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

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1. Privacy Rights

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

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

The Spanish legal system is mainly based on statutory rights and not in the case-law. This is also the case as for privacy rights in Spain due to the fact that article 1 of the Civil Code states that the jurisprudence just complements the legal system and it is not binding because is not considered a source of the legal system. Moreover only the repeated doctrine of the Supreme Court in an interpretation of the application of the law, customs or general principles of the law could be considered as jurisprudence.

Indeed, privacy rights are mainly regulated in different laws of the legal system:

- The most important law that regulates the privacy rights is the Spanish Constitution, particularly its article 18 which ensures the right to honor, to personal and familiar intimacy and to the own image. The same article also regulates the inviolability of the home, the secrecy of communications and the misuse of the computerized means in relation to these issues.

  It should be noted that this article considers the privacy rights, among others, as a fundamental right which in our legal system means a greater protection due to the possible Constitutional motion or the special proceeding in the ordinary courts with preferential and summary treatment.

  Also article 20, about the freedom of speech, is limited by the right to honor, to personal and familiar intimacy and to the own image, whereas article 105 about the citizens access to public files and registers is limited by the intimacy.

- The privacy rights are also recognized in article 8 of the European Convention of Human Rights which Spain has ratified on 4th October 1979. For this reason and in accordance with article 10 of the Constitution, the fundamental rights established in the supreme law shall be interpreted taking into consideration the international treaties and conventions.

- In addition the Organic Law 1/1982, on 5th May, regarding the civil protection of the right to honor, to personal and familiar intimacy and to the own image, is the rule which develops the Constitutional precept aforementioned.

- Furthermore the Organic Law 15/1999, on 13th December, Protection of Personal Data and the Criminal Code, in its articles 197 to 204, are important in relation to the privacy rights.

Nevertheless we must say that the case-law is also important because the jurisprudence of the Supreme Court and of the Constitutional Court complements the undefined legal concept of the privacy rights in cases where the law does not provide a clear answer to the conflict between the parties.

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?

Intimacy

The Organic Law 1/1982 regarding the civil protection of the right to honor, to personal and familiar intimacy and to the own image mentioned, which develops article 18.1 of the Constitution does not provide a lot of details about what information is within the concept of privacy rights.

Nevertheless some of them are expressly mentioned in article 7 of the Law:

- The private life of the individuals.
- Statements or private letters not addressed to them.
- Facts related with the private life of the individual or the family which affects to their reputation or good name.
- The publication or release of the content of letters, memories or other personal writings with a private character.
- The private information known through a profession.
- The image of an individual in places or moments of their private or not life.

Also this article establishes the means used to infringe the privacy of someone:

- Placing or using any audio, photo, video or optical devices or any other similar equipment able to have knowledge about private lives.
- Recording or reproducing part of a private live through any audio, photo, video or optical devices or any other similar equipment.
- The publication, spreading or disclosure of part of a private life or letters, memories, statements and any information known through a professional service.
- Use with commercial, advertisements or similar purposes of names, images or sounds.

It is difficult to say exactly what type of information is covered by the concept of privacy rights in the Spanish legal system because, as part of the doctrine says, it is

relative and circumstantial due to the fact that it is an undefined legal concept which in most of the cases depend on the casuistry.

The general definition offered by the Constitutional Court is all the information that comes from the invasion in any sphere of the individual or family life that someone wants to exclude from the general knowledge and from the third parties interferences which are against his will (STC 144/1999, 22nd July).

Another judgment of the Constitutional Court defines it as the vital space of anyone, under their exclusive power, which is determined by an undefined concept of the reserved and intimate circle. This is made up of data and activities that characterize the particular life of each person and that are authorized to preserve from anyone else except if there is a free agreed authorization. Of course this situation is not the same for all because anyone has its own exclusive privacy which is excluded pursuant to constitutional right (STC 1168/2000, 22nd December).

Whereas the Supreme Court defines the privacy rights guarantee to the individuals a reserved sphere of their life linked with the respect of his dignity as a person (article 10.1 Spanish Constitution). This sphere is against the action and knowledge of the others, who could be public powers or private citizens. The privacy right offers to the holder the power to conserve this reserve sphere, not only personal but also familiar, against the spreading of this for third parties and a not wanted publicity. It does not guarantees a determinate intimacy but the right to possess it, having for this purpose a legal power about the publicity of the information related with the reserved circle, independently of the content that their want to maintain out of the public knowledge (STS 1036/2003, 6th November).

Nevertheless this fundamental right is not absolute, thus it admits some limits such as the freedom of speech and the general interest of the information that is released to the public.
Also are quite important the social uses and the behavioral patterns of the persons concerned in relation to their private sphere because it makes understand that, with their own acts, this does not have a private or home character (STC 99/1994, 11th April and STS 499/2014, 23rd September).

Nevertheless the social uses do not justify investigating and spreading issues which belong to the exclusive sphere of others with the aim of satisfy the curiosity of part of the society. (STS 1036/2003, 6th November).

Data protection

The data protection is regulated in the Organic Law 15/1999, 13th December, which develops article 18.4 of the Spanish Constitution. This right to the protection of data has some differences and also similarities with respect to the right to intimacy.

The data protection aim is to guarantee to the citizens the control over their personal data, its use and destination, with the purpose of avoiding the illegal traffic which is damaging for the dignity and right of the person concerned.

The object is bigger than the privacy right because protects not only the intimacy but also the relevant data for the person concerned and that affects in the exercise of the any personal right, without depending on constitutional rights or rights related with the honor, ideology, intimacy or any other constitutional protection. Ultimately it protects any personal data intimate or not that could affect their rights.

The protection is focused on the data that identifies or allows the identification of the person concerned, the data that could be used to create a profile about their ideology, race, sexuality, economy or the data of any other type that could be used in any other utility that cause a danger for the individual.

Articles 2 and 3 provide a general definition of the scope of application and the definition of the terms stating that this Law will be applied to the data of personal character (any information regarding identified or identifiable natural persons) recorded in a physical support, that could be processed, and to any other modes of later use of this data by the private or public sector.

The data protection implies some obligations that the third parties must fulfill. For instance they need the previous consent to obtain and use personal data, they have to provide information about the destination and use of these data and how it shall be exercised the right to access, rectification, cancelation and opposition to these data.

Nonetheless there are some exceptions to this protection in case of crimes prosecution and in the investigations carried out by the Tax Agency (STC 143/1994 and STC 166/1999, 27th September). These limits to the fundamental right shall be carried out pursuant to article 53.1 of the Spanish Constitution that establishes that this limits shall be established in the law, be based on a constitutional good or right, be proportional to the pretended aim, be clearly determined and be necessary.

The Law also establishes a special protection in its article 7 regarding the ideology, religion, beliefs, trade union members, ethnics, health and sexual life and data about the commission of criminal or administrative offenses.

Secret of the communications

Article 18.3 of the Spanish Constitution establishes the secret of the communications stating that it is guaranteed the communication secret and, particularly, of the mail, telegrams and telephonic, except if there is a judicial order.

Obviously the Constitutional Court has interpreted this article saying that this means the protection of the content of these communications.

The Law 25/2007, 18 October, of conservation of data of electronic communications and public networks of communication establishes even some rules about the conservation of data linked with the communication but not about the content. In these cases, where only is transfer data, such as the telephone numbers that have called, it is also required a previous judicial order.

The problem is that currently there are so many ways of communicate (telephone conversation, letters, SMS, emails, Whatsapp, Facebook inbox…) and this creates some doubts about what this constitutional right protects.

The Supreme Court recognizes that, for example the SMS, is protected pursuant to art 2.H of the European Directive 2002/58 CE, 12 July, because this rule defines the electronic mail as all message containing text, voice, sound or image sent through a public communication network that could be stored in the network or in the device of the receptor until their access to it (STS 884/2012, 8 November).

It is also obvious that the communications secret is not an absolute fundamental right and for this reason, it admits some exceptions that shall be established in the Law such as a judicial order in accordance with article 579 of the Criminal Proceedings Law.

As regards this article the judgment of the ECHR of 18 February 2003 Prado Bugallo Vs. Spain states that this regulation was not enough to guarantee the right and limit the abuses. For this reason and due to the fact that the lawmaker has not passed an amendment, the Constitutional Court considered legal the judicial order that fulfills all the requirements that the ECHR mentioned (STC 49/1999), which in the pretrial investigations are the following:

- Evaluate the proportionality of the measure in relation to the serious crime investigated.

- The specialty because has to be related with a particular crime and not due to a general behavior of the person concerned. For this reason there must be enough evidences of the participation of the person and the commission of the crime and shall be specified the person investigated and the fact.

- The exceptionality, the necessity and suitability of the measures because shall not be other measures less damaging and equally useful. It shall be noted the facts that justify the measures in the judicial order or the remission to the police acts and, if it is necessary an assessment of the case.

- It shall be carried out during a criminal proceeding.

- Also the initial period of the measure and the moments and manner the judge shall be informed of the investigations.

Furthermore in urgent cases, when the investigation is focused on armed or terrorist bands the Interior Minister or the Principal of the State Security can take this measure giving information immediately to the competent Judge who will approve or deny the measure already taken.

Regarding the communication in the workplace we must say that there are some specific rules.

The Supreme Court admits that there is a tolerance for some moderate private uses of the electronic means with private purposes. For this reason it is created an expectative of confidentiality that shall be preserved of the manager control.

Therefore the company shall establish some rules for the use of the electronic means with absolute or limited prohibitions and inform the workers of possible controls and the means to check and prevent this non wanted uses and measures applicable. Doing so cannot be said that is breach a reasonable expectation of privacy (STS 26 September 2007).

Images

The image is also protected by the Spanish legal system.

The definition of the right to the own image, in words of the Constitutional Court, protects the power to dispose of the illustration of your own physical appearance which allows your identification.

This right involves the power of determine the graphic information created by the physical features which made someone recognizable that can be captured or release to the public. It will also involve the power to restrict the imaging, reproduction or publication of your own image by a non-authorized third person (STC 158/2009, 29 June).

Nevertheless this does not imply an absolute restriction to capture or release the physical feature of a citizen and other constitutional rights or freedoms can limit it.

The capture and release of the image only will be admissible when the previous and particular behavior of the person concerned or the circumstances of the case justify the lower protection of the right and the prevalence of a public interest that may be in conflict (STC 99/1994, 11 April).

A special protection will be provided to underage person pursuant to the superior interest of the minors.

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.

There are differences between the treatment that the Spanish legal system provides to the non-public persons and that provided to celebrities.

First of all, we must say that the law does not let without any of the protections aforementioned when we deal with the Constitution or the Law 1/1982 and the Constitutional and the Supreme Court has clarified that these rights shall be also applied to celebrities with some peculiarities.

For instance article 8 of the Law 1/1982 establishes some limits but not the total exclusion of civil protection to the right to own image that are related with celebrities.

It states that this right does not restrict the caption, reproduction or publication thorough any mean when they are persons who hold a public office or a famous or public profile profession and the image is capture in places open to the public or in a public event. Also the caricature of the persons with the characteristics aforementioned will be allowed in accordance with the social uses.

However, the fact that there is a celebrity and the image is captured in a place open to the public does not always allow the release when this place open to the public is characterized by being remotest, isolated, searched by the person concerned to guarantee its intimacy or image (STS 18 November 2008).

Nevertheless the case-law is more interesting in this issue and, at the same time, more detailed due to a large number of cases in relation to these rights usually concern celebrities and tabloids.

It could be said that the social uses and, specially, the patterns of behavior will be also taken into account when celebrities claim these rights because it defines what the person concerned consider that should remain out of the public knowledge and deserves the protection of the law.

Finally it is important to make it clear that the public curiosity is not within the concept of general interest of the information which prevails before intimacy although there might be people interested in private affairs especially of celebrities (Supreme Court Judgment 1036/2003, 6 November, 2nd Legal Ground), even if the information has been verified.

To provide you an illustration, the Supreme Court condemn to the television channel Telecinco for releasing some pictures of a bullfighter captured by a guest when he was bullfighting in privately in his home. The Supreme Court argues that even this fact was related to his career he was bullfighting in the intimacy of his home with some guests (STS 529/2014, 14 October).

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

The legal entities do not have the right to intimacy established in article 18.1 of the Spanish Constitution. The Constitutional Court has said that this article comes from article 10 about the dignity of the person, and protects the citizens of the interference by third parties in its private sphere and the use of the information known ensuring a minimum quality of life.

Nevertheless the legal entities, which are not protected by the dignity and intimacy of the person, could hold a confidence right.

The explanation to this different treatment in comparison with the natural person is that the legal entities exercise the rights whose nature allows it and the right to intimacy is referred in our Constitution to the personal and familiar intimacy. For this reason the confidence of the legal entities is not linked with this constitutional right as the incorporation is not linked with the right to life (STS 28 April 2003).

The same situation will occurs with the right to the own image due to the personal character and its link with the human dignity established in article 10 of the Spanish Constitution (STS 470/2011, 15 June).

Nevertheless different is the treatment of the right to the honor for the legal entities.

Finally, as regards the protection data belonging to legal entities the Organic Law 15/1999 in its article 1 exclusively refers to the protection of the law offered to natural persons and its article 3.A only considers data with personal characters those related with the natural persons. Also the Royal Decree 1720/2007 expressly excludes the applicability of the data treatment referred to legal entities (Report of the Spanish Agency of Data Protection 0119/2009).

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.)

It seems that our legal system still protect in some ways the information provided only to some persons and not in general.

Regarding the right to the own image it must be said that it shall be differentiated the consent to obtain the picture and the consent to publish it. For instance the consent provided by bar customers in general but not

to use their picture in a documentary about drugs, gambling and alcohol (Provincial Audience of A Coruña 107/1996, 9 April; STS 3 November 1988 and STS 22 April 1992).

As regards of the communication recordings this protection cannot be applied to the other person who is receiving or providing a message. The reason is that there are no secrets for the person concerned and that the recording of the message does not breach article 18.3 of the Spanish Constitution. This protection is exclusively provided in case this is refer to the intimacy and for this reason used "ad extra". Also it is clear that there is not a right to the voice or the writing (STC 114/1984, National Court Order 172/2013, 28 June).

And in general terms the Supreme Court has even said that when someone is providing some information to another is losing part of its privacy and provides it with more or less confidence to the listeners that may use this information. And the Constitutional Court has said that it is forbidden use the information known in the intimacy sphere of someone (STC 85/2003, 8 May).

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

The right to honor can guarantee that the information related to an individual must be true. All the information related to an individual that is fictional or false cannot be granted by the right of information and considered relevant before the right to honor because the information shall be contrasted diligently and can do the necessary reservations (STS 793/2013, 13 December).

It must be separated the rumors, insinuations and fabrications from the news duly contrasted. The mention of undetermined sources not exclude to the information author from the fulfillment of the veracity of the information. The obligation must be proportional to the relevancy of information release and especially if it affects to not famous people (STC 219/2012, 3 December).

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.

Article 20 of the Spanish Constitution guarantees the freedom of speech establishing the right to freely express and disseminate thoughts, ideas and opinions; to the creation and literary production; to the academic freedom and to communicate or receive freely truth information by any media.

However the case-law of the Constitutional and Supreme Courts is also important regarding the prevalence or not of this right before another such as the intimacy or honor rights.

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

This right is guarantee for national and supranational law. In the national law the most important regulation is article 20 of the Spanish Constitution; meanwhile in the supranational law the most important is article 10 of the European Convention on Human Rights.

2.3 Describe the main characteristics of the "freedom of speech" as recognized in your jurisdiction (beneficiaries; extent of the freedom of speech; exceptions; specific status for press (including online press))

The beneficiaries of the freedom of speech are all the citizens without distinctions. The Constitutional Court even says that the free public communication ensures the principle of democratic legitimation stated in article 1.2 of the Spanish Constitution (STC 176/1995 11 December).

It is a cornerstone for our legal democratic system because without the freedom of speech the citizens cannot have all the information available or possible and form their own thoughts, ideas or beliefs and participate in the public affairs.

It also implies the right to critics even if these may annoy, disturb or upset someone else because the democratic society requires pluralism, tolerance and aperture spirit. Moreover the freedom of speech is not only for those who release not relevant or inoffensive ideas but also for those who have ideas that annoy, shock or intrigue the State or part of the citizens. Even they could have ideas against the established constitutional system because the freedom of speech allows it except if they breach effectively rights and interests of constitutional relevance.

Even though the transmission of ideas is protected as a fundamental right, the insulting or offensive sentences which are not related with ideas or opinions that wanted to be expressed (even real) are not protected.

For instance article 20 of the Spanish Constitution does not allow the right to express a view of historical facts with the purpose of depreciate and discriminate to some groups of people with similar ethnic or social characteristics because could breach the dignity of the human beings guaranteed in article 10.1 of the Spanish Constitution. As a consequence it is not allowed the hate speech that incite to the violence against the general citizens or part of them which could be classified by races or beliefs (STC 235/2007, 7 November STC 77/2009, 23 March).

Furthermore there can be limited by the right to the honor of the person concerned which does not prevent to criticize the behavior or conduct of others but protects against the insult. In the Spanish legal system is different the freedom of speech, opinion or ideology and the freedom of information.

The freedom of information is exclusively limited to the narration of facts and the freedom of speech is referred to personal and subjective judgments, beliefs, thoughts and opinions. The differences lie, for example in the fact that the freedom of information can be contrasted with objective data (STS 232/2013, 25 March). However usually the information and speech or opinion is intermingled. In addition the right to information implies not only providing these communications but also receiving it.

As regards of the press legal treatment this is qualified to exercise the freedom of speech due to they have a reattributed and habitual job and they are professionals in the media. Therefore their protection of the freedom of speech reaches the maximum level when they use it because the press is a mean that helps to create a public opinion. Nevertheless the fact that the press frequently exercises these rights does not provide them with special privileges (STC 6/1981, 16 March).

It should also be clarified that journalists are not only what we understand for a journalist but also the principals, editors and printer (STC 176/1995, 1 December).

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?

From a legal point of view there are no difference between the treatment of the freedom of speech and the privacy rights. Both are fundamental rights established in articles 18 and 20 of the Spanish Constitution and they have exactly the same protection, the maximum offered by the Spanish legal system. For this reason both rights shall live together in harmony and the exceptions will be established in the next paragraph.

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)?

As explained above the limitation of a fundamental right shall be done by a law which has a constitutional justification, which achieve the legitimate aim wanted, which is proportional and that respects the essential content of the right (STS 478/2014, 2 October).

The Constitutional Court case-law establishes that it will prevail if there is a public interest that occurs when the information is relevant for the community. In this case it is justified some perturbations and inconveniences due to the release of a news. The facts or circumstances shall affect to all the citizens, which is it different from the satisfaction of the interest of some citizens who want to know more about the life of others or from the media consideration about what it is interesting for the society. In addition, the facts explained in the information shall be verified unless the information is contained in a neutral report.

The neutral report is a report which contains facts that may damage the honor of third persons but that are news and are said by someone else responsible. The media must be exclusively the transmitter, narrating without changing their importance. Therefore the veracity is restricted to the existence of the statements and its content. There cannot be a clear falsity of what it is said and that is not use to allow illegitimate interferences. Also the report cannot have an injurious, denigrating and disproportionate nuance.

The freedom of speech will never prevail based on the public curiosity because that is not of general interest or public relevance even if there are people interested in the intimacy of someone else.

Finally, the social uses and patterns of behavior can also prevail the freedom of speech before the intimacy rights (STS 1036/2003, 6 November and STC 6/2012, 23 January).

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.

Yes, there are pre-emptive remedies even regulated in article 20.5 of the Spanish Constitution that states "Only a judicial order could establishes the seizure of publications, recordings and other information means". As a consequence this article guarantees that no other organ can seizure the information and thus limit the freedom of speech.

This not only allows the seizure of the official press means but also the normal means that can use the citizens such as flyers. However it is not applicable to the devices and support or equipment technology used, such as printers or television studios that can be seizure by an administrative measure.

This measure shall be taken in accordance with the civil or criminal proceedings and the procedural laws. These establish that shall be sought by a party and be particularly motivated with a sufficient and reasonable motivation (STC 187/1999, 25 October).

The seizure is provisional and ensures the final judgment of the court and can be taken previously to the message or the program. However it shall be the only effective if there are measures that create fewer damages. The measure is provisional, temporary, conditioned and can be modified. In addition it must be similar to the final judgment. These characteristics are established in articles 726 of the civil procedure law and 816 to 823 bis of the criminal procedure law.

Also article 9.2 of the Law 1/1982 accepts interim measures to ensure the final condemn of the judgment that can include the immediate end of the intervention suffered and remaining in the past situation.

It must also be said that other measures can be taken pursuant to the general interim measures regulation but the aforementioned is the most effective.

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

Yes, there is a legal concept similar to the "gaggin orders" or "super injuctions" that is called "secret of the summary".

This is established in article 302 of the criminal procedure law which states that the parties will be able to know and participate in all the judicial investigations of the proceeding. Even though if it is a public offense, the pre-trial judge, upon proposal from the prosecutor, any of the parties or by himself, issue an order declare it totally or partially secret for all the parties in the trial, for no more of a month and lifting the measure at least 10 days before the end of the investigations.

At the same time article 301 establishes that the pre-trial stage of investigation will be secret except for the parties until the hearings with some exceptions regulated in the law.

Also the hearings will be generally public otherwise could be null and void. However there are some exceptions for morality reasons, public order or respect to the victim or their relatives.

The private law procedures will be generally public except for reasons of public order, national security, underage interests, protection of the private life of the parties and other rights and freedoms force to it or if the tribunal consider it necessary because, due to the particular circumstances, the publicity could damage the justice interests.

The Constitutional Court has tolerated the limit of releasing the information obtained illegally about the pre-trial, breaching the secret. Nevertheless this does not entail the prohibition of talking about the facts of the trial when the information was not obtained from this proceeding (STC 216/2006, 3 July).

Furthermore article 466 of the Criminal Code establishes some condemns for lawyers, prosecutors and judges when they release information about the trial that is secret.

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

The restoration of the breached rights belonging to the person concerned, including: a declaration of the suffered intromission, the end the forbidden action and the replacement to the old situation.

Publication of the judgment with the same diffusion and the right to reply (heading and dispositive part). Also the right to rectify.

The prevention through the elimination of the elements that create the illegitimate intromission.

The compensation for the damages.

The appropriation of the profit obtained.

Mainly these different remedies against the breaches of privacy are established in article 9.2 of the Law 1/1982

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

Article 9.3 of the Law 1/1982 takes into consideration the importance of the damage occurred, the circumstances of the case and the profit obtained. But as a result these analyses depend on the judicial discretionally.

The Law does not admit the petitions without an economic content or a symbolic content and at the same time the judge cannot offer a higher amount than the sum asked by the party.

Usually the courts try to get an objective figure to have into consideration when they are deciding about the amount of the compensation, such as the profits or cases similar but that are legal (selling the images). After that they consider the different circumstances of the case.

Although when there are not any objective parameters they award a fixed amount (cantidad a tanto alzado) justifying it for the fame of the person, the geographic area, the length of time, the means used.

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

The Law 1/1982 does not states any article about the person liable for the damages caused, particularly online. Nevertheless there are some other regulations that determine the responsibility in related cases.

The Law of the Press and Printed Materials 14/1966, 18 of March, determine the responsibility in its article 65 stating that the private responsibility for illegal acts and omissions will be of the authors, directors, editors, printers and importers or

distributors of foreigner printed matters with a solid character. In addition the others companies of the group will be liable for these kinds of acts.

In the case of web pages the regulation is different. The Spanish Legal System, as a member of the European Union, is obligated by the Directive 2000/31/CE, that is developed in the Law 34/2002, 11 July, about services of the society of information and of the electronic commerce.

Articles 13.2 and 16 of this Law establish that the providers of hosting services and data storage will not be liable for the information stored on request for the recipient, as long as they do not have effective knowledge of the activity or information stored is illegal or that breach rights and goods of a third party that has to be compensated. In case they have this effective knowledge they will not be liable whether they act with diligence to retire the data or make impossible the access to them.

It will be presumed that the provider has the effective knowledge when a competent organ has declared the illegality of the data, ordering the retirement or the restriction to its access, or the damages has been declared and the provider knows the resolution, without prejudice to the detection and retirement procedures of contents that the providers apply through voluntary agreements and other communication means that can be established.

In conclusion it is not required a control of all the information but an active participation making possible to detect it and taking transcendent actions to not continue the infringement.

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

In the case of the TV media the regulation is quite confusing. In the past the Law of the Private Televisions 10/1988, 3 May, established with clarity that the breach of the intimacy, honor or the right to own image could be considered as a very serious administrative offense, whereas the current Law 7/2010, 31 March, General Audiovisual Communication, only establishes the duty of respecting the honor, intimacy and own image of the people and guarantee the rights of rectification and reply in accordance with the rest of the legal system. For this reason in a joint interpretation with article 59.2 this situation can be considered as a minor sanction due to the fact that it will be a breach of the rest of duties not expressly said in the regulation for the sanctions.

However it is not common to be punished by this fact. Perhaps for the inaccuracy of the offense and the guarantees that shall respect the categorization principle which is a must in accordance with article 25.1 of our Constitution.
As regards of the other media or the press the law does not establishes anything.

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

The services of audiovisual communication located in Spain including radio and television.

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

The main protection offered by the Spanish legal system is the right to not determine the source of the information (STC 123/1993, 19 April). However the journalist will have to prove the due diligence and not only suppose that is false or true.

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?

It will be applicable as long as the cases are similar and with the specifications mentioned above.

The online press will be ruled by the regulation of the press. The online press can exercise the rights to speech and information (Supreme Court Judgment 605/2011, 20 July) and the liability will be regulated by the specific rules aforementioned (Provincial Audience 707/2010, 29 November and STS 805/2013, 7 January).

An example regarding the social media is the order about the interim measures sought by a priest who ask for the closing of a facebook group which uses his images and make comments about him. In this case the Provincial Audience of Madrid in the order 205/2011, 21 July, said that the declaration of rights and responsibilities of Facebook allowed the use of these images by other users and that the person concerned provided the consent. (Provincial Court Madrid 238/2013, 17 May; Provincial Court Sevilla 34/2014 17 January; Provincial Court Castellón 221/2014, 30 June).

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.

Yes, the Spanish legal system regulates the right to honor within the Law 1/1982 which as you may remember protects the intimacy and the own image and for this reason the remedies are quite similar.

But we must also mention the Organic Law 2/1984, 26 March about the regulation of the right of rectification which establishes in its article 1 that all natural or legal entity has the right to rectify the information disclosed by any social media about facts which are considered inaccurate and that its disclosure can cause a damage.

Also there are remedies such as the right to reply and its publication.

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 rules that exist in Spain are the Regulation CEE 44/2001 Brussels I and the Regulation UE 1215/2012, 12 December, Brusells I bis which will be applied to the judicial actions exercised since 10th of January 2015.

In accordance with article 7.2 the forum will be determined following the concept of the "forum delicti comissi". So the First Instance Court of the place where the facts have occurred or may occur, in these cases where the news is released, spread or broadcasted, will be the competent.

Regarding the applicable law Regulation (CE) 864/2007, 11 July, on the law applicable to non-contractual obligations Rome II expressly excluded this issue in article 1.2.G. As a consequence is applicable the national legal systems.

In Spain article 10.9 of the Civil Code says that this issue will be ruled by the law of the place where the fact has occurred.

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

There are some cases where the publication is worldwide, such as websites. In this scenario the competent place will be where the person concerned have their residence and develop their life of social relationship that is the place where it has the reputation or fame. (Las Palmas Provincial Court 23/2004, 20 January; Madrid Provincial Court 432/2010, 18 October).

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

It is clear that in a legal system as the Spanish the law shall be of a better quality. The Law 1/1982 use confusing terms, does not make a clear separation between the three rights involved (intimacy, honor and own image) and has required a lot of judicial interpretation that in some cases has created concepts not established in the law just because this was inapplicable to the reality. Also the compensation of the damages shall be clearer and the law shall establish better the person responsible and some regulation about the new means of communication.

The old law has raised some doubts particularly about video recordings with droids in the streets or the recordings in public buildings, such as stations, or to policemen in the streets. Also the administrative permissions that shall be asked will be recommended to establish them in the law.

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?

It is difficult to summarize how the Spanish Organic Law of Data Protection ensures the privacy and other personal data used in the media.

The main points of the data protection by this law are these:

- The quality of the data: All the personal data shall be appropriate, relevant and not excessive in relation to the sphere and aims determined, legitimated and explicit. Not using them for other purposes and eliminating them if the aim disappears.

- The person concerned shall be informed of the treatment of personal data, the aims and the person to they are addressed; the voluntary or compulsory character of the answer to the questions; the consequences of answering or not; the possible access, rectification, cancellation and opposition and the identification and address of the responsible of the treatment.

- The person concerned shall give their consent.

- The persons who store, treat or access to the data must fulfill some security standards. Ensuring technical and organizational security measures that guarantee the confidentiality, integrity and availability of the information.

- Duty of secret and custody.

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

Yes, in the Spanish legal system there is a right of opposition to collection of data and this can be exercised through two different ways.

The first way is the necessary consent required to obtain or treat personal data. This consent provided by the person concerned are all will, free, unequivocal, specific and informed declaration through which the person concerned allows his treatment of personal data.

- Free: obtained without the intervention of any flaw in the consent defined in the Civil Code.

- Specific: referred to a determinate operation treatment and for a determinate, explicit and legitimate purpose of the responsible of the treatment.

- Informed: that the person concerned knows before the treatment its existence and the purposes of the treatment.

- Unequivocal: not admissible deducing the consent of the simple facts carried out by the person affected (presumption of consent). It is required that there is an act or omission that implies the existence of consent.

The consent does not have to be expressed and can be tacit. Only shall be expressed pursuant to article 7.2 for the protection of data related with ideology, religion, beliefs, trade unions and the expressed consent but not necessarily written. Also article 7.3 establishes a special protection for data related with health, race origin and sexual life.

In case the consent was tacit it would be required a period of time which implies that the refusing of being opposite to them entails the consent (report number 2000-0000 Spanish Agency of Protection Data).

The other opposition right can be the cancellation that allows the control of the personal data by the person concerned and the erasing of them when they are inadequate or excessive. In addition it can be possible the rectification which implies the modification of inaccurate or incomplete data.

Also there is the chance of revoke the consent.

The right shall be claimed personally and it has to be addressed to the company or public administration that has their data, saying the specific data, and providing the documentation that justifies it.

The personal responsible of the file shall provide a resolution on the cancellation petition in a period of 10 days since the solicitation has arrived. After this period if there is no answer or the answer is not satisfactory to the person concerned, he can claim to the Spanish Agency of Data Protection with the documentation that proves the solicitation.

The cancellation will block the data, conserving them only for the Public Administration, Judges and Courts, in order to determine liabilities related with the treatment during the period of their prescription. After it they must be canceled.

The personal data shall be stored during the periods established in the law or in the contractual relations between the person concerned and the responsible of the file.

If the data were communicated to other persons, the responsible of the file shall notify the cancellation or rectification and proceed to the same cancellation.

All the explained above is regulated in article 16 of the Organic Law 15/1999, 13 December, on the protection of data of personal character and articles 31 to 33 of the Royal Decree 1720/2007, 21 December, that approve the development regulation of the aforementioned law.

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.

This question it is difficult to answer because the right to be forgotten is not expressly established in the Spanish law but it is deducted from its regulation. There is not a proper regulation that rules the right to be forgotten and it was created by the doctrine to refer to other specific rights established on the Law 15/1999 on Protection of Personal Character Data, that are used to retire or block the personal data published on the internet or the end of some treatment, such as the cancelation of criminal records, and also in accordance with the Law 1/1982 on civil protection of the right to honor, intimacy and own image.

In general terms we could say that are particular legal actions to generally protect the people on the internet. There is even a recompilation of rules regarding what can be within the concept of the right to be forgotten published by the BOE.

Also it is regulated in the Directive 95/46/CE who inspires the right to be forgotten.

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 most relevant case in Spain is the Judgment of the European Court of Justice on 13 May 2014 also known as Google Spain vs. AEPD and González.

However there are other some few cases in the national case-law. For instance the judgment of the Provincial Audience of Barcelona 364/2014, 17 July, in which the court considers that the information about a criminal pardon in webpages such as Google or Yahoo was inappropriate, non-pertinent or excessive and that in relation with the purposes of the treatment the information must be eliminated.

The court also considered that may be an economic interest but not a general interest about this information.

The information had been compulsory published in the official gazette but the person concerned took the necessary steps to avoid the particular search of his name by robots.txt not in the electronic official gazette but in the electronic data base of the State Agency of the official gazette (BOE) used to search for dispositions, acts and announcements. As a consequence it was eliminated from the search engines.

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?

Yes, mainly because Spain is the country concerned. This judgment clarifies some issues that the National Audience did not have clear in a conflict between the Spanish Agency of Data Protection and Google about their responsibility of eliminate or cancel the data of its search engine.

The information referred by the search engine could be considered as personal data if allows the identification of someone despite of the search engine does not differentiate personal and not personal data and simply refer to data without any modification in it. Otherwise the protection offered by the directive will be not applied.

The search engine provider will be liable because it can determine the aims and means of this activity and for this reason must ensure within its scope of competencies, possibilities, and responsibilities the fulfillment of the Directive 95/46.

The fact that Google is exclusively established in Spain for the commercial purposes of advertisements and that this establishment is the responsible of the personal data treatment before the Spanish Agency of Personal Data can entail their liability. The treatment of data does not have to be done for the establishment located in the EU member but under their activities framework. Otherwise a restrictive interpretation will not protect the citizens. And in the case of Google the purpose is within the scope because it is selling spaces for the advertisements in this search engine. As a consequence the treatment of data has commercial purposes.

The treatment of the information is different due to the possibility of an easier search of the name and for the fact that all the information of someone is together.

In addition the economic interest and the right to dispose the general public this information by Google is not enough to prevail before the intimacy rights of the person concerned. So the personal data shall be eliminated from Google even if the editor website does not have this obligation, for instance because it has journalist purposes. Also it is relevant that the publication by Google will be more relevant.

As regards of the issue about the possibility that the person concerned seek the erasure of their link to the publication carried out by third parties legally and that contain truth information regarding them because this information can damage or have the wish of forget after a long time, the court has said that the directive establishes there is a breach when the data is inaccurate, non-pertinent, excessive in relation with the aims and conserved for a very long time, except when there is an historic, statistic or scientific purpose. Therefore it is not necessary to damage the person interested and in case the person has a public life this limitation can be excluded due to the interest of the public.

It must be said that in Spain it has not being any modification in the law to clarify the application of the law or because the lawmaker thought that is breaching the European Regulation.

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?

Yes, there must also be taken into consideration the specific regulation about privacy in some of the areas affected, such as articles that protect the secret of the personal health files (Law 41/2002, 14 November, basic regulation of the autonomous of the sick and rights and obligations in matter of information and clinic documentation) or the professional secret.

And also the crimes established in the Criminal Code:

- Crimes committed by public servants in the entry and search of a residence, the interception of letters or telecommunications or used devices of listening, transmission, recording or reproduction of sound, images or any other signal of communication when there is a crime investigation (articles 534 to 536).

- Crimes of secret release and breach of intimacy without consent through the intervention of letters, telecommunications, emails or uses technical of listening, transmission, recording or reproduction of sound, images or any other signal of communication.

  Also the person that, without an authorization and damaging a third party, takes possession, uses or modifies, reserved personal or familiar data in files or support informatics, electronics or telematics or in any kind of file or public or private registry.

  And the person that access without authorization to an informatics program or data or stays inside the informatics system breaching the security measures established to block this access.

- The release, transfer or revelation of data, facts or images obtained through the aforementioned methods or the person that carry out this action without doing the aforementioned but knowing the illicit conduct.

- The person that reveal secret of others known by his profession or labor relationship.

  Professionals who release secrets of third parties in breach of their confidentiality obligations.

It will be necessary a report by the person affected or their legal representative. But it will not be necessary if the crime is committed by a public servant or affect the general interests or a plurality of people. The pardon of the offended extinguishes the criminal action (articles 197 to 201).

- The other crimes regarding the violation of the access to the home, such as the person who without living there access to the home of another and remains against the will of the person living there.

- Also the access to the residence of a legal entity, professional office or establishment when it is not opened to the public (articles 202 to 204).

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