LA LEY 2014-A, LA LEY, February 24, 2014, 9. AR/DOC/4762/2013.



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the case of social media, the creator of the offensive content. Regarding the liability of search engines, please refer to the answer to question 6.2. For contents published in the press, the author and the editor shall be held liable, and on TV and radio, the author and the broadcaster.

4.6. Are there special defences to a cause of action for information disclosed by the press/ media? See the doctrines in re: “*Campillay*” and the principle of "real malice", described in the answer to question 2.3.4.

4.6.1. As part of your answer please explain what is range of news information organisations is covered by the definitions press/ media?

4.6.2. Is there a specific protection offered to informants/sources? Yes, Article 43 of the Argentine Constitution sets forth that “*the secrecy of informants/sources shall be preserved.*”

4.7. Are the principles described in your answers above also applicable to the online world? Is there any specific case-law in your country relating to social media, and if so please summarise this? Yes, in fact, Law No. 26.032 establishes as follows: “the search, reception and release of information and ideas of all kinds through the Internet shall be deemed subject to the constitutional guarantee that protects freedom of speech”. The main court decision is the one described in the answer to question 6.2.

4.8. Are there specific remedies against disclosure of information that (could) damage an individual reputation (such as slander or libel)? Describe these remedies briefly. Please refer to the answers to questions 4.2 and 4.3.

4.9. Forum and applicable law

4.9.1. Describe shortly what rules exist in your jurisdiction for the determination of the forum and the applicable law. The rules applicable are Argentine laws, and the jurisdiction of the court is based on the place where the facts took place or the domicile of the defendants, at the discretion of the plaintiff.

4.9.2. Are there specific rules for breaches caused online (when the information is accessible from different jurisdictions)?  
**No.**



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- 4.10. From your experience, what reforms should be made to the legal system of your country to better protect individual privacy, if any? A specific law should be passed to regulate on the information posted on the Internet.

## 5. Interplay between data protection rules and privacy rights

- 5.1. Summarise how does data protection law in your jurisdiction protects privacy or other personal data being used in online media? **The protection of personal data in online media is not specifically regulated. The closest regulation is Law No. 25.326, whose Section 5, establishes that the publication of personal information is illegal when the individual has not authorized such publication freely, expressly and with informed consent, which shall be granted in writing or through similar means, according to the circumstances of the case.**

- 5.2. Is there an effective a right of opposition to collection of data?

**When personal data are collected, further to the consent mentioned above, the owners of the data must be informed in advance of the prospective uses thereof, the potential recipients or recipient groups; the existence of an archive, record, data bank – either in electronic format or otherwise– and the identity and domicile of the person in charge; the effects of providing such data or of refusing to do so and of the provision of inaccurate data; and the rights to access, amend and remove data by the owner thereof, among others. No individual may be forced to furnish sensible information, except in very specific cases.**

## 6. Right to be forgotten

- 6.1. Is there a statutory or case-law based “right to be forgotten” in your jurisdiction (whether under domestic or supranational law)? Describe it briefly. **The above mentioned Law No. 25.236 provides for the protection of data when there is a presumption of false, inaccurate and outdated information, and bans the publication of data whose registration is banned by said Law, with a right to demand the rectification, removal, confidential handling or updating of the information at issue. Section 26.4) of Law No. 25.236 refers to the financial and commercial data of the individuals and sets forth that they may be kept on databases for 5 years since the date of default. After that term, the individual may request the removal of such information.**





- 6.2. Is there relevant case law in your jurisdiction regarding the right to be forgotten and/or are there other guidelines (whether under domestic or supranational legal procedure) for a successful claim under the “right to be forgotten”. Yes, the judgment in re: ***“Rodríguez, María Belén vs. Google Inc. on damages”***, entered by the Argentine Supreme Court of Justice on October 28, 2014. In this case, a model brought suit against Internet search engines (Google and Yahoo) for unauthorized commercial use of her image in association with erotic and pornographic sites. The Supreme Court dismissed the complaint by majority opinion, and ruled as follows:

*“The eventual liability of search engines must not be examined under the rules of strict liability, irrespective of negligence. Instead, it must be examined under the principles of liability due to negligence.”*

*“Freedom of speech would be impaired if strict liability would be admitted, on the ground that strict liability inherently disregards the idea of negligence and, consequently, the punishment of the party that is held liable.”*

*“Based on the foregoing, there are certain cases in which the search engine might be held liable for contents that it had not created: this would be the case when the engine has effective awareness of the unlawfulness of the content, and if that awareness was not followed by diligent behaviour. This has been also maintained by the countries that exempt search engines from liability. After the search engine has gained effective awareness of the unlawful contents of a website, the “detachment” of the engine regarding those content disappears and, if the search hits are not blocked, the engine shall be held negligently liable. In our country, Section 1109 of the Civil Code is applicable in this case.*

*“In absence of a specific regulation, we must set a rule to clearly distinguish between cases in which the damages are patent and gross, and those in which the damages are uncertain, dubious or subject to examination, which has been expressly ruled in other countries (Section 16 of Executive Order 7, dated 2004, Portugal). The unlawfulness of certain contents is patent, such as child pornography, data that enable the commission of crimes or instruct on how to perform them, those which endanger the life and safety of one or more individuals, those which make an apology for genocide, racism or discrimination with open*



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*perversion and call to violence, those which impair or warn of ongoing court enquiries that must be secret, as well as those which impose offensive lesions to honour, notably false manipulation of images, or those which clearly and undoubtedly imply grave violations to privacy by showing images of acts that – by nature– are inherently private, even if they are not necessarily sexual. The unlawfulness of these contents –under tort or criminal law– is undoubted and is directly visible when visiting the website as effectively proved by the injured party or, if relevant, by any interested party, without any need for further examination or clarifications. On the contrary, in cases in which the offensive contents imply potential lesions to the honour, or otherwise, but which require a clarification that must be examined or determined by the courts or by an administrative authority, the search engine must not be demanded to replace competent authorities and, least of all, courts of law. Consequently, in these cases the notification of the competent court or of the relevant administrative authority is required, and the mere communication by the individual that believes to be damaged or by another interested party shall not suffice.”*

- 6.3. Did the view on the right to be forgotten change in your jurisdiction due to the European Court of Justice Case in Google Spain v. AEPD and González (C-131/12)? Is there any case law arising from this decision in your jurisdiction? Please refer to question 6.2 herein.
  
7. Are there other aspects to take into consideration in your jurisdiction in relation to freedom of speech, the privacy right and the right to be forgotten? No.