



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

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

Commission(s) in charge of the Session/Workshop:

IP/IT MEDIA & TELECOM

LONDON, 2015

National Report of AUSTRIA

Wolfpaul FINDER

Schwarz Schönherr Rechtsanwälte KG

Parkring 12

1010 Wien

+43 (0) 1 512 42 43

finder@schwarz-schoenherr.com

General Reporters:

Jerome Debras, Woog & Associés, Paris, France

jdebras@woogassociés.com

Cristina Hernandez-Marti Perez, Hernandez-Marti Abogados, Barcelona,

Spain

cristina@hernandez-marti.com

18 January 2015

1. Privacy rights

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

1.1. Are privacy rights statutory rights or are these rights case-law based?

The Austrian jurisdiction is based on the concept of continental statutory law. For this reason the legal framework in Austria mainly consist of statutory rights. This is also the case with respect to the privacy rights. Most of them are written down in the Austrian Civil Code, the Austrian Penal Code or specific legal materials such as the Austrian Code for the Protection of Data or Austrian Copyright Act. Notwithstanding the foregoing legal standards such as the European Convention of Human Rights or the European Charter of Fundamental Rights have normative effect as well.

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 concept is quite broad, as various aspects of a “privacy right” are covered by our legal framework. A general right of personality, which encompasses many aspects of the personality, has been codified in the Austrian Civil Code. In addition to a “privacy right” the notion of “data” includes any information that indicates to a person – so to say individual personal data. Limitedly also indirect personal data are qualified as “data”.

The individual name and pictures e.g. are protected in relation to the freedom of the press and the restriction herein. Sounds e.g. refer in many aspects to the copyright framework and the protection herein, which might exceed the scope of “privacy rights”. In certain aspects the abuse of recording or listening devices according to the Austrian Criminal Code might also be qualified as a privacy right (as the relation to copyright might be seen much to far-reaching).

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 decision of Hannover vs. Germany (2004) with respect to privacy rights (referring to the publication of pictures) finds its scope of application in Austria with reference to the ECHR as well. In contradiction to the public interest weighing of the protection of the pictures of minors, politicians – in many cases - as persons of public interest are forced to accept a lower standard of privacy and the right adhering thereto as the ordinary citizen. The press as “public watchdog” may carve out privacy rights much more vehemently. Notwithstanding the foregoing politicians or any other person of public interest do not have to accept to be put in touch

with unwanted public presence, such as merchandising e.g., in this case reimbursement claims may be brought to court.

1.2.2. *Would privacy rights also apply in relation to legal persons (vs. physical persons)?*

Interestingly in the field of data protection law (and therein the Austrian Code for the Protection of Data) in addition to physical persons also legal persons are deemed to fall within the scope of application. This is quite a country specific application of law, most of the European countries did not opt for such an expansion of scope.

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.)*

If a person is authorized to use the private information in a certain way and accepts the scope of authorization no infringement occurs. In case this scope of authorization is exceeded the person affected by the infringement may claim e.g. for damages.

In a broader sense with respect to the scope of a general public it is to say that in general use of the respective legal norms a certain threshold of public has to be exceeded. The authorization of use (and the use within the authorized scope) of certain data or pictures or work does not violate the concept of privacy rights. In any case, however, the concept of moral (“*Sittenwidrigkeit*”), is the limit of any authorization (which refers to the responsibility of the authorized).

1.3. *Is there a specific status for “fictional use” of information related to an individual? And are disclaimers sufficient to allow such use?*

If a clear individualization regardless of fictionality is possible the legal framework for privacy rights applies. Nonetheless in case of freedom of art a balancing of interference of rights has to be done.

2. Freedom of speech

2.1. *Is there 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 as statutory based freedom is laid down in Art 10 European Convention on Human Rights (ECHR) and the Austrian Constitutional Act (“*Staatsgrundgesetz*”). Both legal norms overlap and correlate; in addition to that the

European Charter of Fundamental Rights is effective due to the direct applicability in Austria. These three fundamental legal norms determine freedom of speech in Austria.

The Case Law of the Austrian Constitutional Court, the European Court of Justice and indirectly the European Court of Human Rights has considerable impact as well.

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

As mentioned above this freedom is based on the constitution and on supranational law, which has been implemented already (and therefore is directly/indirectly applicable).

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

2.3.1. beneficiaries;

Any individual person (there are no restrictions), with respect to entities there are manifold restrictions.

2.3.2. extent of the freedom of speech;

Speech shall be free within the limits prescribed by law. Freedom of speech includes the right to receive and to communicate news and ideas without interference of public authorities and without regard to national borders.

2.3.3. exceptions;

Limitations according to Art 10/2 ECHR, with respect to proportionality

2.3.4. specific status for press (including online press)?

Any form of preventive control of the press by the state is prohibited (pre-censorship). Freedom for press-entrepreneurs and the process of collection and distribution of information is also included. Editorial confidentiality is also part of this concept. These fundamental rights do also apply to the online press.

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?

With respect to Art 10 ECHR, freedom of speech may be limited by public authorities for the protection of the reputation or the rights of others or in case of protection of confidential information. This balancing is part of the principle of proportionality. A clear hierarchy does not exist. Such a proportional approach can also be seen in the correlation of the Austrian Code for the Protection of Data and Art 8 ECHR.

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)?

- a) Prevailing of freedom of speech: “public watchdog” approach of the press (in correlation with person of public interest); e.g. designation of a politician as “Kellernazi”¹
- b) Prevailing of privacy rights: value judgements in excessive form lead to a restriction of the freedom of speech

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.

- a) Claims for cease and desist (proof of risk of recurrence or breaching by the claimant necessary)
- b) Based upon a) under certain circumstances preliminary injunctions in case of e.g. data protection infringements or intellectual property infringements.

4.2. Are “gagging orders”² or “super injunctions”³ as known in the UK known under the legal system of your country? Describe briefly their main characteristics.

The concept of “gagging orders” or “super injunctions” is discussed amongst informed but has not been implemented in the legal framework. Nonetheless in certain legal areas the public may be excluded from the proceedings (e.g. trade

¹ https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20031113_AUSL000_000BSW39394_9800000_000

² See for details : http://en.wikipedia.org/wiki/Gag_order#United_Kingdom

³ See for details: http://en.wikipedia.org/wiki/Injunction#UK_superinjunctions

secrets with respect to the Austrian Unfair Competition Act or in case of minors being victims of crimes). Strictly speaking this is – however – not a gag order.

4.3. Are there other post-disclosure remedies, such as for example damage claims, rectification claims, right to an answer. Describe shortly.

- a.) Damages claims (in case of fault)
- b.) Right of reply or equivalent remedies (with official publication) e.g. according to the Austrian Media Act
- c.) Right of publication of the judgment e.g. according to the Austrian Copyright Act or the Austrian Unfair Competition Act
- d.) Remedies against reputation-damaging statements according i.e. Austrian Civil Code, Austrian Copyright Act, Austrian Media Act or Austrian Unfair Competition Act
- e.) Right to request information, right to correction and right to deletion according to the Austrian Code for the Protection of Data

4.4. In the case of damages, how are they calculated?

E.g. with respect to the Austrian Code for the Protection of Data the calculation of damages is split. With reference to the Austrian Civil Code damages are refunded in the amount of direct economic loss (in case of fault).

In addition to that – nonetheless – by way of use of sensitive data immaterial damage – solely in relation to the Austrian Code for the Protection of Data (provided that exposure embarrassment might be given) can be refunded (this however highly restrictive). The amount of compensation relates to the appropriateness.

4.5. In case of disclosure of private information, who can be held liable for damages, especially online?

With respect to the Austrian Code for the Protection of Data the principal (the one who decides, that personal data shall be processed) can be held liable.

In addition to that the liability of a provider has been (quite restrictive) codified in the Austrian E-Commerce Act. The regulations in Germany are much more restrictive with respect to surveillance obligations in this case.

4.6. Are there special defences to a cause of action for information disclosed by the press/media?

- a.) The concept of editorial confidentiality according to the Austrian Media Act

- b.) Privileged status of the media within the Austrian Code for the Protection of Data, whereby Media companies, media services and media employees are under no obligation to provide information with respect to request for information, deletion or correction relating to the published content

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

According to the Austrian Media Act all forms of mass communication are encompassed. The Austrian Media Act is technology-neutral. For this reason print-media, electronic media (such as e.g. broadcasting, websites) and all other audiovisual media are included. The main characteristic is that identical reproduction and distribution has to be insured by the respective media, the scope of application is determined hereby.

4.6.2. Is there a specific protection offered to informants/sources?

According to the Austrian Media Act, informants/sources are protected by the editorial confidentiality. This has been created as a right to refuse to give evidence before courts and administrative bodies. An evasion thereof is prohibited.

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 summarize this?

According to my knowledge, no specific rules and no specific case law to the subject of online media exists. It is of much greater importance in which country/legal area the media, online available, may have set the infringement.

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.

- a.) Damages claims (in case of fault)
- b.) Right of reply or equivalent remedies (with official publication) e.g. according to the Austrian Media Act
- c.) Right of publication of the judgment e.g. according to the Austrian Copyright Act
- d.) Remedy against reputation-damaging statements according i.e. Austrian Civil Code, Austrian Copyright Act, Austrian Media Act or Austrian Unfair Competition Act

- e.) Right to request information, right to correction and right to deletion according to Austrian Code for the Protection of Data
- f.) Protection against slander according to the Austrian Criminal Code

4.9. *Forum and applicable law*

4.9.1. *Describe shortly which rules exist in your jurisdiction for the determination of the forum and the applicable law.*

With respect to data protection neither the individual determination of the forum and nor the individual determination of the applicable law is permitted. According to the European Data Protection Directive (95/46/EG) the substantive law of the member state applies, in which the person responsible to the use of data has the principle place of business for the purpose of the respective use. For this reason no choice of law is permitted. With respect to the determination of the forum the European Data Protection Directive determines that the member states need to guarantee sufficient remedies which might be brought before a court. The Austrian Code for the Protection of Data provides concreteness as with respect to matter of data protection an exclusive place of jurisdiction either at the place of the plaintiff's or the defendant's domicile is mandatory.⁴

4.9.2. *Are there specific rules for breaches caused online (when the information is accessible from different jurisdictions)?*

In case of data infringements according to the Austrian Code for the Protection of Data the rules listed in 4.9.1. hereabove apply. In case of reputational damage the respective provisions aim to refer to the target audience of the respective website infringing. All this is based upon Art 5 of the European Regulation on Jurisdiction and the Enforcement of Judgements.

4.10. *From your experience, what reforms should be made to the legal system of your country to better protect the individual's privacy, if any?*

Judges should be trained and used much more subject specific (especially in this sensitive area with enormous and rapid evolution due to the technical change). The legal insufficiency with respect to the lengthy path of legislation has to be cushioned by case – law (which can solely be created if judges are permanent and intensively trained).

⁴ <http://www.wirtschaftsanwaelte.at/rechtswahl-und-zustaendigkeit-im-grenzueberschreitenden-datenschutz/>

5. Interplay between data protection rules and privacy rights

5.1. Summarize how does data protection law in your jurisdiction protect privacy or other personal data being used in online media?

The Austrian Code for the Protection of Data allows “the media” (and therefore online media as well) to use data directly for journalistic activities. The use of data for journalistic activities – however - is admissible in so far as is necessary to satisfy the information role of “the media” in exercising the fundamental right of freedom of speech/press under Art 10 ECHR. In addition to that the privacy rights of the Austrian Media Act have, in any case, to be respected.

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

Any aggrieved party has, if the use of data is not provided for by law, the right to object to the use of its data for breach of legitimate specific confidentiality interests. In case the data are publicly accessible, such an objection may be filed without individual justification. All data shall be deleted within a period necessary for the purpose of the processing.

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.

An explicit “right to be forgotten” does not exist. Legal discussions on that topic have – nonetheless – been led; in particular the term “excessive monitoring trends” has been used by the Austrian Constitutional Court and the Austrian Supreme Court in several judgments. E.g. the law about the retention of data (the storage of data of citizens without a particular reason) has been repealed by the constitutional court of Austria. With respect to the specific case discussed herein the impact might be far reaching as Google has been qualified as “principal” in accordance with the Austrian Data Protection Act. The individual’s right to request that outdated or incorrect information shall no longer be made available in the internet does unquestionable lead to further developments in the current case law.

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”.

The Austrian Society for Data Protection supports the request of extinction of data against Google. In case such a request is rejected by Google, persons affected may apply to the Austrian Data Protection Authority. Notwithstanding the foregoing, lots of claims between private individuals may be brought before general jurisdiction courts.

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?*

The case Google Spain v. AEPD has - undoubtedly - fueled the Austrian discussion about the extinction of data in an online world. At the moment there is no case law with respect to that issue, nonetheless, Google concedes in individual cases.

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?

The discussion whether privacy rights might be seen as intellectual property rights is ongoing, controversial but fruitful. The question whether privacy rights might be released from the holder of rights and exist as independent and marketable legally protected right is still raised among informed. Unambiguous decisions of the supreme court are still outstanding.

8. Bibliography

- **Holoubek, Kassai, Traimer:** *Grundzüge des Rechts der Massenmedien*, 3. Auflage, Springer, 2006
- **Knyrim, Rainer:** *Datenschutzrecht*, Manz, 2003
- **Wiebe, Andreas:** *Wettbewerbsrecht*, Facultas, 2010