



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 Brazil**

Renato Leite Monteiro

Opice Blum, Bruno, Abrusio & Vainzof Advogados Associados,  
Al. Joaquim Eugênio de Lima, 680 - 1º andar - Jardim Paulista - 01403-000 -  
São Paulo/SP, Brasil, 55 11 2189 0061, [rmonteiro@opiceblum.com.br](mailto:rmonteiro@opiceblum.com.br)

Daniel Avila Failla

Dannemann Siemsen Bigler & Ipanema Moreira  
Av. Indianópolis, 739  
04063-000 São Paulo - Brasil  
+55 (11) 2155 9585  
[dfailla@dannemann.com.br](mailto:dfailla@dannemann.com.br)

### **General Reporters:**

**Jerome Debras**, Woog & Associés, Paris, France  
[jdebras@woogassociés.com](mailto:jdebras@woogassociés.com)

**Cristina Hernandez-Martí Pérez**, Hernandez Martí Abogados, Barcelona,  
Spain  
[cristina@hernandez-marti.com](mailto:cristina@hernandez-marti.com)

12 March 2015



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

## 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 to which the information refers to.

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

Privacy and protection of personal data rights in Brazil are both statutory and case-law based. Even though the country has a civil law based legal system, there is not an enclosed concept of privacy on the legislation. On both the Federal Constitution (Section 5, subsection X) and the Federal Civil Code (Subsection 20 and 21) there is a general protection based on the rights to a private life, name, image and honor. Other federal legislation also refers to sectorial right to privacy, such as the Federal Law 12.965/14, which regulates Internet services in the country.

### 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 include pictures, images, videos, names, honor, intimacy, private life, financial records, connection logs, data in flow, consumer databases, CCTV, personal data, cookies, unique identification numbers, IP addresses, telephone numbers, telephone calls in flow, medical data and all identifiable information.

#### 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.

In case of celebrities, case-law has shown that they have less expectation of privacy, mainly on public places, but also on more private situations. There is no statutory rule to this difference in treatment, and case-law is based on general constitutional principles, such as public interest.

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

Yes, but not all. Section 52 of the Federal Civil Code grants to legal persons the protection of personality rights, such



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

as image, name and reputation, which are included on the general protection to privacy.

- 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, it would. Information shared with a third party, in some cases, cannot be disclosed to other parties unless there is express consent of the information/data subject. Nonetheless, information and content disclosed in public held environments, such as social networks, are not encompassed in the right to privacy.

- 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 is not, yet, regulation for fictional use of information pertained to an individual, not until a general protection of personal data law is in effect. But based on case-law it is possible to affirm that if the information is held unidentifiable, it can be used for fictional purposes.

## 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.

Section 5, subsection IV of the Federal Constitution makes the right to Freedom of Speech a fundamental right in Brazil. Also, section 220 of the same statute guarantees the Right to Freedom of Press. Case-law has corroborated the effectiveness of such rights.

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

Both. Brazilian Federal Constitution makes it for the domestic law, but Brazil is also signatory of several international



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

conventions that guarantee Freedom of Speech, such as the UN Charter and the Inter-American Convention on Human Rights.

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

2.3.1. beneficiaries;

Any person, either physical or legal, national or foreigner, is a beneficiary of Freedom of Speech in Brazil.

2.3.2. extent of the freedom of speech;

It covers all legal content of both public and private spheres. There is no right to speak freely about content which is knowingly illicit, such as the exceptions below.

2.3.3. exceptions;

The same section of the Federal Constitution which grants Freedom of Speech does not allow for anonymous manifestation. Therefore, there is a general prohibition for anonymous speech. Nonetheless, this section needs to be interpreted together with the Federal Civil Code and other statutes. An integrative interpretation provides for possible anonymous speech of licit information and content. In conclusion, there is a prohibition of anonymous speech of false and illicit information.

Other limitations are content related to racism, color based speech, religion prejudice based speech, nazism or fascism, apology to commit crimes, libel, defamation and accusations of uncommitted crimes.

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

Section 220 of the Federal Constitution guarantees the Freedom of Press and declares the right to free manifestation, to creation, expression and information, regardless of the means, online or offline, used to publish or broadcast it, taking into consideration the only limitations imposed by the constitution.

Recently the Brazilian Supreme Court deemed a law that aimed at regulating the right to free press unconstitutional and it is no longer in effect.



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

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?

There is no hierarchy between the two rights. Both of them are considered fundamental rights. In case there is a conflict between them, both shall be applied proportionally, taking into consideration the factual situation.

- 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) ?

Public interest, lack of harm, to the society or to the individual, and characteristics of right to privacy subject, such as if the case deals with a public person, a celebrity or a politician.

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.

Section 12 of the Federal Civil Code guarantees the right to request any measure that shall cease damage or of the threat of damage to personality rights, which include the right to privacy.

Section 12 can be applied upon the request for an injunction or a precautionary measure based on the Federal Civil Procedure Code.

- 4.2. Are “gagging orders”<sup>1</sup> or “super injunctions”<sup>2</sup> as known in the UK known under the legal system of your country? Describe briefly their main characteristics.

There is not a procedure similar to the UK “gagging orders”, but it is possible to request injunctions that can prohibit the press or any other person of publishing or revealing information about an

---

<sup>1</sup>See for details : [http://en.wikipedia.org/wiki/Gag\\_order#United\\_Kingdom](http://en.wikipedia.org/wiki/Gag_order#United_Kingdom)

<sup>2</sup> See for details: [http://en.wikipedia.org/wiki/Injunction#UK\\_superinjunctions](http://en.wikipedia.org/wiki/Injunction#UK_superinjunctions)



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

individual. Such request and the injunction can be granted in a confidential basis, preventing its disclosure to the public. The procedure will be very much similar to regular injunctions and will follow the criteria of the Civil Procedure Code. The main criteria is the likelihood of irreparable damage perpetrated by means of the act that shall be prevented by the injunction.

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

The very same section of the Federal Civil Code that grants the possibility of ceasing a damage or a threat to damage personality rights grants the possibility for posterior damage claims and rectifications claims. There is no proper right of answer after a law that aimed at regulating the press in Brazil was deemed unconstitutional. Nonetheless, a right of answer can be granted by a regular court order.

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

The Superior Court of Justice, which has the authority to judge special appeals based on violation of federal statutes, has some methodologies on how to calculate damages, but they do not include privacy violations, which shall be calculated case-by-case. However, the other lower courts have the authority to perform their own calculations.

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

The Federal Law 12.965/14, which regulates Internet services in Brazil, declares on its section 19 that Internet intermediaries shall not be liable for user generated content, even if private information is disclosed. In general, the individual responsible for the disclosure will be held liable, not the intermediary. Exceptions are related to employee data, financial records, and some types of personal data, but the concept of data controller and data processor liability is yet to be introduced.

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

No, there is not a special defense to a cause of action specially related to the press.



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

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

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

Yes, when it comes for informants/sources that leak information to the press. The constitution guarantees to the press the right to not reveal their sources.

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?

All the principles described above can be applied to the online world. Case law on this matter is abundant. It even led to a Federal Law aimed at regulating some aspects of Internet services. There are cases related to social networks, online newspaper, misuse of images, unauthorized disclosure of private information, industrial espionage, copyright, intermediaries' liability, racist and prejudice content.

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.

See item 4.1 and 4.2.

4.9. Forum and applicable law

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

The main rules to determine jurisdiction in Brazil are based on territory, value of the case, the people involved and the subject matter of the case.

Territory will take into consideration where the illicit took place, if it occurred in more than one stated, or where the obligation was celebrated; the personal requirement will take into consideration if the person involved in the case has special forum requirements, such as if they belong to



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

one of the branches of the government; subject matter will take into consideration the nature of the cases, if it involves a matter which shall be analyzed by federal courts, such as cases related to indigenous people or with international ties.

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

No, there no specific rules to breaches caused online.

- 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 general law on the protection of personal data shall be enacted. Currently there are only sectorial rules and general principles that do not cover situations such as data breaches, international data transfers and consent requirements. A data protection authority, or an agency with similar authority, needs to be created. Currently, the draft bill of law on the subject is under discussion, but it is not possible to envision will it take to be enacted.

## 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?

Privacy and protection of personal data in the online media and the online world is mostly, but not only, regulated and protected by the Federal Law 12.965/14, known as Civil Legal Framework for the Internet in Brazil. The law includes several privacy and data protection principles and rules, which were previously found only in the draft bill on the protection of personal data, such consent requirements, third party transfer limitations, right of correction, net neutrality and the prohibition to analyze the content of data packages over the Internet.

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





INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

No. The project for the bill of law on the protection of personal data provides for the right of opposition. Currently this legal tool does not exist on the Brazilian legal system.

## 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.

There is no statutory specific provision related to the right to be forgotten on the online world. Whenever request upon the court of law, the requests are based on the above mentioned personality rights.

- 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, there is, but not related to the online environment. Currently there are two pending cases at Brazilian Supreme Court that refers to offline right to be forgotten. Both of them are related with content produced for TV shows that re-enacted old criminal cases. On the assessment made by the lower courts, the right to be forgotten was granted in one of the cases. The main argument was that citing the name of the plaintiff, who was acquitted from the criminal investigation, was not necessary to tell the story described on the TV show. The same argument was used on the other case, but the court ruled that the citing the name of the plaintiff (the plaintiffs were the family of the individual) was necessary to understand the context of the criminal case described on the TV show. The Supreme Court accepted to hear the cases and their judgment might shed some light to the right to be forgotten over the Internet.

In addition, there is no case law providing right to be forgotten guidelines.

- 6.3. Did the view on the right to be forgotten change in your jurisdiction due to the European Court of Justice Case in



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Google Spain v. AEPD and González (C-131/12)? Is there any case law arising from this decision in your jurisdiction?

There is no case law directly arising from Mr. González case, but it had a big influence on the current discussions and several cases have been filed using the right to be forgotten guidelines of the EU Court as arguments, adapting them to Brazilian personality rights. However, up to this moment, there is no case law that applied such guidelines.

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 current most important aspect of the right to privacy and protection of personal data is the draft bill. On the Data Protection Day of 2015, the Brazilian Ministry of Justice opened up a consultation requesting comments and suggestions about a new version of the Data Protection Bill. Brazil currently only gives sectorial protection to personal data. The new version of the awaited text has several changes from its 2010 version. These are the main changes of the text.

1. **Personal data:** the concept of personal data is widened when compared to the previous version of the text. It has been influenced by current discussions in Europe towards updating the data protection legal framework;
2. **Sensitive data:** sensitive data can now be collected, treated and processed in more cases, as long as there is proper consent, which has some guidelines in the text and must be different and separate from the regular consent;
3. **Consent:** the requirement to obtain consent and the information which must be given to the subject have been broadened. The specific purpose for collecting and processing the data must be informed to subjects prior to obtaining their consent;
4. **Right to denial:** subjects must have the right to deny the collection of their personal data without limiting their access to the services, with some exceptions;



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

5. **Data Protection Authority:** the previous version of the text clearly created a separate and independent data protection authority. The new version excluded this chapter of the text, referring to a 'competent authority', without defining what will constitute it.
6. **Privacy Officer:** companies will have to employ Privacy Officers who will be responsible for overseeing compliance with the law and also serve as a link between the company and the 'competent authority';
7. **Binding Corporate Rules – BCRs:** a long standing tool in the EU data protection system, Binding Corporate Rules are now included in the new version of the text. This should generally enhance the flow of data until the Brazilian legal system adapts itself to the new data protection environment;
8. **Global corporate rules:** the possibility of data flow within the same corporate structure was also tackled on the new version of the project;
9. **Liability:** strict liability was included in the first version for companies that mishandled personal data. The current version applies secondary liability and also lists possibilities for exemption from liability;
10. **Vacatio Legis:** companies will now have 90 days to adapt to the new data protection rules, 30 days more than in the previous text.

The law will provide a new legal approach to data protection. The bill discusses topics such as:

- (i) what constitutes personal data;
- (ii) how personal data must be processed;
- (iii) how to obtain consent to process personal data;
- (iv) when the data protection law is going to be applied;
- (v) the basic principles which are applied to data protection;
- (vi) citizens' basic rights concerning data protection;
- (vii) the transfer of personal data to third parties;



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

- (viii) how security breaches must be dealt with;
- (ix) the role of the private sector;
- (x) international transfers;
- (xi) liability and penalties applicable to data controllers and data processors.

Several basic rights of citizens concerning data protection are listed, such as the right to

- (i) access data;
- (ii) correct inaccurate or incorrect data;
- (iii) deletion;
- (iv) object to processing;
- (v) not be subject to purely automated decisions; and
- (vi) compensation for the misuse of personal data.

The current Brazilian legislation that specifically regulates the collection, storage, safekeeping and processing of data and electronic records obtained from and/or transferred via the internet (Law 12965/2014) is brand new and effective from June 2014. It complements other provisions of the Brazilian legislation, including the Federal Constitution, which establishes privacy and communication secrecy as fundamental rights. The Brazilian Civil Code considers privacy as an inviolable right of all citizens. In addition to that, the Consumer Defence Code, the Law of Positive Registrations, the Brazil's Clean Company Act and the Brazilian Criminal Code have some articles addressing privacy. Most important, a new data protection law is currently under discussion and when enacted will be applied to all automated personal data processing.

## **BIBLIOGRAPHY**

- Monteiro, Renato Leite; et al. *Marco Civil da Internet – Lei 12.965/2014*. Editora Revista dos Tribunais, 2014



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

- MONTEIRO, Renato Leite. *The privacy and data protection framework in Brazil*. E-Commerce Law and Policy. 2013. (<http://www.e-comlaw.com/e-commerce-law-and-policy/hottopic.asp?id=1386>);
- MONTEIRO, Renato Leite. *Brazil's Decree to protect e-commerce consumer rights*. E-Commerce Law and Policy. 2013. (<http://www.e-comlaw.com/e-commerce-law-and-policy/article-template.asp?from=eclp&ID=2113>);
- MONTEIRO, Renato Leite; LIMA, Caio. *Brazilian panorama on the protection of personal data: discussion and comparative analysis* (in Portuguese). Federal University of Paraná. 2013. (<http://www.atoz.ufpr.br/index.php/atoz/article/view/41>);
- MONTEIRO, Renato Leite. *Brazil's Medical Mobile Data Protection Scenario*. Data Protection Law & Policy. 2013. ([www.e-comlaw.com/e-commerce-law-and-policy](http://www.e-comlaw.com/e-commerce-law-and-policy));
- MONTEIRO, Renato Leite. *Brazil's digital awakening and the road ahead to data protection*. Data Protection Law & Policy. 2012. (<http://www.e-comlaw.com/data-protection-law-and-policy/>);
- MONTEIRO, Renato Leite; LIMA, Caio C. C. *Comments on the Data Protection of Personal Data Bill* (in Portuguese). Brazilian Ministry of Justice. 2011(<http://securitybreaches.files.wordpress.com/2011/05/anteprojeto-de-lei-brasileiro-sobre-protecao-de-dados-pessoais.pdf>);