INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

IP/IT MEDIA & TELECOM- Workshop:

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

LONDON 2015

National Report of Switzerland

Tobias Steinemann

DUFOUR Advokatur Notariat
Dufourstrasse 49,
4010 Basel, Switzerland
+41 61 205 03 03

tobias.steinemann@dufo.ch

General Reporters:

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

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

April 20th, 2015

1. Privacy rights

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

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

In Switzerland, privacy rights are statutory rights and form part of the most elementary constitutional rights. Art. 13 of the Swiss constitution states that every person has the right to privacy in their private and family life and in their home, and in relation to their mail and telecommunications. Further, every person has the right to be protected against the misuse of their personal data. The right to privacy in Switzerland is also covered by the European Convention on Human Rights which is directly applicable in Switzerland and states in art. 8 that every person shall have the right to privacy regarding their private and family life as well as their home and correspondence.

Further, Swiss law guarantees statutory protection to privacy rights on legislative levels below the Constitution.

From a criminal law perspective, art. 179-179^{novies} of the Swiss Criminal Code are of consideration. These provisions deal with offences regarding breaches of privacy or secrecy such as breach of sealed documents, listening in and recording the conversation of others, unauthorized recording of conversations, obtaining personal data without authorization and the breach of privacy through the use of an image carrying device.

In the Swiss Civil Code (CC), the privacy rights form part of the so-called personality rights (art. 27 CC). Also the regulations in the Swiss Data Protection Act (DPA) are meant to protect the privacy rights of individuals. The DPA also contains criminal offence provisions regarding the misuse of personal data.

Lastly, Swiss law also knows statutory obligations for certain professions such as lawyers and doctors to keep their clients and customers data and information confidential. Those groups are generally seen as being concerned with more delicate or more personal information which their clients do now want to share with the broad public. Therefore, these professional regulations also form part of the statutory basis of privacy rights in Switzerland.

Conclusively, privacy rights are broadly based on a statutory level. However, case law always has to be considered as the concrete content of the rights is – as in most areas of the law – subject to social and moral evolution.

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?

Firstly, it has to be noted that under Swiss law it is not the information as such which is protected by the privacy rights but the person's freedom to "use" his/her personal and intimate information as preferred. Protected is basically all information a person only shares with his her closest friends and relatives.

In general, the constitutional right to privacy protects all information and data that is connected to the sphere of privacy of a person. The CC and the respective case law is more

concrete and cover – besides the protection of a person's home and communication – the following information as being part of the privacy rights:

- image of a person: a person's right to self-determine whether his/her image shall be published or used in a commercial or political way;
- name of a person: it is prohibited to use the name of a person in a sense that it directs to a specific person in a commercial or political way without the consent of the specific person;
- voice of a person: it is prohibited to use voice recordings of a person in a commercial or political way without the consent of the specific person;
- words: protection of authors against wrong citation

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 general, the constitutional right to privacy applies to every person regardless of their respective state of fame. An infringement of the right to privacy can only be justified if either

- the infringed person has given his/her consent;
- the infringed person's interest in keeping the information private is outweighed by conflicting public or private interests; or
- based on a legal justification.

Nevertheless, the more a person forms part of the general public (e.g. politics, show business, sports etc.) and the more famous the person is, the more this person has to cope with regarding to potential violation of their privacy rights. The public interest in receiveing information about celebrities is generally higher than it is concerning others. Therefore, the Swiss Supreme Court recognized in BGE 126 III 216 that the publication of information about celebrities can be justified.

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

The personal extent of privacy protection encompasses private persons as well as legal persons. Although the protection provided by the Civil Code also applies to legal persons, their protection, by nature, would be limited to infringements of the legal person's honour, reputation and name.

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.)

Disclosure of information to a third party by a recipient would still be covered by the privacy rights. As already mentioned, it is the person's right to decide who shall have access to the information and how it has been used. The unauthorized disclosure of information by a recipient therefore would still be covered by the privacy rights if the "owner" of the information has neither given his/her consent, nor was there an outweighing public or private interest nor a legal basis which justified the disclosure. In general, it is a matter of what has been agreed upon between the parties. If there has been an agreement that the recipient shall be allowed to disclose it, the person to whom the respective information relates cannot rely on privacy rights anymore.

In line with this, the DPA states that personal data may only be processed for the purpose indicated at the time of collection, that is evident from the circumstances, or that is provided for by law (art. 4 par. 3 FADP). Therefore, disclosure of private information is unlawful unless it is justified by the consent of the injured party.

If a person discloses information to the general public without a disclaimer that the information shall not be used or processed, the person in general also cannot rely on privacy rights regarding the use of that disclosed information.

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

In BGE 135 III 145 the Swiss Supreme Court had to determine a case in which privacy rights clashed with information used in a fictional way in a novel. The Court held that if a person recognizes him-/herself in a fictional novel character based on the given information on that character and the surroundings in the respective book, can be compared to an infringement of privacy rights in a personal letter. The potential infringement has to be determined irrespective of the ability of others to connect the fictional character to the respective person. The court explicitly said that even the person protected under the freedom of art is obliged to respect the privacy rights of others. Hence, it is a matter of weighing up the two constitutional rights against each other based on the facts of each case.

From that case it can be taken that liability for infringements of privacy (or more general: personality) rights cannot be disclaimed as it can also occur without disclosing any information to third parties. But even if the infringement of privacy rights consists of an unlawful disclosure of private information by fictional use to third parties, a disclaimer probably would not prove to be effective as the person disclosing it, would be liable if third parties would still be able to recognize the connection between the fictional character and the respective person.

2. Freedom of speech

2.1. Is there on 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 – just like the privacy rights – a statutory right guaranteed by the Swiss Constitution and the European Convention on Human Rights. The Consitution provides on one hand the freedom of expression and information (art. 16) guaranteeing the right to freely form, express and impart their opinions as well as to freely receive information to gather it from generally accessible sources and to disseminate it. On the other hand, the Constitution also states the freedom of media (art. 17) which is seen as a ground pillar in the process of opinion making and freedom of speech. Censorship is prohibited.

In summary, the constitutional protection of communication covers the following areas:

- freedom of expression and information (art. 16)
- freedom of the media (art. 17)
- freedom of radio and television (art. 17 and art. 93 par. 3)
- academic freedom (art. 20) and freedom of artistic expression (art. 21)
- freedom of assembly (art. 22) and freedom of association (art. 23)
- freedom of the citizen to form an opinion and to give genuine expression to his or her will (art. 34 par. 2)

The provision of the freedom of speech (art. 16 par. 2) is the basic provision and shall be applicable whenever a violation with regard to opinions or information is not subject to one of the specific provisions (e.g. the freedom of media, the freedom of association etc.).

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

Freedom of speech is based on the Federal Constitution as well as the European Convention on Human Rights, which is directly applicable in Switzerland.

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

2.3.1. beneficiaries;

Freedom of speech is a basic human right and recognised as such in Swiss law. therefore, beneficiaries of the freedom of speech are adults and minors irrespective of their nationality, privately and publicly employed persons, public officials/civil servants as well as legal persons, for instance political parties etc. (Müller/ Schefer, Grundrechte in der Schweiz, S. 357). In Switzerland, the right to freedom of speech is granted to any and all natural and legal persons.

2.3.2. extent of the freedom of speech;

Core content of the right to freedom of speech is the prohibition of censorship which has to be applied absolutely. Pre-censoring, i.e. the (systematic) control of expressions before they are published, is strictly prohibited. Govermnent is not allowed to introduce systems or requirements where media have to address the state for its consent prior to the publishing of the information/expression/opinion. The same can be said about systematic censorship after publishing. This would also amount to a violation of the core content of this constitutional right.

Freedom of speech covers "opinions" and in Swiss law this term is interpreted broadly. Even expressions which are not rationally based but rather unreflected and emotional expressions, shall be covered by the freedom of speech. Further, also non-verbal communication such as symbolic gestures or expressions can be protected. The means by which the opinion is communicated are not relevant for the constitutional right to apply. It is also irrelevant whether the recipients of the respective expression understand it as an expression of an opinion.

2.3.3. exceptions;

With the exception of the core content, the freedom of speech is not applied absolutely. Infringements thereof can– as it is with most of the constitutional rights – be justified based on the requirements as set out in art. 36 of the Swiss Constitution. The infringement of the freedom of speech shall be justified if it has been

- based on a formal statutory legal provision allowing such infringement,
- serving a public interest or the protection of fundamental rights of third parties and
- reasonable, which means the infringement had to be necessary and suitable to reach the goal pursued by the public interest as well as balanced with regards to the private interests of the injured party as opposed to the public interest at stake.

For example, statements leading to discrimination, animosity or violence against a person or a group of persons because of their racial or ethnic origin, religion, color, gender, disa-

bilities or illnesses, sexual orientation etc., the freedom of speech can be subject to restrictions to keep the national public security.

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

As already set out, the Swiss Constitution explicity guarantees the freedom of media in art. 17. Henc, the press and media can rely on a constitutional right which is an expression of the value of their statur in a democratic state. Free media shall serve the public interest of free public communication. In case of a violation of privacy rights by the media, it is always tried to argue by the media that the publication of the respective information is justified by this public interest and the job the media have to do in society.

Freedom of media is a core element of the constitutional protection of communication.

3. Hierarchy between Freedom of Speech on one side and privacy rights on the other side.

3.1. Under the law applicable in your jurisdiction, is there a clear hierarchy between freedom of speech on the one hand and privacy rights on the other?

No. Both have a basis in the Swiss Constitution but cater to different needs and are at odds with each other. Generally speaking, one constitutional right does not justify the infringement of another constitutional right. Therefore, whenever different constitutional rights are involved, they have to be weighed up against each other based on the facts of the respective case and the interests involved.

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 laid out before, infringements to constitutional rights can only be justified if the requirements are met. In general, those two rights will clash in the event the privacy rights have been violated and this violation if justified with the freedom of speech argument. If the allegedly infringing act has a formal statutory legal basis and freedom of speech is raised as the justifing public and or superior private interest, it will be a question of the test of reasonability. The court will have to determine whether the allegedly infringing act was

- necessary and suitable to reach the goal pursued by the public interest (freedom of speech) and
- balanced with regards to the interest of the private person in privacy of the injured party as opposed to the freedom of speech and the public interest at stake

In general, it is not possible to determine factors which in general will allow someone to justify the infringement of privacy rights with the freedom of speech argument. The public interest at stake is certainly an important factor but so is the private interest of the injured person. Hence, it will always be a case by case decision and the outcome will have to be determined based on the facts of the case and the specific interests at stake.

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.

The law prescribes different measures to prevent the disclosure of personal information and data.

Art. 28a CC states that any person may ask the court to prohibit a threatened infringement. Further protection is provided by the DPA. In art. 8 par. 1 of the DPA it is held that any person may request information from the controller of a data collection as to whether the data collection contains data concerning them and is being processed.

With private persons processing personal data: The injured person may in particular request that data processing is stopped, that no data is disclosed to third parties, or that the personal data is corrected or destroyed (art. 15 par. 1 DPA).

With federal bodies processing personal data: Anyone with a legitimate interest may request the federal body concerned to refrain from processing personal data unlawfully, to eliminate the consequences of unlawful processing and to ascertain whether processing is unlawful (art. 25 par. 1 DPA). The applicant may in particular request that the federal body correct or destroy the personal data or block its disclosure to third parties, communicate its decision to third parties, in particular on the correction, destruction, blocking of the data or marking of the data as disputed, or publishes the decision (art. 25. par. 3 DPA).

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.

Yes, there are legal means to get the court to prohibit the disclosure of information. This can also be done as so-called precautionary measures ("vorsorgliche Massnahmen"). However, freedom of speech has to be considered and can only be limited under the circumstances as set out above. In particular, these remedies cannot amount to a censorship which would be a violation of the core content of the constitutional communication rights.

In Switzerland, the concept of super injunctions is not known.

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

There are a few potential post-disclosure remedies available to the injured person:

Financial remedies:

- claim for satisfaction (art. 49 of the Code of Obligations): any person who's privacy rights have been unlawfully infringed is entitled to a satisfaction provided it is justified by the seriousness of the infringing act;
- handing over of the profits (art. 423 of the Code of Obligations): where agency activities were not carried out with the best interests of the principal in mind, he is nonetheless entitled to appropriate any resulting benefits;

---

[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

- claim for damages (art. 41 of the Code of Obligations): any person who unlawfully causes loss or damage to another, whether wilfully or negligently, is obliged to provide compensation.

Non-financial remedies:

- ask the court to order that an existing infringement ceases (art. 28a para. 1 CC);
- ask the court to make a declaration that an infringement is unlawful if it continues to have an offensice effect (art. 28 para. 1 CC);
- request that the rectification is being notified to third parties or published (art. 28 para. 2 CC);
- right to reply (art. 28g CC): persons who 's privacy rights are infringed by a representation of events in periodically appearing media, especially the press, radio and television shall have a right of reply.

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

In Switzerland damages always refer pecuniary or financial damages only. The amount of damages is calculated by applying the theory of difference ("Differenztheorie"). It is a comparison of the injured person's status of wealth before the occurrence of the damaging event to the person's status of wealth after the occurrence of the damaging event, assuming the damaging event would have never occurred.

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

In general, liable for damages is the person who commits the unlawful act leading to the loss of the person whose privacy rights have been infringed. Therefore, anyone who infringes privacy rights or processes data in an unlawful manner could be held liable in case damages occur. This also relates to the online world and the service providers (OSP).

If private information has been disclosed, one always has to look at the specific facts of the case and the involved parties. The person disclosing it on an online platform can be treated the same way as he/she is treated in the normal world. That person can be held liable if there is no justification to the disclosure (e.g. consent of the injured person or outweighing public interest etc.). The person providing the online platform, on which the information has been disclosed, is far more difficult. In general, a disclaimer should prove very effective. If the OSP has disclaimed liability for the content users upload it should be safe as long as it provides the means to complain about unlawful content and removes it from the website upon complaint. In general, the terms and conditions of such platforms will state that no one is allowed to post or publish unlawful content and that it is the user's responsibility to ensure that their shared content is in line with the law. The OSP can be held liable, however, if there is any wrongdoing in his own actions which amounts to an unlawful act itself. This could for example be if the platform is explicitly there to share illegal contents or the provider does not remove or control contents with reasonable efforts.

The DPA provides that personal data needs to be protected by reasonable technical and organizational measures against unauthorized processes such as disclosure (art. 7 DPA). Whenever a processor of personal data discloses such information without the consent of the person the data is related to, the processor can be held liable even if he did not disclose

the data willfully or it has been stolen and disclosed by a third party due to not reasonable protection.

With regard to the online world data processing by third parties has to be considered. The Swiss DPA allows the transfer of a data process to a third party if there is no contractual or legal provision prohibiting such transfer and as long as the third party processes the data only in a way the principal was allowed to do so. If this third party then unlawfully discloses such data, it can be held liable. However, also the transferring principal is in danger of liability if he unlawfully transferred the data or did not ensure that the third party is transferring the data as allowed. It is always a question of the facts of the specific case, especially whether such transfer was permitted in the first place.

Every party can be held liable in Switzerland, irrespective of their domicile, as long as the effects of the infringement of privacy rights occur in Switzerland.

In case of breach of privacy the operator of a website is obligated to remove all illegal content from the website. If damage occurs one can hold liable anybody who has been unlawfully processing the data. Based on art. 139 of the Swiss Code on International Private Law the damaged party can choose the applicable law in case of claims resulting from a breach of privacy by media. He/She can choose from:

(a) the law of the state where he has the habitual residence,

(b) the law of the state where the alleged infringed resides or is domiciled

(c) the law of the state, where the success of the infringement occurred.

The term 'media' encompasses press, radio, TV, and other public information media, which also includes the internet.

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

The main defense will be the constitutional rights of communication such as freedom of speech and freedom of press and media. In the event press or media disclose private information, the argument of freedom of media will be brought up by the publisher. A very effective defense is the respected and highly valued public interest in free communication and opinion forming which freedom of press is serving.

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

Swiss law uses a wide interpretation of the term "media". Therefore press, radio, tv as well as the internet are all summoned under the term "media" and subject to the respective provisions. A claim for rectification is only possible in relation to a media which is published periodically.

The definition of "print media", according to the Swiss Supreme Court, requires that there has been a publication to a unlimited or open amount of recipients (BGE 113 II 369, E. 3.a). If something is unlawfully disclosed to a limited group of person it is not considered to be publicy disclosed and the case does not concern the media provisions.

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

Protection of informants and sources are recognised as important pillars to the freedom of media in Switzerland. Therefore, art. 17 par. 3 of the Swiss Constitution offers protection of sources. This means that journalists are entitled not to give away the identity of their informants in order to protect their sources.

In addition to the constitutional right, art. 28a of the Swiss Criminal Code allows persons who are professionally involved in the publication of information in the editorial sector of a periodical medium to refuse evidence as to the identity of their sources without being punished for such refusal.

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?

Yes. The Swiss Supreme Court held that the internet is to be considered as 'media/ press'. Therefore, the outlined rules and statutory laws with regard to media also apply to the online world. Further, the DPA covers online data processing too and has to be considered the same way. And certainly, also the constitutional guarantees equally protect individuals against infringements of their privacy rights in the online world.

In BGE 136 II 508 the Swiss Supreme Court had to deal with a data protection case in a p2p-scenario. What happened was that a swiss company with their own software searched several p2p-networks for offered works which are protected by copyright. When such a work was detected and downloaded, the software saved the following data into a data collection of the company: username of the user, the used IP-address, the p2p-networkprotocol, the name and electronic fingerprint (hashcode) of the copyright work, date and time of the connection between the software of that firm and the software of the offering person of the specific copyright work. In its findings, the Court first held that IP-addresses have to be considered as personal data in the sense of the DPA which therefore was applicable to the case. The Court then had to determine whether the processing of data was justified in that scenario based on the public interest of identifying copyright infringements. Therefore, it was a consideration of this public interest against the private interests of the persons who's data has been collected/processed. In this case the Court found that the processing was not justified and amounts to a infringement of privacy rights.

In BGE 138 II 346 the Swiss Supreme court had to deal with Google Street View. Despite the fact that Google automatically blurred faces of people and number plates of cars, several individuals felt like their privacy rights are infringed by this practice and programme. In summary, the Court mainly found that the images taken by Google have to be considered personal data in the sense of the DPA, which is concretising the Civil Code's provisions on privacy rights. It was held that everyone has the right to self-determine what shall happen with the own image and whether it shall be published online or not. The Court stated that Google is obliged to ensure complete anonymisation of persons and number plates in more sensitive areas such as schlools, hospitals, courts, retirement centers, prisons etc. In general, it shall be acceptable if 1% of the uploaded images are not fully anonymised but will be immediately and efficiently upon request. Images of areas which are not visible for regular pedestrians such as courtyards, gardens etc., shall not be disclosed without the consent of the concerned persons. Therefore, Google was not allowed to take pictures from a height

above 2m. Google was given a period of maximum three years to take down all images which are not in line with these guidelines.

Specific case law regarding infringement of privacy rights does not exist in Switzerland.

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.

First of all, a person's reputation is protected by the Criminal Code but these provisions as well as the Civil Code's remedies in general are of no assistance if the infringer does not care about them and intends to disclose the infringing information anyway. In order to prevent the disclosure of infringing information, a person can – if it hears about a potential disclosure of such information – a precautionary decision or interim measures ("*vorsorgliche Massnahmen*") against the alleged infringer that he/she shall not be allowed to disclose the information. Its a faster procedure by which the applicant has to show credibly that (a) a right to which he/she is entitled has been violated or a violation is anticipated; and (b) the violation threatens to cause not easily repearable harm to the applicant. If the applicant credibly shows that his privacy rights are about to be infringed, the court can prohibit the disclosure of the information upfront. Against periodically published media, the court can only order interim measures if the imminent violation of rights may cause the applicant serious disadvantage, the violation is obviously not justified and the measure does not seem disproportionate.

Forum and applicable law

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

Forum in international cases:

If the person action wants to be taken against resides or has its registered offices in one of the countries of the European Union, the forum has to be determined in accordance of the provisions of the so-called Lugano-Übereinkommen (LugÜ)between Switzerland and the European Union. In art. 5.3 LugÜ it is held that – in addition to the ordinary courts of the state where the defendant resides – actions can be taken at the court of the place where the effects of the infringing act occur.

If the defendant resides or has his registered office in another country outside the European Union, the Swiss courts at the domicile of the defendant as well as at the place of the usual residence, the place where the infringing act was committed or the place where it had its effects.

Applicable law:

The Swiss Code on International Private Law allows the parties to agree on the applicable law after the occurrence of the infringing act (art. 132 IPRG). Hence, the choice of law

prior to the infringing act would be invalid. In the absence of such agreement, the Swiss court will apply the law of the state in which both parties have their place of usual residence or if this does not exist: the law of the state where the infringing act was committed unless the effects of the infringing act occur in a different state which would lead to the application of the law of that state.

Forum in national cases:

In the event of a national issue the forum is defined either by the Swiss Criminal Procedure Code or the Civil Procedure Code. In civil law cases, the court at the domicile/registered office of either of the parties has jurisdiction to decide about actions against privacy infringements or about requests for a right to reply.

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

In general, the outlined rules on international private law are applicable to determine whether a plaintiff can take actions against an alleged infringer in Switzerland (see above).

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

In general, there's a wide and broad protection of privacy rights in Switzerland with a helpful range of remedies available. However, new technological measures provide increasing opportunities for global misconduct. In this area it is more of a challenge for the international community. Further international collaboration with regard to the online world to improve the individuals' opportunities to avoid infringements of privacy rights would be helpful.

A solution to satisfy the needs of data sharing would be to encourage platforms which are privately owned by the people sharing their data who also can freely choose who they want to share their data with. In February 2015 one such platform has been registered in the Swiss commercial registry as a cooperative ("*Genossenschaft*").

Specifically in Switzerland, the right to be forgotten should be strengthened as it has not been regulated with regard to search engines and other similar data collections.

5. Interplay between data protection rules and privacy rights

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

As already mentioned above, the DPA prohibits the processing, i.e. collection, storage, use, revision, disclosure, archiving or destruction, of personal data, meaning of data relating to an identified or identifiable person. With that being said, every process of personal data,

regardless of the method of choice or the technical means, presents a process relevant to the DPA and is therefore prohibited. The DPA therefore prohibits such processes also to online media.

Art. 12 of the DPA states that a person processing personal data may not infringe the privacy of the concerned person.

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

Collection of data is an act to be qualified as processing in the sense of the DPA. Art. 4 para. 4 of the DPA states that the acquisition of data and the purpose thereof has to be recognizable for the concerned individuals. Further, every person has the right to be informed by owners of data collections whether they are collecting data about them (art. 8 DPA). An aspect of the constitutional right of informational self-determination (art. 13 para. 3) is the right to erasure of personal data, that has been unlawfully obtained or legally obtained data that has been stored for too long.

See also answers to question 4.1.

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.

So far, the right to be forgotten has been recognised by Swiss courts in relation to criminal cases. It is recognised that also a report about the past can amount to an infringement of privacy rights. Press reports about past criminal charges are only justified as long it is reasonable, i.e. serving the protection of the public and are not discretionary to the respected person.

As the right to informational self-determination is a constitutional right and stipulated in art. 13 par. 2 of the Swiss Constitution, so is the right to erasure of personal data. It is therefore a statutory based right.

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 just mentioned, a right to be forgotten has been recognised in Switzerland to a certain extent with regard to past criminal offences. In BGE 111 II 209 the Swiss Supreme Court had to determine whether a print media's disclosure of a person's past political views amounted to an infringement of privacy rights. The court found that there is no such right

to be forgotten which would limit the freedom of press. Whether such disclosure by the media was allowed is always a question of the privacy rights.

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?

So far, the European Court of Justice Case has not reflected on Swiss case law. Although, there has not been applicable case law so far, the national data protection officer, Hanspeter Thür, expects that the findings of the European Court's decision are going to be applied also in Switzerland. However, it is possible, that the Swiss Supreme Court takes other factors into account or weighs them differently than the European Court when balancing the respective interests.