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 France

Xavier Carvasse

Beylouni Carbasse Guény Valot Vernet
10, rue Lincoln - 75008 Paris
+33 1 48 88 60 60

x.carbasse@bg2v.com

General Reporters:

Jerome Debras, Woog & Associés, Paris, France
jdebras@woogassocies.com

Cristina Hernandez-Marti Perez, Hernandez Marti Abogados, Barcelona, Spain
cristina@hernandez-marti.com

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 France, privacy rights are protected by statutory texts, in particular through article 8 of the European Convention of Human Rights and article 9 of the French Civil Code. In addition, on January 18, 1995 the French Constitutional Council (*DC n° 94-352*) ruled that the protection of private life, inasmuch as it is an aspect of individual freedom, is a principle having a constitutional value. Finally, the violation of privacy rights is also criminally sanctioned under article 226-1 of the French Criminal Code.

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 in France may cover information about the health, sentimental life, family, domicile, revenues, religious or political beliefs of an individual. The right to the protection of one's image is deemed to be included in the category of privacy rights. Article 226-1 of the French Criminal Code also condemns "*any willful violation of the intimacy of the private life of other persons by resorting to any means of (i) intercepting, recording or transmitting words uttered in confidential or private circumstances, without the consent of their speaker; (ii) taking, recording or transmitting the image of a person who is within a private place, without the consent of the person concerned.*"

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 celebrity of the person is not, in and of itself, a criteria for determining the extent of privacy rights. However, besides a general distinction between the private and the public space, the context in which the information is published is also important. Thus, publishing information pertaining to an individual's private life may be justified if it serves an information purpose relating to current events and debates, as well as the public's right to be informed.

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

Although statutory texts do not explicitly state that privacy rights apply to legal persons as well, French courts regularly hold that legal persons can indeed see a number of their privacy rights protected.

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 mere fact of disclosing private information constitutes a violation of privacy rights. In addition, the right to the secrecy of correspondence is protected by provisions of the French Criminal Code prohibiting the interception of correspondence. Illegal phone tapping is also punished under the French criminal law. In addition, the protection of the secrecy of correspondence extends to private exchanges made by electronic means. Thus, e-mails are also covered by this protection.

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

No specific status has been laid down by the legislator in matters of "fictional use" of information related to an individual. However, courts have constantly ruled that in cases where fictional characters are easily identifiable as real persons, rules concerning privacy rights (and, subsequently, concerning slander) will apply to those works.

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 protected in France by statutory texts, in particular by article 10 of the European Convention on Human Rights, by article 11 of the Declaration of the Rights of Man and of the Citizen and by the Law of July 29, 1881 on the Freedom of the Press. In addition, the Declaration of the Rights of Man and of the Citizen holds a constitutional value in French law, as recognized by the Constitutional Council in its decision dated July 16, 1971 (*DC n° 71-44*).

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

As described above, the freedom of speech is based on both domestic statutory texts with a constitutional value, and supranational law.

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

In principle, the freedom of speech of all persons, private or legal, is protected.

2.3.2. extent of the freedom of speech;

Limitations placed on the freedom of speech can be linked to:

- the protection of an individual's privacy rights
- the protection of public order (mainly public morals and human dignity)
- limitations imposed by the law of 1881 on the Freedom of the Press, such as the punishment of libel and defamation
- implicitly or explicitly subscribed agreements

2.3.3. exceptions;
2.3.4. specific status for press (including online press)?

The press is subject to specific rules touching upon matters of freedom of speech. The law of July 29, 1881 concerning the press regulates the liability of heads of publications, the conduct of litigation in press-related issues (statute of limitations, searches, complaint admission criteria), as well as press-specific crimes such as slander.

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?

The protection of privacy rights is one of the accepted limitations on the freedom of expression. While no hierarchy can be established between these two fundamental freedoms, the criteria allowing to balance them is the notion of public interest: where this notion is at stake, the freedom of expression is given primacy; otherwise, privacy rights prevail.

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) ?

The most significant criteria allowing freedom of speech to prevail over privacy rights is the notion of public interest, expressed in this context by the public's right to information on current affairs and debates.

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.

While no pre-emptive remedy per se exists, procedures for interim relief (*procédure de référé*) can be used, when appropriate, in order to avoid disclosure of certain information concerning, in particular, privacy issues.

The interim relief procedure is a simplified procedure allowing the claimant to obtain, in a matter of weeks, days or even hours, in cases of extreme emergency, an interim enforceable decision. This decision is, of course, not final and can further be reversed.

French courts constantly uphold that disclosure of information relating to an individual's private life can constitute "an imminent prejudice" justifying the award of an interim relief. Likewise, if such disclosure were to have taken place already, interim relief can still be requested and granted in order to limit the spread of information, by invoking a "clearly illegal disturbance."

In addition, in matters of interim relief, the judge is free to choose the measures he deems most appropriate to the situation. Court orders consist of injunctions, under penalty, to do something or not to do something. Thus, the judge can for instance order the seizure of a publication, the banning of a film or written piece, the insertion of a disclaimer, the deletion of certain excerpts, etc.

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.

While there are no actual "gagging orders" or "super injunctions" available under French law, as indicated above, the interim relief measures awarded by courts in emergency procedures (see above 4.1.) can have the effect of such instruments.

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

A variety of post-disclosure remedies is indeed available under French law.

Claimants can sue under article 9 of the French Civil Code, which specifically protects privacy rights, asking for damages, rectification claims and publishing of the respective court orders, or/and under French tort law (article 1382 of the French Civil Code) asking for damages.

Article 9 states that judges can, independently of reparation, order all measures destined to block or put an end to violations of privacy rights. Claimants under article 9 need only to provide proof of a violation of their privacy rights.

---

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

Article 1382 requires more comprehensive proof. Claimants would have to prove that the defendant committed a fault (generally characterized by the violation), that such fault caused them a prejudice, and that there is a causal relation between the fault and the prejudice.

In addition to these court remedies, French laws concerning the press, radio and television communication, and the digital economy have instituted a right of answer. The right of answer therefore exists in matters of press, radio, television and online publications.

It has to be requested no more than 3 months following the article or communication to which it responds, and the respective media then has 3 days to publish the answer. In cases of written information, the answer can't exceed in length the original text.

The right of answer is not reserved to cases of an attack on the good name of a person or where false information has been published. Its traditional objective is to ensure that the public is fully informed. However, in matters of television and radio communication, this right has been restricted to cases where a person's good name or reputation has been damaged.

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

Damages under French law are awarded according to the principle of full reparation of prejudice (*restitutio in integrum*). This means that the entire prejudice suffered by one party will be repaired, and that prejudice alone. Loss of chance is repaired only insofar as the party can prove a direct, personal and definite prejudice. The evaluation of the prejudice is left to the judge's factual appreciation. In cases of violation of privacy rights, damages usually range between one euro and thousands of euros depending on a case by case analysis done by the courts. Criteria taken into account to increase the amounts: picture on the cover rather than in the newspaper/magazine, harassment, children involved, pictures taken by paparazzi, etc. On the contrary, factors for diminishing damages include: the banality of the information, past tolerance/acceptance from the part of the person concerned, or well-known information.

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

In matters of online content, the author of the illicit post (be it text, video or other) is in principle liable. The host provider will be held liable if it is proven that he has deliberately allowed to be posted online or posted himself the illicit content.

In addition, the law distinguishes between the liability of editors and that of the host provider. The editor is, in online matters, deemed to be the author of the post and service providers are obliged to ensure that such editors are identifiable.

The host provider is simply an intermediary. He is held liable only if he has knowledge of the existence of the illicit content, the content is manifestly illicit, and if he didn't act

promptly in order to have the content removed as soon as he learned of its illegal character. Service and host providers are not subject to a general obligation to monitor the content hosted. They are required to act only when a precise content is reported.

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

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

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

[Note: we understand informant/source to mean the person providing information to the journalist.]

Journalists can invoke the protection of their sources as a defence to a cause of action for information. Journalistic sources are protected in France under the law n°2010-1 of January 4, 2010 concerning the protection of journalists' sources.

The law defines a journalist as "*any person who, in the exercise of his profession within a press company (entreprise de presse), an online public communications company, a television or radio company, or several press agencies, undertakes, on a regular basis and in exchange for remuneration, the collection of information and its disclosure to the public.*"

However, beyond the right of journalists to refuse disclosure of their sources, and except for a contractual arrangement between the journalist and his source which would render the journalist liable in case of disclosure or negligence in protecting source secrecy, no specific protection is offered to informants/sources against further legal consequences should they be discovered. Thus, if a journalist decides to disclose the identity of his source, he is free to do so. He might only be liable under tort, if conditions are met (damage to the source, fault of the journalist, direct causation).

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?

The scope of the French law concerning the protection of journalists' sources covers journalists working for "*online public communications companies.*" Protection is thus only granted to employees of such companies operating an online, public-oriented, communication, who in addition undertake an actual journalistic work as defined by the law (collecting information in order to disclose and promote it to the public).

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.

The law of July 29, 1881 on the freedom of the press establishes a number of specific remedies covering situations that are damaging to an individual's reputation.

Under this law, libel is defined as "*any allegation or imputation of fact damaging the honour or the consideration of a person.*"

Insult is also specifically targeted and defined as "*an outrageous expression, term of despise or invectives which do not charge any fact to the insulted person.*"

Both libel and insult constitute criminal offences punished by a 38 euros fine when committed in a non-public context. The fine will be higher when committed publicly (12 000 euros) or against an employee invested with a public service mission (45 000 euros). In addition, courts can also order the publishing of a text (generally, a summary of the judgement) in various press/media publications at the expense of the author of the damage.

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.

Conflict of laws rules in France are subject to EU regulations Rome I (*Regulation No 593/2008 on the law applicable to contractual obligations*), Rome II (*Regulation No 864/2007 on the law applicable to non-contractual obligations*) and the Brussels regulation (*Regulation No 44/2001 on jurisdiction*, as amended). This answer will however only focus on forum and applicable law rules in matters concerning breach of privacy rights damages to reputation which are generally considered as belonging to the general category of tort.

The Rome II regulation, providing rules of applicable law in matters of tort law, does however not apply to non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation. In such matters, the applicable law will then be the law of the place where the event causing the damage occurred, without prejudice to overriding mandatory provisions of French law (*lois de police*).

Concerning forum determination, the basic principle laid down by the Brussels regulation is that jurisdiction is to be exercised by the EU country in which the defendant is domiciled, regardless of his nationality.

However, matters relating to liability for wrongful acts - tort, delict or quasi-delict - are to be decided by the courts for the place where the harmful event occurred or may occur. Similarly, the French Code of Civil Procedure states that in matters of tort the competent forum will be the place where the damage occurred or the place where the damage was suffered.

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

Online breaches are subject to general rules of conflict of laws. For example, if a website located outside the EU publishes slanderous content or discloses private information, it can be sued before French courts if the website aims at pointing towards the French public. French law is applicable if the damage (or part of the damage) is suffered in France.

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 following steps could be taken in order to increase and enhance the protection of individual privacy in France:

- Inform and educate students in school on the dangers of exposing private information when using the internet and about their right of opposition
- IP addresses should be considered to be personal data and thus protected accordingly
- Oblige public authorities and private companies were at least 100 employees are granted access to a database storing personal data to hire a "personal data officer" in charge of ensuring compliance in this respect

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 creation and processing of personal data is subject to a number of obligations destined to protect the privacy rights of those whose data is handled. These obligations vary depending on the nature and purpose of the information stored in a database.

Thus, any database containing personal data has to be declared, before its creation, to the National Commission for Data Protection and Liberty (CNIL), the French regulator in matters concerning personal data. However, exemptions include data concerning members of a political or religious movement, or trade union, and data gathered in the normal course of company management (data on salaries and social contributions for example).

Databases that can pose a particular threat to individual rights and freedoms require an explicit authorisation from the CNIL. This prior authorisation mainly concerns inter alia data on sensitive information (origin, political and religious opinions), biometric or genetic information, or data transferred outside of the European Union.

Furthermore, the company in possession of personal data must inform the person in question of the identity of the database handler, the purpose of the collection, and of their right of access, modification and opposition.

Transfer of data to countries outside the EU is also subject to regulation. Thus, if data is transferred to countries that the EU Commission deemed as "countries offering a sufficient level of data protection", or to a company in the US which has been included on the "Safe Harbour" of the EU Commission, then the company in possession of the data only has to submit a declaration to the CNIL. If data is transferred to a country which is not offering a sufficient level of data protection, or to the US to a company which is not on the "Safe Harbour" list, but contractual clauses are included in order to ensure data protection in such countries or companies, then the transfer will be subject to an authorisation and further verification by the CNIL.

Finally, data handlers are also subject to a number of security and confidentiality obligations in order to ensure the protection of the personal data they store.

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

Article 38 of the law n° 78-17 of January 6, 1978 concerning on digital technology and individual freedoms states that anyone can oppose, for legitimate reasons, the handling of their personal data. Anyone can refuse, without having to justify themselves, that data concerning their person be used for marketing or commercial purposes.

The right of opposition can take the form of:

- a refusal to respond to a non-mandatory collection of data
- a refusal to give one's consent to the processing of sensitive data
- the possibility of demanding the deletion of data contained in commercial databases
- the possibility of opposing the transfer or sale of data (in particular by subscribing an option when accepting to hand over the data)

The right of opposition can be exercised either at the time when data is collected, or later, by directly addressing the database handler.

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..

While no statutory "right to be forgotten" existed, per se, in France, French courts have nonetheless constantly upheld, under specific circumstances, a person's "right to be forgotten". In addition, as it is the case in many modern legal systems, France has a

mechanism of judicial rehabilitation requiring that, after a statutory period, the mention of crimes be removed from the criminal record of an individual.

Prior to the Google Spain decision of the ECJ, French courts distinguished largely based on facts when deciding to enforce a kind of "right to be forgotten." Thus, one distinction emerged between persons who have been convicted of a crime and persons who have only been subject to criminal investigations. French courts tended to admit the right of persons who haven't been convicted to invoke a "right to be forgotten" if the information were to reappear in the press long after the debate around the investigation was over.

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".

As evoked under 6.1, prior to the Google Spain decision, claims under the "right to be forgotten" were essentially made in matters relating to press and other written publications (memoirs, history works, etc.). In such cases, as one decision of the French Constitutional Council of June 7, 2013 (*DC n° 2013-319*) shows, the court operates a proportionality test between the freedom of speech (and the public's right to be informed) and the other rights and interests in presence. In this respect, it should be noted that the "right to be forgotten" was not assigned a constitutional value, and hence the proportionality test is done taking into account other related rights and public interest objectives that can be linked to the "right to be forgotten" (right of pardon/amnesty, social peace objectives, etc.).

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?

Following the Google Spain decision of the ECJ, the CNIL took part in the works of the G29 (working group of the European data protection authorities) and adopted the subsequent common interpretation of the decision and list of criteria for examining complaints concerning the right to be forgotten. However, the main contribution of the Google Spain decision to French law is, by virtue of the EU's direct effect, to introduce a right to be forgotten, or at least a "right to eliminate references", as it is referred to by the CNIL. By virtue of this right, individuals can ask companies publishing or processing content online to eliminate references concerning themselves; in case of refusal, a complaint can be filed with the CNIL.

For information, the list of criteria adopted by the CNIL to examine complaints consists of a set of guidelines to follow depending on the situation of the plaintiff (notoriety of the person; under-aged plaintiff), the information concerned (general information; information concerning an individual's private life; information concerning an individual's professional activity), the context in which the information is published (purpose, legal obligation, debate), and the potential effects on the plaintiff.

In addition, in a decision of December 19, 2014, the Paris High Court (*Tribunal de Grande Instance de Paris*) has ordered, by way of interim relief, for the first time since the ECJ Google Spain decision, that Google Inc. remove certain references from search algorithms under the "right to be forgotten."

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?