



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

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 ?

Privacy rights arise from both federal and state constitutions and statutes as well as federal and state case law.

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?

The type of information is generally not specified. The laws cover all private information which a reasonable person would find objectionable if disclosed to the public. Disclosure of private facts includes publishing or widespread dissemination of little-known, private facts that are non-newsworthy, not part of public records, public proceedings, not of public interest, and would be offensive to a reasonable person if made public.

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.

Public personas have a lessened privacy interest than non-public personas. This derives from the fact that public personas are in the public eye and generally benefit monetarily from being in the public eye. In other words, public persons activities are generally more new-worthy and information relating to them can be considered a matter of public interest.

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

Corporations do not have personal interests and are not afforded privacy rights.

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.).



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Yes. The disclosure by authorized recipients to an unauthorized third party can give rise to a legal claim against (i) the authorized recipient for unauthorized disclosure and (ii) the unauthorized third party.

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

These situations would be evaluated by a court based on the totality of the circumstances. There is no specific rule.

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.

The federal and state constitutions both provide for freedom of speech.

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

The basic right of free speech is contained in the federal constitution.

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

Physical and legal persons are both entitled to free speech.

- 2.3.2. extent of the freedom of speech; exceptions;
 - 2.3.3.

The U.S. Supreme Court often has struggled to determine what exactly constitutes protected speech. The following are examples of speech, both direct (words) and symbolic (actions), that the Court has decided are either entitled to First Amendment protections, or not.

Freedom of speech includes the right:

- Not to speak (specifically, the right not to salute the flag).West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).
- Of students to wear black armbands to school to protest a war (“Students do not shed their constitutional rights at the schoolhouse gate.”).Tinker v. Des Moines, 393 U.S. 503 (1969).



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- To use certain offensive words and phrases to convey political messages. *Cohen v. California*, 403 U.S. 15 (1971).
- To contribute money (under certain circumstances) to political campaigns. *Buckley v. Valeo*, 424 U.S. 1 (1976).
- To advertise commercial products and professional services (with some restrictions). *Virginia Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).
- To engage in symbolic speech, (e.g., burning the flag in protest). *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990).

Freedom of speech does not include the right:

- To incite actions that would harm others (e.g., “[S]hout[ing] ‘fire’ in a crowded theater.”). *Schenck v. United States*, 249 U.S. 47 (1919).
- To make or distribute obscene materials. *Roth v. United States*, 354 U.S. 476 (1957).
- To burn draft cards as an anti-war protest. *United States v. O’Brien*, 391 U.S. 367 (1968).
- To permit students to print articles in a school newspaper over the objections of the school administration. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).
- Of students to make an obscene speech at a school-sponsored event. *Bethel School District #43 v. Fraser*, 478 U.S. 675 (1986).

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

The rights of the press are protected as free speech.

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?

Generally freedom of speech trumps privacy rights.

- 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)?

Under US jurisprudence, the courts value the free exchange of information over individual privacy rights.



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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.

Individuals may file to obtain an injunction against the disclosure.

- 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.

Gag orders are not available to private parties. The government can avail itself of gag orders in cases involving national security.

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

Since privacy claims arise under the law of tort, courts generally award monetary damages as recompense. The court is generally free to require equitable remedies as well.

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

Damages are set by the jury and not based on formal calculations.

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

The discloser and publisher of information can be held liable for damages. It is however harder to proceed against the publisher of information, if that person is a member of the press. The press benefits from wide-ranging free speech protections.

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

Yes, the press is protected by wide ranging freedom of speech protections. The press is entitled to report new-worthy information of public interest.

¹See for details : http://en.wikipedia.org/wiki/Gag_order#United_Kingdom

² See for details: http://en.wikipedia.org/wiki/Injunction#UK_superinjunctions



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

The press is widely defined under US jurisprudence and would also cover members of non-traditional news outlets.

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

US law provides for a reporters privilege. It is the reporter's protection under constitutional or statutory law, from being compelled to testify about confidential information or sources. It may be described in the US as the limited First Amendment right many jurisdictions by statutory law or judicial decision have given to journalists in protecting their confidential sources from discovery.

- 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?

This area of law is developing rapidly. Generally, online journalism enjoys the same protections as traditional print journalism.

- 4.8. Are there specific remedies against disclosure of information that (could) damage an individual reputation (such as slander or libel) ? Describe these remedies briefly.

The key factor here is whether the disclosed information is truthful or not. Slander and libel require that the information would be without truth or merit.

- 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.

Forum and applicable law are determined by the federal and state procedural statutes and rules.

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



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There are no specific rules governing online breaches. The courts apply the general procedural rules.

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

Individual privacy in the US is not well balanced with public interest. Particularly with respect to non-public persons, an EU style right to be forgotten would add valuable protections for US individuals.

5. Interplay between data protection rules and privacy rights

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

The United States has about 20 national privacy or data security laws, and hundreds of such laws among its 50 states. These laws, which address particular issues or industries, are too diverse to summarize fully in this volume.

In addition, the large range of companies regulated by the Federal Trade Commission ('FTC') are subject to enforcement if they engage in materially unfair or deceptive trade practices. The FTC has used this authority to pursue companies that fail to implement minimal data security measures or fail to live up to promises in privacy policies.

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

No general statements can be made in this regard. Please see above.

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..

No.

- 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".



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No.

- 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?

No.

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?