INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

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

IP/IT MEDIA & TELECOM- Workshop:

LONDON 2015

National Report of Belgium

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10 March 2015

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 the which the information refers to.

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

In Belgium, the privacy rights find their origin both in treaties, as in the Constitution.

The Constitutional right on privacy has only been implemented in 1994. Since then, Article 22 of the Belgian Constitution stipulates explicitly that everyone has the right to respect for his private and family life. This right includes the right not to have information about a person to be disclosed to other persons without the consent of the person, which the information refers to.

Before 1994, the protection of privacy rights could be found in Article 8 of the European Convention on Human Rights (hereinafter the ECHR), Article 17 of the International Covenant on Civil and Political Rights (hereinafter ICCPR) and Article 16 of the Convention on the Rights of the Child, as in the Law of 8 December 1992 on the protection of the personal life with regard to the processing of personal data (hereinafter the Privacy Law).

Although the protection of privacy rights is provided by the Constitution, and the ECHR, the extent and the scope of the privacy rights is developed trough the case-law. For example, the courts have consistently determined that the right to be forgotten is included in the right to respect for one's private and family life.

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?

Privacy rights relate to any type of information by which a person can be identified, regardless to the medium or form used.

A definition of personal data can be found in Article 1 of the Privacy Law, which covers any information to an identified or identifiable natural person. An identifiable person is one who can be identified directly or indirectly, in particular by reference to an identification number or one or more factors specific to his physical, psychological, mental, economic, cultural or social identity.

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.

Yes, the celebrity of a person can have an influence on the extent of that person's privacy rights. It is generally assumed that public figures limit their privacy rights when they expose themselves to the media.

Given that they seek a certain advantage by placing themselves in the spotlight, it is considered that they waive certain aspects of their private life to a certain extent. The right of freedom of expression, freedom of the press and the right on information of the public can trump the privacy rights of a public person. The Court of Brussels judged in this regard that the image of a public person can be used for information purposes, notwithstanding the explicit protest of that person.

However, it is important to determine if the private life of a celebrity, or the aspects thereof which are disclosed, is connected to his public appearance.

For example, the Court of Appeal of Gent held in 2001 that the sexual orientation of a person is part of the essence of that person's privacy rights (Ghent 12 June 2001, *AM* 2002, 169). The case in question concerned an article in which members of a boy band were called homosexual. The author of the article blamed the members of the boy band of hypocrisy since they tried to maintain a heterosexual image for commercial purposes.

The court held that a distinction must be made between a character created on stage and the actual identity of that person. The outing of a person as homosexual, without his consent, is considered as a violation on that person's privacy rights.

In this regard, the Hannover case of the European Court of Human Rights is worth mentioning as well, since the Court makes a distinction between matters of public interest and matters in which the public is interested. If the information, which concerned in this case a photo of princess Caroline Von Hannover, is not in any way relevant to matters of public interest, the photo could not be published without her consent (ECHR 24 June 2004, Von Hannover vs. Germany, www.hudoc.echr.coe.int).

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

Legal persons enjoy some privacy rights, such as the right on its name and the protection of its reputation. A legal person however cannot invoke a portrait or image right.

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.)

The disclosure of private information by authorized recipients without the consent of the disclosing party, can constitute a violation of the privacy rights of the latter. A possible infringement of the privacy rights of the disclosing party will depend on the medium trough which the information is disclosed.

(i) Telephone calls, letters, e-mails

In the Belgian case-law, it has been held that the recording and disclosure of a telephone conversation, by one of the parties who took part in that conversation, does not constitute a violation of the privacy rights of either party. The courts rule that the recipient cannot violate his own privacy rights, nor the rights of the disclosing party since the latter has voluntarily shared this information.

This point of view has been confirmed by the Supreme Court in 2001 (Cass. 9 January 2001, *Comp*. 2001, 199).

Pursuant to Article 29 of the Constitution, the secrecy of correspondence is inviolable. However, the Supreme Court held the constitutional protection does not cover the use of the letter by the recipient (Cass. 21 October 2009, *Arr. Cass.* 2009, 2418). E-mails are protected by the Law of 13 June 2005 concerning electronic communication. Similar to the secrecy of correspondence, the protection of e-mails extends to the use by third parties.

Given that the use of the recipient of the letter or e-mail is not covered by the Law, the latter is in principle allowed to disclose the letter or e-mail.

(ii) Pictures and images

Concerning the photograph of a person, the authorized recipient has to obtain the explicit consent to use or disclose that picture to third parties (provided that the person photographed is not a public person).

(iii) Social media

In order to determine whether information disclosed on social media can be disclosed to third parties will, according to the Supreme Court, depend on the "privacy expectation" of the first discloser.

The more publicity the first discloser gives to his statements on social media, the less he will be able to invoke his privacy rights.

In other words, the context in which social media is used will be crucial to determine whether the privacy rights of the first discloser have been violated.

When certain information is disclosed on social media, the nature and privacy settings of the profile of the first discloser will determine whether further disclosure can be deemed as a violation of his privacy rights. If the profile of the first discloser would be accessible to the public, it can be argued that there is no violation of the privacy rights if certain information is shared.

On the other hand, if the profile is private, other circumstances will determine whether authorized recipients have violated the privacy rights when they disclosed the information to third parties.

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

There exists no specific legal provision, which governs the fictional use of information related to an individual.

Recently, the President of the court of first instance of Antwerp has pronounced a judgment in a case concerning fictional information of a person (Pres. Rb. Antwerp 30 October 2014, *not-published*). A publisher had the intention to publish book on Mr Julien Schoenaerts, a Belgian actor. In this regard, the publisher added a quote from the actor to the cover of the book, which gave the false impression that the actor had cooperated with the publication.

The family of the actor filed a claim, by which the asked the court that the publisher should be obligated to indicate clearly on the cover that the book contains inaccuracies. The President of the Court agreed and ordered that both the cover of the book as the first page had to indicate that the book contains inaccuracies.

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 a Constitutional right, and can be found as well in different treaties.

On a supra-national level, freedom of speech is protected by Article 10 ECHR and Article 19 ICCPR. On a national level, freedom of speech is guaranteed by Article 19 of the Constitution.

Similar to privacy rights, the extent of the right of freedom of speech is established trough the case-law.

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

The right of freedom of expression has been implemented in the Constitution of 1831.

Afterwards, the ECHR provides in its Article 10 the fundamental protection of the right of freedom of expression. The ECHR can directly be applied and enforced by the Belgian courts. In the hierarchy of legal norms, the ECHR precedes the Belgian Constitution.

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

2.3.1. beneficiaries;

Anyone enjoys the right of freedom of speech.

2.3.2. extent of the freedom of speech;

Any speech is covered, unless it is not prohibited by the exceptions.

However, it is not always clear to determine what type of information is considered as 'speech'. For instance the Court of Brussels held that the publication of a caricature is not considered as the expression of an opinion and does therefore not enjoy the protection of Article 19 of the Constitution (Rb. Brussels 25 April 2008).

2.3.3. exceptions;

As most freedoms, the freedom of speech is not absolute and knows different exceptions.

The most important exception to freedom of speech is implemented in Article 10 §2 ECHR:

"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

This implies that every exception to freedom of expression has to answer to Article 10.2 ECHR.

In this regard, the Law of 10 May 2007 on the punishment of certain acts inspired by racism or xenophobia implies a limitation to freedom of expression. Pursuant to this Law, any speech, which would intimidate, discriminate directly or indirectly, or give the order to discriminate persons based on their race, origin, ethnicity, nationality, is punishable by Law. Violations of this Law are punishable by imprisonment or a fine.

In 2004, the Supreme Court held that said Law stays within the boundaries of Article 10.2 ECHR (Cass. 9 November 2004, *JT* 2004, 6157).

Furthermore, pursuant to the Law of 1 March 1995, it is prohibited to deny, minimalize, approve, or justify the genocide, which has been committed during the Second World War by the German national-socialistic regime. Every violation of this Law is punishable by imprisonment and a fine.

The Constitutional Court has ordered that the criminalizing the denial of the holocaust falls within the scope of Article 10.2 ECHR (Arbitragehof 12 July 1996, *RW* 1996-97, 1222).

Another particular limitation on the right freedom of expression has only been introduced recently. The city council of a municipality has the power to make certain actions punishable with an administrative sanction. It has been observed that different city councils use this power to punish public insults to the mayor or public officers. In Doornik, the city council has ordered that any insult towards the city mayor on social media can result in a fine of 350 EUR. It is however unclear if this measure will stand. The Council of State has not yet been asked to examine the legality of this measure.

Other cities had already introduced a punishment for insults towards police officers or other citizens. For instance, in Vervies the insult of policemen on social media or the comment section of online newspapers can trigger a punishment of 205 EUR. There are no statistics yet on how many of these punishments have been carried out and it is fair to say that these regulations could constitute an infringement of the right of freedom of speech.

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

The freedom of the press is guaranteed by Article 25 of the Constitution. No distinction is made between the regular and the online press. A part from the freedom the press, no specific status is given to the press.

The European Court Human Rights has confirmed that the press has the right to be critical, and is entitled to publish information or opinions which can provoke, harm or disruptive.

The court of first instance of Antwerp held in this regard that if the freedom of speech must be balanced against the privacy rights of the person who is the subject of an Article, the nature of the newspaper can be determinant to verify whether or not a violation of privacy rights occurred (Rb. Antwerp 9 May 2003, *AM* 2003, 400). In other words, the court will appreciate the circumstances differently if it involves a quality journal rather than tabloids.

Nonetheless, a journalist is expected to carry out sufficient research to the truth of the information, and he needs to ensure that it is objective and correct.

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?

No, the hierarchy between both rights is not clear and it will always depend on the circumstances of the case. Every time a court has to balance these rights against each other, all elements, which surround the case, are taken into consideration.

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)?

In cases where the court has to balance the right of freedom of expression against the privacy rights, the public interest argument is often decisive to rule in favour of the freedom of expression. If the privacy rights of individuals (not celebrities) are at stake, the Supreme Court obligates that the courts define and motivate the social necessity, which justifies the interference of that person's private life.

If the press deals with a matter of public interest, and in this regard might harm a person's good name, the exercise of the right of freedom of expression is subjected to the condition that the journalist handled in good faith. In other words, the

journalist is expected to aim at providing truthful and reliable information. The actions of the journalist will be compared to a normal and careful journalist, placed in the same circumstances.

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.

In principle, pre-emptive remedies in order to avoid disclosure are not available. Article 25 of the Belgian Constitution clearly states that censorship can never be implemented.

Only after the information has been disclosed, the court can order a distribution ban in case the rights of individuals have been violated by the publication of the information.

Since the Article 25 of the Constitution refers to the printed press – it stipulates literally: *"the printing press is free. (...)"* – there has been a discussion if the audio-visual media falls under its scope. Courts have ruled both ways.

Hence, there is a discussion in the Belgian doctrine and case-law whether the freedom of the press would only concern the printing press or not.

The Supreme Court decided in 2006 that Article 25 of the Constitution does not apply to broadcasts on the radio, television, or cable-television, since they do not constitute "expressions" by means of written statements.

The lower courts however, are not that strict, and they have ruled on several occasions that Article 25 of the Constitution cannot be applied on radio and television.

In 2011, the European Court of Human Rights held in its judgement that the distinction made by the Supreme Court between the printed press and television broadcasts does not appear to be determinant to apply Article 25 of the Constitution. In other words the Court has confirmed a general ban on pre-emptive censorship (ECHR 29 March 2011, RTBF vs. Belgium, www.hudoc.echr.coe.int).

4.2. Are "gagging orders"[1] or "super injunctions"[2] as known in the UK known under the legal system of your country? Describe briefly their main characteristics.

No, the Belgian legal system does not provide for a gag order similar to the injunctions available in the UK.

It is however possible that lawyers are prohibited to talk to the media during a certain trial. This type of "gag order" is ordered by the head of the bar, in order to protect the serenity of the trial.

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

(i) Damage claim

Damages can be claimed. However, there are no uniform guidelines in order to determine the amount of the damages.

(ii) The right to answer

The right to answer is provided by law. Pursuant to Article 1 of the Law of 23 June 1961 concerning the right to answer, every individual or legal person, who is named or who is indicated in a periodical magazine, has the right to demand the insertion of his answer free of charge. The right to answer can only be exercised if it is with the purpose to rectify certain elements or to prevent damage to the reputation of that person.

The answer has to be published entirely, without additions and on the same place and in the same font, as the text, which it concerns.

If the publisher does not comply with the Law concerning the right to answer, it can be held criminally liable.

Article 7 of said Law provides a similar right concerning the audio-visual press.

(iii) Publication of the judgment

If a court determines to hold the author liable, it can order that the judgement has to be published.

[1]See for details : http://en.wikipedia.org/wiki/Gag_order#United_Kingdom
[2] See for details: http://en.wikipedia.org/wiki/Injunction#UK_superinjunctions

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

Privacy rights are considered as extra-patrimonial rights, which cannot by valorised.

However, the courts have ruled that a violation of privacy rights can give rise to patrimonial damages. In the Belgium legal system, the general principle is adopted that in order to claim damages, the actual extent (amount) of the damages has to be proven.

As a result, it is quite difficult to claim considerable amounts.

Given that it is practically impossible to determine to value of the damages, the courts will award a compensation calculated on grounds of equitableness (*ex aequo et bono*). They can vary between EUR 1 and EUR 15.000.

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

The person who has unlawfully disclosed private information, will face liability. If disclosure would occur in an online environment, the case Delfi vs. Estonia might be relevant (ECHR 10 October 2013, Delfi vs. Estonia, www.hudoc.echr.coe.int), in which the Court confirmed that in internet use portal can be held liable for the defaming and degrading comments of its website users.

Concerning liability, a distinction has to be made between the criminal and the civil liability. Furthermore, a cascading liability is provided between the author, the publisher, the pressman and the distributor.

(i) Crimes of the printed press

A crime of the printed press encompasses the expression of an opinion in a printed piece of writing, which is reproduced trough a mechanical process, and of which a considerable amount of copies are distributed.

In other words, a crime of the printed press is not a specific crime as such, but constitutes a criminal act if it is committed in these circumstances. For example, third parties are prohibited to intercept e-mails. If an e-mail would be intercepted and published, it can be qualified as a crime of the printed press if (i) the content is expressed as an opinion (ii) in printed piece of writing, (iii) of which several copies are distributed.

It is not required that the author is a journalist or a member of the press to commit a crime of the printed press.

Article 25 of the Belgian Constitution provides a specific liability regime. The publisher, pressman, or distributor cannot be held liable if the author is known, and if he has his residence in Belgium.

Hence, the author who disclosed the information will be held liable if he is known and if he has his residence in Belgium. If one of those conditions is not fulfilled, the liability will be moved first to the publisher, then to the pressman and in last instance to the distributor.

Crimes of the printed press can occur both online as offline.

(ii) Civil liability

The Supreme Court has ruled that the liability regime of Article 25 of the Constitution applies in civil cases as well.

The press will be held liable if in the context of its activities, has committed a fault, which caused damages to another party, and if a causal link between the fault and damages is established.

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

The press can rely on the protection embedded in Article 25 of the Constitution, which provides the freedom of the press.

Moreover, the freedom of the press is considered to be encompassed in Article 10.1 ECHR. The European Court of Human Rights has decided on various occasions that the freedom of the press is an essential part of the freedom of expression.

Moreover, pursuant to Article 150 of the Constitution they enjoy the privilege of a jury trial. Article 150 of the Constitution stipulates that: *a jury will be appointed for all criminal acts, including political crimes or crimes of the printed press, unless the crimes of the printed press are inspired by racism or xenophobia."*

Given the lethargy of a jury trial, crimes of the printed press remained basically unpunished. Hence, the legislator has intervened in 1999 and has referred the crimes of the printed press, which have a racist undertone, to the ordinary courts.

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

There does not exist a legal definition of the term press, media or news organisation.

There are different types of journalists, depending on the contract they have, or if they carry the title of professional journalist or not.

Pursuant to the Law of 30 December 1963, a person can only carry the title of professional journalist if the following conditions are fulfilled:

- he is at least 21 years old;
- he is not deprived of his political or civil rights;
- his main activity consists in the participation of the editorship of magazines, periodicals, radio- or television broadcast, film journals and other press agencies, which are dedicated to the coverage of current events;
- he performs these activities for at least two years;
- does not perform commercial activities and specifically no activities with the purpose of advertisments, unless in his capacity as director of the news, or press agency.

However, it is not required to obtain this title in order to carry out journalistic activities.

Everyone who is engaged in journalism or who contributes to the gathering, assessing, creating or presenting of news will be part of the press.

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

Yes, informants and sources are protected by the Law of 7 April 2005 on the protection of journalistic sources.

The Law stipulates that journalists and editorial staff enjoy source protection. They have the right to withhold the name of their sources, the nature or origin of their sources.

There are however exceptions to the protection of journalistic sources. The protection can be waived in case the following conditions are fulfilled:

- the information sources have to prevent crimes, which pose a threat to the physical integrity of one or more persons, including terroristic attacks;

- the information has to be crucial to prevent these crimes and cannot be obtained in any other way;
- the disclosure has to be ordered by the court.

It should be noted that information concerning journalistic sources cannot be subjected to any investigative measure, unless it is established that it will prevent a future crime.

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?

In first instance, the Law of 7 April 2005 only protected "professional" journalists. In other words, any journalist who works on and independent basis or under the employment of a legal person, and who regularly contributed to the collection, redaction, producing or disseminating of information by means of a certain medium enjoyed the protection of the law.

Given that this definition excluded anyone who contributed on an irregular basis, or who did not actually work as a journalist, it was considered as a violation of the right of freedom of expression. In 2006, the Constitutional Court held that said definition constituted a violation of Articles 19 and 25 of the Constitution, as well as Article 10 EHCR, and it referred to case-law of the European Court of Human Rights, when emphasizing that the freedom of the press can only be guaranteed if there is an adequate protection of journalistic sources (Constitutional Court 7 June 2006, judgement n° 91/2006).

Since then anyone who contributes to the collecting, redacting, producing or disseminating of information, regardless whether it is regularly or under payment, is included. This implies that online bloggers are covered by the Law on the protection of journalistic sources.

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.

1. Criminal remedies

Slander and libel are punishable by law. Pursuant to Article 443 of the Criminal Code, a person who wilfully accuses someone of a certain fact, which can hurt his honour or expose him to public disdain, and of which the legal proof cannot be provided can be held criminally liable.

The Criminal Code makes a distinction between libel or slander and defamation. Defamation means an accusation of a certain fact or event, of which the law does not allow any proof. The accusation as such is punishable.

Slander and libel on the other hand, are accusations of which the law does allow proof.

Those who committed slander, libel or defamation can be punished with imprisonment of minimum 8 days and maximum one year, and with a fine of minimum EUR 156 and maximum EUR 1,200 if the libel, slander or defamation occurred:

- in a public place; or
- in the presence of several persons;
- in the presence of the victim and several witnesses;
- in writing, whether or not printed, by images, symbols, which are being distributed, sold or displayed;
- in writing, not made public, but distributed to several persons.

In order to start criminal proceedings, the victim will have to bring a claim before the investigative judge or before the public prosecutor, who will start an investigation, which can be followed by a criminal proceeding.

2. Civil remedies

Pursuant to Article 1382 of the Belgian Civil Code, anyone who has committed a fault, which caused damages can be held liable, provided that a causal link between the fault and the damages is established.

A civil claim can be brought for slander and libel as well.

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.

In a cross-border conflict between parties who reside in different member states, the forum will be determined by Article 7.2 of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and enforcement of judgements in civil and commercial matters (hereinafter the "Brussels I bis Regulation).

Article 7.2 of the Brussels I bis Regulation states that: *"in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.*

In a cross-border conflict with a party who has his residence in a third country (State outside the European Union), Article 96 of the Belgian Code on International Private Law stipulates that the Belgian courts are competent tot hear the case if the harmful event occurred or may occur in Belgium or if the damages arising out of the harmful event occurred or may occur in Belgium.

Concerning the applicable law, it is important to note that the regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (hereinafter the Rome II Regulation), explicitly excludes any claim which arise out of violations of privacy and rights relation to personality, including defamation.

In order to provide a possibility to determine the applicable law, the Belgian legislator introduced in 2009 a second paragraph to Article 99 of the Belgian Code of International Private Law, trough which the applicable law can be established.

Article 99 § 2 of the Code on International Private Law states that non-contractual obligations which arise out of defamation or the violation of privacy will be governed by the law of the State in which the event giving rise to the damages occurred or by the law of the State in which the damages occurred, unless the person claimed liable can establish that he could not foresee that the damages would occur in that State.

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

In 2012 the Supreme Court has taken its position on the determination of jurisdiction in cases where a violation of privacy rights occurred online (Cass. 29 November 2012, *RABG* 2013, 1281).

If privacy rights are violated in an online environment, the Belgian courts will be competent if the online content is or has been available in Belgium.

The Supreme Court has applied the jurisprudence of the European Court of Justice (ECJ 7 March 1995, Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd vs. Presse Alliance SA, C-68/93; Oliver Martinez and Robert Martinez v MGN Limted, C-161/10).

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

The Belgian legal system provides in general a fair balance between the right of privacy and the right of freedom of expression. However, given that it is always up to the courts to strike that balance, the legal certainty is not always guaranteed. On the other hand, most of these cases depend on the actual circumstances, which makes it difficult to provide uniform guidelines.

Improvements could be made concerning the preservation of the presumption of innocence of criminal suspects. In the interest of a fair trial, and to preserve the presumption of innocence, it might be opportune to provide pre-emptive measures, or at least enforceable regulations for the press to what extent they can cover the investigation and the trial.

During the latest newsworthy trials, the objectivity of the press in its coverage can be questioned. For instance, in 2010 the notorious "parachute-killing"[3] trial was held under wide media coverage. Before and during the trial, the defendant consistently claimed her innocence. The public opinion at the time was heavily divided. To make matters worse, a certain news journal had organized a guilty or not-guilty poll on its website. It is fair to ask whether under these practices a jury could remain unbiased and the presumption of innocence could be preserved.

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?

Specifically concerning the processing of personal data, the Law of 8 December 1992 on the protection of the personal life with regard to the processing of personal data has to be taken into consideration (hereinafter the Privacy Law). This law is the Belgian implementation of the Directive 95/46/EC of 24 of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Pursuant the Privacy Law, an individual has to give his consent to the collection and processing of his personal data.

A current phenomenon on social media is that users share videos of committed crimes, accidents, or other events, in which individuals can be recognized. Videotaping someone is considered as an act of processing under the Privacy Law. If that person in question has not given his consent to record his actions in

[3] A woman was suspected and convicted of killing another woman, who was her fellow skydiver, by sabotaging her parachute.

videotape, and to distribute that video, publishing such a video (or picture) on social media could constitute a violation of the Privacy Law.

However, as always, this principle knows quite some exceptions. Personal data, which is collected and processed for journalistic purposes are excluded from said Law. The application of this exception has been confirmed by the courts.

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

Yes, Article 9 of the Privacy Law provides a person to oppose to the collection and processing of his personal data, even after he has given his consent.

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..

It is considered that the right to be forgotten is part of the right of respect for one's private life. There is no explicit statutory disposition, which provides the right to be forgotten as such. This right is included in Article 8 ECHR and Article 22 of the Belgian Constitution.

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".

When balancing both rights, the courts will often determine if there is a public interest argument to re-publish certain information concerning a person. If the re-publication would still contribute to the public debate, the right to be forgotten would probably not prevail.

In the Belgian case-law, most cases concern the re-publication of a person's image, after that person had been famous or most likely infamous.

In 2001, the Brussels court argued that a tension exists between a person's portrait right and freedom of expression in the context of news activities. The case in question concerned a documentary on the public television in regard to a prisoner, who was convicted in 1982. The court held that the news' value of the re-publication of a person's image, long after that person has committed newsworthy facts, has to be balanced against that person's privacy rights and his chances to

rehabilitate. In its judgement, the court argued that during a trial, a person can step into the public spotlight, but he can step out of the spotlight afterwards.

In this regard, the documentary did not establish a sufficient public interest to show that person's image 9 years after the facts.

These matters are decided on a case-by-case approach, in which the public interest argument will be decisive to rule whether the person in question can exercise his right to be forgotten.

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 courts have heard cases concerning the right to be forgotten, since the Google case.

On 25 September 2014, the Court of Appeal of Liege ruled and confirmed that the right to be forgotten derives from the right of respect for one's private life (Luik 25 September 2014, *JLMB* 2014, 1952). In the context of the distribution of digital archives, the right to be forgotten meets the right of freedom of expression, since both rights are equal.

According to the Court, the right to be forgotten contains two aspects. The first concerns the re-publication of the judicial past of a person trough the press. The second aspect regards the removal of a person's digital information, including the information available online. In other words, the right to remove digital information implies the possibility of a person to claim that certain information concerning his personality is removed after a certain time.

It is interesting in this case that the court has set out a couple of requirements in order to acknowledge the existence of the right to be forgotten:

- the initial publication of the facts has to be occurred validly;
- the nature of the facts has to be judicially inspired;
- there cannot be a present-day interest to re-publish the facts:
- the facts cannot have a historical interest;
- the person concerned cannot lead a public life;
- the person concerned has to establish an interest in his rehabilitation;
- the person concerned has to have fulfilled his debt or punishment.

Only if these conditions are met, the claim to anonymisation should be granted.

This judgment shows that the criteria to exercise the right to be forgotten are rather strict.

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 right to be forgotten has been recognized by the Belgian case-law for quite some time now. The courts have tried to strike a faire balance between the right of freedom of expression and the right of private life.

Social media, and the online world, has without a doubt influenced the exercise of privacy rights. Just recently the Belgian Secretary of Privacy (which is a brand new secretary post) has threatened Facebook with a court case, if it would not comply with the Belgian privacy rules. It is a matter of time to see whether this was merely a political statement or if further steps will actually be taken.