



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

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

IP/IT MEDIA & TELECOM - Workshop
LONDON 2015

General Reporters:

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

Cristina Hernandez-Martí Pérez, Hernandez Martí Abogados, Barcelona,
Spain
cristina@hernandez-marti.com

May 1 2015

1. Introduction

Protection of individual personality rights in the media affects all of us not only as lawyers but also as individuals. In this workshop we will discuss about the right to be informed, privacy rights, and the “hot” new right to be forgotten. Who is not curious to know more about the right to be forgotten which is announced as crucial in the Internet search engine and social media economy? What is the interplay between data protection rules and privacy rights? Which remedies are available and what law is applicable? We will not only focus on the European Court of Justice in *Google Spain v. AEPD and Gonzalez*, and his consequences both in market practice and in EU member’s states case law, but also consider these rights on a global perspective.

Among the topics will discuss about privacy, personal data protection, and hot new European “Right to be forgotten” which is announced to be crucial in the internet search engine and social media economy and right to be informed. Furthermore we will discuss topics such as censorship, freedom of the press, tabloids, (Stolen) pictures, telephone tapes, sex tapes, fictional use, gossips, watchdog, publicity rights, slander, libel, press offenses, publisher liability, right of answer. Then as law without enforcement is like life without love, injunctions, damages and settlements will also be discussed during the workshop

As a conclusion, most legal system shares a common view on principles relating to freedom of expression and exceptions. Differences are slightly evolving depending the geographical zone and the legal system.

However, going deeper in details, case law criterias and approach may differ from one jurisdiction to another. Similar remedies are available against infringement of privacy rights. Damage claim is available under all of the jurisdictions.

In our AIJA workshop in London, we will mainly focus on this differences approaches and practises.

Our national reporters were:

- A. Ülkü Solak, Turkey
- Adam Gyorgy, Hungary
- Anna Wojciechowska, Poland
- Ave Piik, Estonia
- Carlo Mezzeti, Italy
- Caroline Berube and Ralf Ho, China
- Daniel Avila and Renato Leite Monteiro, Brazil

- David Ma, Canada
- Elina Mantrali, Cyprus
- Erik Ulberg and Cecilia Rehen, Sweden
- Florian Stamm, USA
- Gonzalos Menendez, Guatemala
- Jose Luis Martin, Spain
- Juan Pringles, Argentina
- Julia Blind, Germany
- Lynn Pype, Belgium
- Lynne Main, England & Wales
- Marc Elshof and Irene Feenstra, The Netherlands
- Nis Marinus Dommergaard and Joachim Kundert Jensen, Denmark
- Philip Nolan, Ireland
- Stefanos Tsimikalis, Greece
- Tobias Steinemann, Switzerland
- Tomas Rybar, Slovakia
- Wolfpaul Finder, Austria
- Xavier Carbasse, France

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

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 which the information refers to.

1.1. Statutory rights or case law based?

In most of jurisdiction privacy rights find their origin both in international treaties and constitution as matter of principle.

However, in most of the jurisdiction the concept of privacy is widely appreciate by courts and then balanced with other constitutional rights such as freedom of expression.

Criminal law also protect a breach to privacy rights in many jurisdiction (France, Finland, Turkey, Switserland...)

International treaties reference includes Declaration of Human Rights (Article 12, Privacy Rights); American Declaration of the Rights and Duties of Man (Article 5, Protection of Honor, Personal Reputation and Privacy); International Pact on Civil and Political Rights (Article 17, Privacy Rights). They are enforceable in many jurisdictions worldwide, even though effective enforceability may vary from a country to another.

The European Convention on Human Rights (“ECHR”) expressly provides for the right to privacy in Article 8.

In addition to general rights of privacy under constitutions and ECHR, European member state transposes EU Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Personal data.

Then European jurisdiction offers two legal grounds to protect privacy rights and European data privacy law is broadly encompassing data privacy issues as Personal data is defined DPA as data relating to a living individual who is or can be identified either from the data or from the data in conjunction with other information that is in, or is likely to come into, possession of the data controller (indirect identification).

Generally case law allows concretising statute law and addressing new issues such as the right to be forgotten which is not as per mentioned in statute law in any jurisdiction.

Finish constitution protects everyone's private life, honour and home as well as the secrecy of correspondence, telephony and other confidential communications which are inviolable.

In Germany, privacy rights are statutory rights and there is no explicit right to privacy in the German Constitution - the “Basic Law” (Grundgesetz – GG) but protection of privacy is included within the protection of human rights in Arts. 1-20.

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

1.2. Type of information (including pictures, sounds, etc.) covered by the concept of “privacy rights”

In most jurisdictions, in particular in Europe, privacy is protected in itself as part of fundamental right of image, family life, confidentiality of communication and by the mean of rules on data privacy.

Generally Privacy rights relate to any type of information by which a person can be identified, regardless to the medium or form used and encompass every aspect of private, family and home life, dignity, honor and all decisions about personal life,

Privacy rights are not limited to tangible information such as portraits (photographs, drawings, sculptures) of a person, but extend to the privacy of the spoken and the written word, and the privacy of data.

Legal doctrine² often recalls the definition of the privacy rights created by the Parliamentary Assembly of the Council of Europe: “The right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection against misuse of private communications, protection from disclosure of information given or received by the individual confidentially.

The type of information spread is rather irrelevant; thus pictures, videos and other means, including insinuation, may violate these privacy rights. For the act to be sanctioned, it must be conducive to causing the person damage or suffering, or subjecting the person to contempt.

A general right of personality, which encompasses many aspects of the personality is generally codified in Civil Code countries.

Privacy rights in France may cover information about the health, sentimental life, family, domicile, revenues, religious or political beliefs of an individual. The right to the protection of one's image is deemed to be included in the category of privacy rights.

The concept of “privacy rights” is not specifically defined in Swedish law but Swedish constitution prohibits non-consensual recordings in public registers which are solely due to an individual's political views and “significant” intrusions in the personal privacy in relation to public authorities,

Swiss approach is rather original as 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 and therefore the constitutional right to privacy protects all information and data that is connected to the sphere of privacy of a person including image, - name, voice or words of a person:

Common law and mixed systems generally do not state any general definition.

In USA type of information covered by the concept of “privacy rights is not specified and cover all 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.

In Canada, Privacy rights between as between individuals and the government are constitutionally protected. Section 8 of the Canadian Charter of Rights and Freedoms (provides that “everyone has the right to be secure against unreasonable search or seizure. This has been judicially interpreted “to establish a right to privacy.”which provides for freedom of expression, has also been judicially interpreted as a right to say nothing at all and therefore affords a privacy right.. Various legislation protects privacy rights as between individuals and the government. The federal Privacy Act²³ restricts the collection, use and disclosure of personal information by federal government departments, ministries and agencies.

The Personal Information Protection and Electronic Documents Act (“PIPEDA”)² is a federal statute governing the collection and use of personal information from individuals by private sector organizations

1.2.1. Dependence upon the celebrity of a person ?

In general, even though no statute contain express provision on that issue, celebrity of a person can have an influence on the extent of that person’s privacy rights. It is generally assumed that public figures limit their privacy rights when they expose themselves to the media.

Then the extent of privacy rights does not depend upon the fame of the person, or upon other elements relating to that person, but actually celebrity always interfere in case law.

In Swiss law more a person forms part of the general public (e.g. politics, show business, sports etc.) the more this person has to cope with regarding to potential violation of their privacy rights : An infringement of the right to privacy can only be justified if either (i) the infringed person has given his/her consent ; (ii) the infringed person's interest in keeping the information private is outweighed by conflicting public or private interests ; (iii) based on a legal justification.

The general definition offered by the Spanish 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).

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.

In Finland, the Criminal Code includes exemptions to both prohibited acts of dissemination of private information and defamation: the spreading of information, an insinuation or an image of private life of a person in politics, business, public office or public position, or in a comparable position, does not constitute a breach of law if it may affect the evaluation of that person's activities for purposes of dealing with a matter with importance to society.

Poland also includes clear exemption for public persons.

In Germany courts make the extent of privacy rights subject to the sphere in which a person is interacting with his/her environment: Less protection of privacy rights is given in the public sphere and there is a higher level of protection of privacy rights in the social sphere. The social sphere extends to all actions that are not considered to be private, such as professional or political actions. The private «intimate» sphere offers the best level of protection: family members and close friends enjoys an absolute protection; no encroachment on this core area of private life can be tolerated.

In USA, 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 and information relating to them can be considered a matter of public interest.

The Turkish Constitution states that privacy rights can be restricted if such a restriction decision is given by a court or judge order and if it is required for:

- national security,
- public peace,
- public health,
- public morality,
- prevention of a crime, or
- protection of the rights and freedom of others.

As the extent of privacy rights is not defined by legislation in Turkey, privacy should be considered on a case-by-case basis. For instance Court of Cassation ruled against a complainant with an infectious disease who claimed his privacy had been violated by a newspaper article which discussed whether the complainant could practice his work (as a doctor) in his condition. The court decided there is public interest in making people aware of a threat of infectious disease, and therefore publishing this information would not violate the complainant's privacy rights

In Cyprus, constitution also provides specifically that freedom of speech may be subject to conditions, restrictions or penalties prescribed by law and which are necessary in the interests of the security of the Republic, the constitutional order, the public safety, the public order, the public health, the public morals, the protection of the reputation or rights of others, the prevention of the disclosure of information received in confidence, or the maintenance of the authority and impartiality of the judiciary.

1.2.2 Privacy rights also apply in relation to legal persons (vs. physical persons)

In most jurisdiction there is no general privacy right for legal persons eventhough they may take advantagae of protection by tradesecret, or legal person reputaiton.

Legal persons enjoy some privacy rights, such as the right on its name and the protection of its reputation. A legal person however cannot invoke a portrait or image right.

In USA corporations do not have personal interests and are not afforded privacy rights.

In Switzerland, 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.

In Ireland, While the freedom initially focuses on “citizens” of the State, Article 40.6.1.i recognises the freedom of expression for “organs of public opinion”. The Irish Constitution guarantees to both individuals and the media the freedom of expression. As indicated above, Article 40.6.1.i guarantees “citizens” the right to freely express their convictions and opinions. It is not certain whether this term also encompasses bodies corporate (legal persons). While there have been decisions of the Irish courts accepting that legal persons may invoke certain ‘personal rights’ (such as the right to private property in *Iarnród Éireann v Ireland* [1996] 3 IR 321), a similar interpretation has not been adopted with respect to the right to freely express one’s convictions and opinions.

In Brazil Federal Civil Code grants to legal persons the protection of personality rights, such as image, name and reputation, which are included on the general protection to privacy.

1.3. “fictional use” of information related to an individual

In most jurisdictions, a person’s privacy rights can be encroached by fictional use as long as the fictional person can be identified as a real person.

In italy, Guidance on the definition of “identifiable person” was recently provided by the Supreme Court, with ruling n.1608 of 27 January 2014, which established the principle that mentioning the name of a certain person is not a condition for the violation of their privacy, as it is sufficient for such person to be identified via a deductive method of exclusion within a certain category of people

2. Freedom of speech

2.1. statutory/ treaty based freedom or constitutional recognition of “Freedom of speech” or case-law.

Freedom of speech is protected by Article 10 ECHR and Article 19 ICCPR but also Charter of Fundamental Rights of the European Union (article 11) and European Convention on Human Rights (article 10).

In most of the jurisdiction, freedom of speech is guaranteed the Constitution and the scope of the right of freedom of speech is established through the case-law.

Any speech is subject to freedom of expression unless not covered by exceptions.

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

Some jurisdiction had domestic law provisions before supra national provision came into force, specially in Europe.

Supra national Law are mainly the European Convention of Human Rights and the International Convention on Civil and Political Rights.

In general freedom of expression is largely defined.

In Finland, the Constitution provides the freedom of expression for everyone (beneficiaries). The freedom of expression entails the right to express, disseminate and receive information, opinions and other communications without prior prevention by anyone. Provisions on restrictions relating to pictorial programmes that are necessary for the protection of children may be laid down by an act.

Derogation must fulfil specific criteria to be justified.

In general, it can be stated that freedom of expression is enforceable in so far as privacy rights of others are not violated at the same time.

In Finland, specific statute law applies to the exercise of freedom of expression in the media Act on the Exercise of Freedom of Expression in Mass Media (460/2003). The Act lays down e.g. certain duties for publishers and broadcasters, such as the obligation to designate a responsible editor for a periodical equivalent apply in other jurisdictions in order to facilitate any liability.

2.3. Main characteristics of the “freedom of speech” as recognized in your jurisdiction (beneficiaries, extent of the freedom of speech, exceptions and specific status for press including online press?)

2.3.1 Characteristics of the “freedom of speech

Any speech is covered, unless it is not prohibited by the exceptions.

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 in most jurisdiction

However, it is not always clear to determine what type of information is considered as ‘speech’ and For instance the Court of Brussels held that the publication of a caricature is not considered as the expression of an opinion and does therefore not enjoy the protection of Article 19 of the Constitution (Rb. Brussels 25 April 2008).

Switzerland is broader on the scope of the protection as 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.

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.

In Italy, in principle, freedom of speech encompasses the right to convey any information or opinion (even a totally personal view of facts) and to express criticism. However, if specific facts are reported as true facts and referred to identifiable natural persons or organizations, Italian Courts usually apply a threefold test to assess if constitutional recognition of freedom of speech applies:

- a. “truth of statements” (including “putative truth”, meaning that a serious work of research and verification of sources has been carried out);
- b. “temperance of expression” (meaning that expressions which are gratuitously offensive, as well as innuendos, are not covered by freedom of speech);
- c. “public interest of the matter” (meaning that it is, at least potentially, of genuine interest

for public opinion)see ex multis: Supreme Court, 18.10.1984, n. 5259; Id. 15.12.2004, n. 23366.

2.3.2 Exceptions

In most jurisdiction exception, the infringement of the freedom of speech is limited to specific harmful issues and 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, disabilities or illnesses, sexual orientation etc., the freedom of speech can be subject to restrictions

In Switzerland and may jurisdiction 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.to keep the national public security.

In Sweden, on the general freedom of expression can be introduced in ordinary law (i.e. the law does not need to be in the form of a fundamental law), but the possibility to pass such laws is limited. A law limiting the freedom of expression may only be made to satisfy a purpose acceptable in a democratic society and may not go beyond what is necessary with regard to the purpose for which it was intended. Nor may it extend so far as to constitute a threat to the free shaping of opinion. No limitation may be imposed solely on grounds of a political, religious, cultural or other such opinion.

The freedom of expression may be limited for certain specific purposes: the security of the Realm, the national supply of goods, public order and public safety, the good repute of an individual, the sanctity of private life, the prevention and prosecution of crime, and in business activities.Outside of the scope of these purposes, freedom of expression may only be limited where particularly important grounds so warrant,while paying particular attention to the importance of the widest possible freedom of expression in political, religious, professional, scientific and cultural matters.

The exercise of the freedom of speech in article 10 in the European Convention may be subject to restrictions prescribed by law and when they are necessary in a democratic society,in the interests of national security, territorial integrity or public safety, for the preventionof disorder or crime, for the protection of health or morals, for a more general exemptions that cover information about a matter with importance to society if, considering the content, rights of other persons, and other circumstances.

In Ireland, It is important to first highlight the specific limitations set down in the Constitutioni itself. Freedom of expression is first restricted by and must be exercised subject to “public order and morality”. Moving away from the protections of the Constitution, many Irish statutes can be seen as curtailing the freedom of expression. State security, the administration of justice, public health and safety, public morality, the right to privacy and the

right to one's good name are all recognized exceptions to the freedom of expression and upon which the freedom has been limited in statute.

In Guatemala, an exception to freedom of speech exists; Against public political figures or workers, specifically regarding work related issues.

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).
- To use certain offensive words and phrases to convey political messages. *Cohen v. California*, 403 U.S. 15 (1971).

In Turkey, Freedom of speech is recognized by the Turkish Constitution under the section entitled "Freedom of Expression and Dissemination of Thought". Accordingly, everyone is granted the right to express and disseminate their thoughts and opinions by any means, either individually or collectively. But, it is not prohibited to subject the transmission of information by radio, television, cinema and similar means to a licensing system. It should also be noted that members of the Grand National Assembly of Turkey are granted immunity for their votes and statements made during parliamentary proceedings, as well as for the views they express before the Assembly, or (unless the Assembly decides otherwise) for repeating or revealing these statements outside the Assembly.

Freedom of speech guaranteed by the Constitution may be restricted only by law and for the following purposes: protection of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation; preventing crime or punishing offenders; withholding information duly classified as a state secret;

- protecting the reputation or rights and private and family life of others;
- protecting professional secrets as prescribed by law; or
- ensuring the proper functioning of the judiciary.

Provisions under section V of the Criminal Code entitled "Offenses Against Public Peace" are significant to establish the framework of the freedom of speech. Crimes penalized under the Criminal Code include:

- provoking people in a way to risk public safety;
- humiliating another person based on social class, religion, race, sect or origin;
- showing disrespect to the beliefs of a religious group to the extent posing a

risk for public peace;
 provoking people to commit crimes

If any of the acts listed above are committed through press and broadcast by exceeding the limits of informative purposes, the punishment will be increased.

The freedom of press is also subject to restrictions as required for protection of others' rights and reputation, public health, national security, public order, territorial integrity, the impartiality of judicial bodies, and in order to prevent disclosure of official secrets

2.3.3 Specific status for press (including online press)?

In most jurisdiction, there is no specific status for online press and Constitutions explicitly guarantee the freedom of media in art. 17.

In sweden, **The Freedom of the Press Act and the Fundamental Law on Freedom of Expression** Opinions expressed through a medium enjoy a greater constitutional protection than other modes of expression. The FPA and the FFE both guarantee the right, vis-à-vis public institutions, to publicly express thoughts, opinions and sentiments, and to communicate information on any subject whatsoever on the respective covered media.

There are six underlying principles, upon which the protection for opinions expressed through the protected media is built. Among them are (i) Prohibition against censorship and other obstacles to exercising the freedom of expression (ii).i. Protection of sources and a legal right to anonymity (iii) Freedom of establishment, i.e. the right for everyone to produce printed matter by means of a printing press, transmit radio programs by landline and to produce and disseminate technical recordings.²²

Spanish courts based on 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).

In Hungary, according to article IX Section 5 of The Fundamental Law of Hungary the right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community and blasphemy of national symbol is subject to criminal sanctions such as incitement against a community, denial of Nazi crime or use of symbol of totalitarianism.

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

In most of jurisdictions, there is no Hierarchy between Freedom of Speech on one side and privacy rights on the other side.

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

When evaluating the lawfulness of a particular restriction, the test of proportionality is usually applied.

In general, it is difficult to determine factors which 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.

Public position of the person whose privacy rights have been violated and the importance of the matter to society is also taken into account into most of jurisdictions.

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.

In USA, freedom of speech generally trumps privacy rights. Under US courts value the free exchange of information over individual privacy rights.

The most significant criteria, which can be used as an argument for letting the freedom of expression prevail over privacy rights when undertaking such a balancing act, is the promotion of the public interest. Is the subject a public person? Is the discussion or issues raised of public interest or otherwise important for the free shaping of opinion? What is the consequences of the publication

In Czech republic, Privacy rights therefore usually as such prevail over freedom of speech with regard to the information concerning the most intimate sphere of a person, as not protecting such information would mean that the privacy rights have lost their essence and meaning.

In Finland, there is no clear hierarchy between the constitutional rights of freedom of expression and the right to privacy. The assessment between the rights must be made separately in each case : A case in point is the Supreme Court decision KKO 2010:39, which was also considered by the European Court of Human Rights (case Ruusunen v Finland). concerned the dissemination of information violating the personal privacy of the former Prime Minister Matti Vanhanen by his girlfriend Susan Ruusunen, who wrote a book including private details of their facts of the relationship, different lifestyles, and his family habits. Furthermore, the book included detailed accounts of their sexual relations. ECHR stated that, as a public figure, the ex-Prime-Minister was expected to tolerate a greater degree of public scrutiny which may have a negative impact upon his honour and reputation than a completely private person. The Court agreed with the Supreme Court aso

those elements of the book that from the point of view of the general public's right to receive information about matters of public interest Ruusunen was entitled to publish.

In Switzerland 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 Sweden freedom of expression, which for centuries has played a central and important role in Sweden and forms part of the Swedish constitution while, it can be said that privacy rights are not safeguarded in the constitution in the same way for its own objectives, but rather in order to protect against measures which can also be perceived as limiting or threatening the freedom of opinion.

However, ordinary laws protecting privacy rights, can limit the freedom of expression. In addition, Sweden must of course, as a member of the EU, comply with the EU-legislation protecting privacy rights and the interpretations thereof made by the Court of Justice of the European Union (the "Court of Justice").

Swedish courts have been faced with a situation where there is a conflict between freedom of expression on the one hand, and privacy rights on the other hand, they have not resorted to solving the problem through a strict analysis of the hierarchy of laws, but rather by carefully weighing these important interests against each other in order to find a fair balance between the two: 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.

In Spain, in addition, the right to information implies not only providing these communications but also receiving it. Freedom of expression will prevail if there is a public interest that occurs when the information is relevant for the community as soon as it is not based only on the public curiosity.

In Polish law, it may be stated that the more famous the injured person is and the more facts demonstrate his/her celebrity status, the less protected his/her privacy is. But information violating privacy rights cannot be justified if they are published in publicly accessible media and are based on insufficiently tested and in fact incorrect information/

In Dutch law, relevant criteria would be public interest (in particular for journalists), but also whether the (intended) publication/allegations are based on verifiable facts or whether it is (clearly) unfounded and only intended to bring harm. The fact that it regards a celebrity or a minor can also be relevant.

In Ireland, When determining whether there is public interest in the publication of particular information, the Irish courts may also have regard to ECHR jurisprudence. Cases like *Von Hannover v Germany* [2004] 59320/00 have been cited with approval by the Irish High Court. there must be an overriding public interest for the publication of an individual's private information. The Irish courts have created a hierarchy of constitutional rights which places freedom of expression and speech at the top and are generally reluctant to curtail these

freedoms.

As a conclusion in general information is considered to be of a significant public interest, the freedom of expression will generally prevail over privacy rights, even if the information is sensitive or may damage the repute of the individual concerned.

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.

Alex Fox and Robert Griffiths point out that an interim non-disclosure order is the most commonly sought pre-emptive remedy in England and Wales. HRA s.12(3) states that “*no such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.*”

Mr. Ma and Mrs. Maxwell indicate that injunctions are generally available in most Canadian jurisdictions, and can be sought from a court to prevent the release of private information. Furthermore, they point out that in order to be entitled to an injunction, the parties must satisfy the three branches of the test established by the Supreme Court of Canada in *RJR-Macdonald Inc. v. Canada*¹: (a) Is there a serious issue to be tried? (b) Will the applicant suffer irreparable harm if the injunction is not granted? (c) Which party will suffer the greatest harm from granting or refusing the injunction, i.e. where does the balance of convenience lie?

Elina Mantrial, Cyprus national reporter mentions that an injunction is the most common legal measure taken to prevent a party from going ahead with any action and that any court in Cyprus, in the exercise of its civil jurisdiction, may issue an injunction if it deems fit.

Lynn Pype affirms that pre-emptive remedies in order to avoid disclosure are not available. Article 25 of the Belgian Constitution clearly states that censorship can never be implemented. It is only after the information has been disclosed that the court can order a distribution ban in case the rights of individuals have been violated by the publication of the information.

Stefanos Tsimikalis, highlights that in Greece the main remedy available to the person whose privacy rights have been violated is the filing of a lawsuit by which he/she will request that the defendant ceases the infringement and refrains from infringing his rights in the future. There have been cases like Larisa Court of Appeals 431/2000 where the courts

¹ [1995] 3 S.C.R. 199 (S.C.C.).

have found that the same claim may be exercised pre-emptively, so prior to the violation taking place, if it can be proven that there is actually an imminent danger that the violation will take place.

Philip Nolan mentions that the Irish High Court has the power to grant a variety of injunctions, both mandatory and prohibitory. These orders can be used to prevent the disclosure or publication of information. Pre-trial injunctions include interim injunctions, made in cases of extreme urgency. Such orders are made on an *ex-parte* basis. The decision of the English House of Lords in *American Cyanamid v Ethican Limited* [1975] 1 All ER 504 set the criteria followed by the Irish courts in order to apply for an injunction. These criteria's were followed in Ireland in *Campus Oil v Minister for Energy* [1983] 1 IR 88. The test is the following: there must be a serious/fair issue to be tried; damages must not be an adequate remedy; and the balance of convenience lies in favour of granting the injunction.

Marc Elshof and Irena Feenstra explain the two proceeding options in the Netherlands. Firstly, summary proceedings, which are brief and fast and in principle only preliminary relief can be claimed in summary proceedings. It is often used in cases where a party wishes to prevent certain publication and time is of the essence. On the other hand, proceedings on the merits are more time consuming and a judgment in such proceedings can be of a declaratory nature. In these proceedings the claiming party can also ask the court to order to prohibit disclosure of the information.

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.

Mr. Fox and Mr. Griffiths specify that in England & Wales following the controversy in 2011 over so-called ‘super-injunctions’, the Master of the Rolls, Lord Neuberger, set up the Super-injunction Committee to examine the use of injunctions to bind the press to non-disclosure. The committee report confirmed that a super-injunction is an interim injunction, which prohibits (1) publishing certain information, and (2) disclosing the existence of the injunction or the proceedings.² The Master of the Rolls’ practice guidance states that super-injunctions “*can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice.*”³

Under Argentine law they are not specifically regulated. However, they do have precautionary measures and injunctions aimed at avoiding injury through a court order that prevents the damage being caused. The requirements to meet injunctions are pointed out by Juan Pringles i) immediacy of the need for legal protection; (ii) the right invoked must be highly substantiated; and (iii) the claimant must deposit a surety to guarantee the rights

² <https://www.judiciary.gov.uk/publications/committee-reports-super-injunctions/>

³ <https://www.judiciary.gov.uk/publications/committee-reports-super-injunctions/>

that might potentially be impaired. The purpose is to prevent that a delay in the final judgment may minimize the right at issue during the proceedings.

Wolfpaul Finder highlights that “gagging orders” or super injunctions have not been implemented in the Austrian legal framework, even though in certain legal areas they may be excluded from the proceedings.

Renato Leite and Daniel Avila, Brazil national reporters, state that there is not a procedure similar to the UK “gagging orders”, but it is possible to request injunctions that can prohibit the press or any other person to publishing revealing information regarding an individual. Such a request, and the injunction, can be granted on a confidential basis, preventing its disclosure to the public.

On the other hand, in Cyprus, “gagging orders” are available and widely used and they are particularly used in support of disclosure and discovery orders against banking institutions and other service providers.

Ave Piik enumerates the remedies available under Estonia law (i) demand to cease the infringement (ii) claim damages (iii) demand refuting on correcting the false information. Furthermore, Mrs. Piik points out that according to the case-law of the Supreme Court, an apology is not a legal remedy, but a moral obligation. So, the victim cannot ask the court to force the infringer to apologize in front of the person whose personality rights were infringed. In addition, the victim can also claim damages. Damages in this regard may consist of a) incurred expenses; b) decrease in income; c) loss of income due to the infringement; and d) damage arising from loss of potential economic potential.

Tobias Steinemann, Switzerland national reporter, states that the possible remedies are: claim for satisfaction; handing over of the profits; claim for damages; ask the court to order that an existing infringement ceases; ask the court to make a declaration that an infringement is unlawful if it continues to have an offensive effect; request that the rectification is being notified to third parties or published; and the right to reply.

Florian A. Stamm states that 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

Under the twenty-five jurisdictions damages are available. Courts may award damages even though many of the national reporters mention that the damage quantification is not too high.

In Austria, the available remedies are: damages, right of reply or equivalent, right of publication of the judgment, remedies against reputation-damaging statements and right to request information, right to correction and right to deletion according to the Austrian Code for the Protection of Data.

England & Wales national reporters mention that the most common post-disclosure remedy is damages and that in very rare cases exemplary damages (punitive damages), account of profits and delivery up or destruction of offending material may also be available. Where there is also a claim in defamation there may be a right to an apology.

In Belgium the available post-disclosure remedies are (i) damage claim (ii) right to answer (iii) publication of the judgment.

In Germany the remedies available are: damage claims, rectifications claim and the right to answer.

In Greece the remedies available are damage claims and remuneration claims for moral damages. Even so, damages are really difficult to calculate and moral damages are calculated by Courts discretion. Furthermore, right of answer and right to rectify area also available.

In Guatemala, Gonzalo Menendez, points out that the civil remedies available are damage claims and rectification of the disclosure. The constitutional remedies available are clarification, rectification, explanation and refutation.

Dr. Adam György mentions that the Hungarian Civil Code provides the available remedies: a court ruling establishing that there has been an infringement of rights; perpetrator restrained from further infringement; restitution; termination of the injurious situation and the restoration of the previous state and surrender of financial advantage.

Carlo Eligio Mezzetti, points out that in Italy damages are calculated on equitable basis. It is difficult for the offended person to give evidence of an economic damage. He underlines the fact that the dissemination of the information and the social standing of the person involved are often taken into account.

The Netherlands national reporters number the remedies available: rectification; damages; prohibition to repeat disclosure; or complaint at the Netherlands press council.

Jose Luis Martin, indicate that the post-disclosure remedies available in Spain are restoration of the breached rights; declaration of the suffered intromission; end of the forbidden action; replacement to the old situation; publication of the judgment with the same diffusion and the right to reply; right to rectify; compensation for damages and appropriation of the profit obtained.

In Switzerland, Tobias Steinemann mentions that damages always refer pecuniary or financial damages only. The amount of damages is calculated by applying the theory of difference. 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.

Ülkü Solak cites the privacy infringement remedies available under Turkish law: bring a criminal charge; start civil action and claim compensation for monetary damages; begin civil action and claim compensation for moral damages; demand the reimbursement of a defendant's unlawful profits derived from such disclosure; demand the continuing offence be stopped; if the privacy violation has occurred on the internet, apply to the content provider to have the content removed; or demand correction of the information.

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

Mr. Pringles points out that in Argentina damages are estimated by the claimant upon bringing lawsuit and are determined by the Court based on the proof available in the proceedings.

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

Canada national reporters review the factors which are considered by the courts and work as a guideline in assessing the appropriate amount of damages under common law to be: (i) the nature, incidence and occasion of the defendant's wrongful act; (ii) the effect of the wrong on the plaintiff's health, welfare, social, business or financial position; (iii) any relationship, whether domestic or otherwise, between the parties; (iv) any distress, annoyance or embarrassment suffered by the plaintiff arising from the wrong; and (v) the conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the defendant. On the other hand, under the statutory regime set out in PIPEDA⁴, *Nammo v TransUnion of Canada Inc*, the Supreme Court found that "to be 'appropriate and just', an award of damages must represent a meaningful response to the seriousness of the breach and the objectives of compensation, upholding *Charter* values, and deterring future breaches." It appears that the same reasoning applies to a breach of PIPEDA.

Caroline Berube and Ralf Ho, national reporters from China, call the attention to the damage calculation. The Supreme People's Court has stated how to calculate damages related to tort causing mental damages. For compensation of pure psychological and emotional distress of the victim, the judge will consider: a) the degree of fault of the offender; b) the damage caused to the victim; and c) financial conditions of both parties.

On the other hand, under Cyprus law, Mrs. Mantrali comments that as a general principle, damages are calculated on the basis of compensating the victim for any losses sustained, with the aim of restoring a victim to the position he or she would be in had the wrongful action not been committed, to the extent that it is possible to do so with a monetary award. Where it has not been shown that a loss has been sustained, the Court may award nominal damages.

⁴ Personal Information Protection and Electronic Documents Act. Canadian Law

Joachim Kundert Jensen highlights that in Denmark it really difficult to calculate the damage compensation since the person affected is not able to demonstrate any loss. Often the person affected is offered a compensation for the injury of approx. DKK 25.000 (approx. EUR 3,350).

Alex Fox and Robert Griffiths mention that damages in general are low. Damages are calculated at the discretion of the court. In *Mosley v News Group Newspapers Limited* [2008]⁵, J Eady laid down principles for the calculation of damages for breach of privacy, which included the following: damages must be proportionate, damages can take into account aggravating behaviour by the defendant, and damages cannot be awarded for the purpose of deterrence.

Suvi-Tuulia Leppäkorpi, Finnish national reporter, underlines the fact that the compensation may cover medical costs and other costs arising from personal injury, as well as loss of income and maintenance, pain and suffering. The Tort Liability Act provisions on personal injury apply also to damages for the anguish arising from offences such as dissemination of information violating personal privacy and defamation. The court may consider e.g. the nature of the offence, the publicity of the matter and the factual effects of the offence to the person's life whose rights have been violated. It is also possible to consider whether the person himself/herself has been active in spreading information regarding their own private life. He also emphasizes the fact that the damages awarded in Finland have been relatively low in amount.

Xavier Carvasse explains how damages under French law are awarded, according to the principle of full reparation of prejudice (*restitutio in integrum*). The evaluation of the prejudice is left to the judge's factual appreciation. The criteria taken into account to increase the amounts: picture on the cover rather than in the newspaper/magazine, harassment, children involved, pictures taken by paparazzi, etc. On the contrary, factors for diminishing damages include: the banality of the information, past tolerance/acceptance on behalf of the person concerned, or well-known information.

Mr Pype, Belgium national reporter, considers it difficult to claim considerable amounts of damages. Given that it is practically impossible to determine the value of the damages, the courts will award compensation calculated on grounds of equitableness (*ex aequo et bono*). This can vary between EUR 1 and EUR 15,000.

Dr. Blind and Mr. Brommer point out that the German law is based on the principle of restitution. So the infringer has to compensate any damaged caused in order to put the infringed person in the same condition as he would be if the damage would not have occurred.

Mr. Menendez indicated that in Guatemala the civil courts would decide on the total damage amount based on the moral damage in each case.

In Hungary it is also difficult to calculate damages. Dr. György mentions that according to Section 2:52 (3) Civil Code the court shall determine the amount of restitution in one sum, taking into account the gravity of the infringement, whether it was committed on one or

⁵ <http://www.bailii.org/ew/cases/EWHC/QB/2008/1777.html>

more occasions, the degree of responsibility, the impact of the infringement upon the aggrieved party and his environment.

In Ireland the main remedy is the damage grant. Mr. Nolan indicates that in Ireland courts will assess damages case-by-case based on its individual facts. The courts will take into consideration a number of factors when awarding damages. Even so, courts have not provided many reasoning on the quantum of damages. He also underlines the fact that aggravated and exemplary damages are not so usual in Irish case law.

Mr. Elshof and Mrs. Feenstra highlight the fact that material damages in the Netherlands are calculated on the basis of actual damages suffered and proven by the claiming party. In relation to immaterial damages it will be determined *ex aequo et bono*.

Anna Wojciechowska mentions that Polish courts are not obliged to award damage compensation in each violation privacy rights case. Even so, when assessing courts take into consideration: the type and the nature of good that has been violated, severity and duration of negative psychological trauma caused by the violation (harm) and experienced by the person whose right has been infringed. The degree of fault of the infringer, intended purpose to achieve by taking action in violation of the right and the financial benefit, which the person received or expected to receive in connection with this infringement, are also considered⁶.

Cecilia Rehn and Erik Ulberg focus that in Sweden the calculation of damages emerging from privacy rights are often based on a fairness opinion. Due to the fact that violation of personal integrity in general does not lead to pure economic damages, the calculation is discretionary and made on a case-by-case basis. Nevertheless, in situations where violations of privacy rights have caused economic damages, for instance loss of income, the victim shall be fully compensated.⁷

Mrs Solak underlines the fact that while calculating damages, the amount of loss establishes the upper limit of the compensation. In Turkish legislation, punitive damages are not accepted. Accordingly, pecuniary damages should be equal to the loss suffered. However, non-pecuniary damages may be difficult to calculate because their purpose is to remedy the individual's pain and suffering. In this case, the judge must determine an amount sufficient to ease the individual's pain and suffering on a case-by-case basis.

In the United States damages are established 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?

⁶ Judgement of the Polish Supreme Court of 11 April 2006 (I CSK 159/2005).

⁷ According to the Tort Liability Act (Chapter 2, Art. 2), the violation must be regarded as a criminal offence in order to incur compensable economic damages.

In Argentina, in relation to the online world, the owner of the website posting the information online shall be liable, and in the case of social media it will be the creator of the offensive content.

Mr. Finder points out that under the Austrian Code for the Protection of Data, the principal (the one who decides that personal data shall be processed) can be held liable.

Brazil national reporters reveal that internet intermediaries shall not be liable for user generated content, even if private information is disclosed. In general, the individual responsible for the disclosure will be held liable, not the intermediary (Section 19 Brazil Federal Law 12.965/14).

Ave Piik highlights that according to case-law of the Supreme Court of Estonia, if infringing material is published via mass media (e.g. online or in the newspaper), both parties – the party disclosing the material and the party who sent the disclosing party the material – can be held liable for the disclosure of the information. In relation to the online world, she mentions that the same rules apply. She also mentions the *Delfi* case where the Court found that the person writing the comment (direct infringer) is the initiator of the (infringing) comments. However, regarding the news portal, the Supreme Court found that due to the economic interest in people writing comments under the news articles, the news' portal would also be deemed as the person disclosing the information.

Mrs Leppäkorpi clarifies that in Finland in general the person who can be held liable for damages is the person disseminating or spreading private or false information. Even so, publishers and broadcasters of periodicals, network publications and programs can also be held liable for damages for their operations, even if the injury has been caused by someone else.

In France, Mr Carvasse points out that in relation to online content, the author of the illicit post is in principle liable. The host provider will be held liable if it is proven that he has deliberately allowed the illicit content to be posted online or has posted this himself. Moreover, the law distinguishes between the liability of editors and that of the host provider. Regarding online matters, the editor is deemed to be the author of the post and service providers are obliged to ensure that such editors are identifiable. The host provider is simply an intermediary, only held liable if he/she has knowledge of the existence of the illicit content. Service and host providers are not subject to a general obligation to monitor the content hosted. They are required to act only when a precise content is reported.

Mr. Tsimikalis mentions that in Greece the liable person, in any case, would be the person disclosing the information. It may also be the case that the person responsible for the infringer may also be held liable.

Furthermore, in Guatemala it is also the case that the person who disclosed the information is the one that would be liable, also the person or site who knowingly discloses to the public private information.

Mr. Mezzetti, Italy national reporter, mentions that under Italian law the liability would be attributed only to the author of the damaging statements. Even so, different rules would apply in case the media performs the disclosure. The owner of the publication and the

publisher are civilly liable, together with the author. Criminal penalties may also be imposed.

Mrs Rehn and Mr Ulberg state that the person who discloses private information in private capacity, and therefore violates a person's privacy rights, is the one held liable for damages. If the person acts as an employee, the employer is liable according to the principle of vicarious liability.⁸

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

Mr. Finder identifies the special defences to a cause of action for information disclosed by the press/media: the editorial confidential and privileged status of the media within the Austrian Code for the Protection of Data whereby Media companies, media services and media employees are under no obligation to provide information with respect to a request for information, deletion or correction relating to the published content.

England & Wales national reporters mention that a defence to media intrusion of privacy under appropriate circumstance is the publication in the public interest.

Mr Pype exposes that the press can rely on the protection embedded in Article 25 of the Belgian Constitution, which provides the freedom of the press.

German national reports refer to press articles about persons in which the privacy right of those persons clashes with the basic right of freedom of the press. On a case-by-case it will be determined which of the Basic Right prevails taking into account the circumstance of the case.

The Italian national reporter points out that the most common defence is the right of information and freedom of speech. The Italian Supreme Court in February 7 1996 stated that this assessment has to be carried out on a neutral basis (not taking into account subjective feelings).

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

Mrs. Piik specifies that the term "Media" is not specifically defined in Estonian law. However, it can be assumed from the notion of "media services" being defined as the procedure and principles for provision of audio-visual media services and radio services under the Media Services Act.

⁸ In Swedish, this is called "principalansvar". The liability is stated in the Tort Liability Act, Chapter 3. The employee is only legally responsible for damages in "exceptional" circumstances, Chapter 4, Article 1.

Dr. Blind and Mr. Brommer state that in Germany the definition of press/media “is formal, broad and subject to development. Press includes all kind of printed matters, which are intended for distribution like books, newspapers, magazines, CD-Roms, other memory media, etc. If the visual element dominates, it will be considered as a film. Online media, which means a combination of texts, pictures and sounds, will fall in the scope of broadcast.”

Dr. Gyorgy states that according to Section 1 (2) Hungarian Act CIV of 2010 on Freedom of the Press and on the Basic Rules Relating to Media Content, media service provider shall mean: “the natural or legal person who has editorial responsibility for the choice of the content of the media service and determines the manner in which it is organized. Editorial responsibility means the exercise of effective control both over the selection of the media content and over its organization, and does not necessarily imply any legal liability for the media services provided.”

In Switzerland as in many other jurisdictions the key defence will be the constitutional rights of communication such as freedom of speech and freedom of press and media.

In the USA, Mr. Stamm underlines that the press is widely defined under jurisprudence and would also cover members of non-traditional news outlets.

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

In Argentina, this specific protection comes from Article 43 of the Argentine Constitution, which states that the secrecy of informants/sources shall be preserved.

Under the Austrian Media Act informants/sources are protected by editorial confidentiality.

Mr. Kundert, Danish national reporter, spotlights that there is a general right for journalists to protect the identity of their sources and The Danish Administration of Justice Act provides that journalists are allowed to protect the identity of their sources cf. para 172. However, if proceedings concern an offence of a serious nature, which is punishable under the law by imprisonment for no less than four years, the court may order the journalists to give evidence as witness if it is deemed to be essential for the proper examination of the case.

Xavier Carvasse notes that journalists can invoke the protection of their sources as a defence to a cause of action for information. This is protected under the law n°2010-1 of January 4, 2010 concerning the protection of journalists' sources.

Under Belgian law, Lynn Pype lets us know that informants and sources are protected by the Law of 7 April 2005 on the protection of journalistic sources. Journalists and editorial staff enjoy source protection. Even so, there are exceptions to the protection. The protection can be waived if it fulfills the following conditions: information sources have to prevent crimes; the information has to be crucial to prevent these crimes and cannot be obtained in any other way, and the disclosure has to be ordered by the court.

Mrs Wojciechowska comments that the Polish Act on Press Law introduced the “journalist privilege”. A journalist is obliged to maintain the confidentiality of the information enabling identification of an author of a press release, letter to the editor or other similar material, as well as other persons providing information published or submitted for publication, if these persons reserved non-disclosure of the above data. This obligation would be waived if subject to a judicial review.

Mr Martin points out that the main protection offered by the Spanish legal system is the right not to determine the source of information (STC 123/1993, 19 April). Even though the journalist will have to prove the due diligence and not only suppose that it is really true or false.

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?

Argentine Law No. 26032 establishes that “the search, reception and release of information and ideas of all kind through the Internet shall be deemed subject to the constitutional guarantee that protects freedom of speech”.

In Canada, national reporters state that *PIPEDA* has had a significant impact on the operations of social media websites. An example is from 2012 involving Facebook and its “Friends Suggestion” function⁹. In this case, three complainants received personal email invitations to join Facebook, along with “friend suggestions”- a list of Facebook users that the complainants appeared to know and could “befriend” if they decided to join the website. None of the complainants were Facebook users themselves, and therefore they believed that Facebook had inappropriately accessed their email address books (or that of their friends) to generate lists of suggested Facebook friends.

They point out that the Privacy Commissioner of Canada investigated this matter and did not find any evidence that Facebook had accessed the email address books of the complainants, or was maintaining personal profiles about non-users. However, the Commissioner found that email addresses were personal information, and that Facebook had failed to meet the knowledge and consent requirements of *PIPEDA*. Specifically, Facebook failed to initially identify the purposes for which their email addresses would be used, prior to collecting them. Facebook also failed to take reasonable measures to ensure that non-users were *made aware* that their email addresses were being collected for the purpose of generating suggested friends. Facebook also failed to obtain the knowledge and consent of non-users prior to using their email addresses to generate friend suggestions. Facebook subsequently corrected its breaches of *PIPEDA* by providing non-users with

⁹ Office of the Privacy Commissioner of Canada, *PIPEDA* Report of Findings #2012-002, <https://www.priv.gc.ca/cf-dc/2012/2012_002_0208_e.asp>.

clear and adequate notice that it will use their e-mail addresses to generate lists of suggested friends. It also created an “opt-out” mechanism for non-users in the form of an unsubscribe button.

Sweden national reporters, Mrs Rehn and Mr Ulberg, underline the fact that the legislator does not make any difference between online violations and other violations. Thus, the principles above are also generally applicable to the online world. They also mention a case known as the “Instagram Case”, in which two teenage girls were sentenced for gross slander after having published grossly offensive information about numerous people combined with pictures on the social network Instagram.¹⁰

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.

Mr. Finder mentions the remedies available under Austrian law and damages claims (in case of fault) a) Right of reply or equivalent remedies (with official publication); b) Right of publication of the judgment; c) Remedy against reputation-damaging statements according i.e. Austrian Civil Code, Austrian Copyright Act, Austrian Media Act or Austrian Unfair Competition Act; d) Right to request information, right to correction and right to deletion according to Austrian Code for the Protection of Data; e) Protection against slander according to the Austrian Criminal Code.

Mrs. Berube and Mr. Ho draw attention to the specific remedies available in China against disclosure of information that damage individual reputation: (i) Stop the infringement for ongoing infringement. The victim can request the infringement to be stopped; (ii) Apologize in the media; (iii) Compensate for the loss. Compensation for privacy disclosure, which requires two thresholds: a) the victim suffered moral damage; and b) the victim’s privacy has been violated and property compensation is required.

Turkey national reporter, Ülkü Solak, points out that defamation is a crime against a personality dignity under the Turkish Criminal Code. If the crime is committed through the media this will be considered as an aggravate circumstance when deciding the case.

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.

¹⁰ The District Court of Gothenburg, case B 705-13.

In most of the jurisdictions the laws and jurisdiction are determined by the place where the facts took place or the domicile of the defendants, as is the case of Argentina.

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

Danish private international law is primarily founded on the Convention on the Law Applicable to Contractual Obligations (Rome Convention 1980), the Convention On The Law Applicable To International Sale Of Goods (Hague Convention 1955), the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the Berne Convention for the Protection of Literary and Artistic Works. In addition hereto, Denmark has also ratified two parallel agreements concluded with the European Union regarding international civil procedure – Council Regulation (EC) No 44/2001 of 22 December 2000 (Brussel I) and Council Regulation (EC) No 1348/2000 of 29 May 2000.

Mr Fox and Mr Griffiths, England & Wales national reporters, state that Forum shopping and so called “libel tourism” has been clamped down upon by the UK parliament in the Defamation Act 2013. Where a person is not domiciled in the UK or another member state, the court does not have jurisdiction to hear the action, unless it is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate

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

In most of the countries subject to this general report there are no specific rules to the breaches caused online. General rules for conflict of laws would apply.

In Estonia, Mrs Piik states that there are no specific rules for online breaches. In France there are no specific rules either and Xavier, French national reporter, emphasizes the fact that online breaches are subjected to general rules of conflicts of law.

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

Mr. Pringles believes a specific law should be passed in Argentina to regulate on the information posted on the Internet.

In Mr. Finder’s opinion, as an Austrian lawyer, judges should be trained and be much more subject specific, and legal insufficiency should be suppressed by case law.

David Ma and Dina Maxwell, Canadian national reporters, point out that there are several proposed reforms to *PIPEDA* that are currently before Parliament which aim to better protect the personal information of all Canadians surfing the internet and making online

purchases. These reforms are currently being considered by the House of Commons in Bill S-4, entitled “*An Act to amend the Personal Information Protection and Electronic Documents Act and to make a consequential amendment to another Act.*” Bill S-4 is also known the *Digital Privacy Act*.

Interesting is the fact that the data protection regime is quite effective in Cyprus, as pointed out by Elina Mantral, even though there are still some aspects (technology, internet and social media) which remain regulated within archaic frameworks.

As Denmark national reporter, Mr Kundert’s point of view is that in Denmark the level of fines for not complying with the APPD is very low (up to DKK 25,000) and the Data Protection Agency has limited resources available. Individual privacy would be better protected if the Data Protection Agency was given more resources and the level of fines was at the same level as in other European countries.

The opinion of the England & Wales national reporters to this matter is that codified in statutes. The developing case law is unclear and causes significant costs to be incurred in testing the issues.

Xavier Carvasse’s thoughts in relation to what reforms should be made in the legal system of France are the following steps (i) Inform and educate students in school on the dangers of exposing private information when using the internet and about their right of opposition (ii) IP addresses should be considered to be personal data and thus protected accordingly (iii) Oblige public authorities and private companies where at least 100 employees are granted access to a database storing personal data to hire a “personal data officer” in charge of ensuring compliance in this respect.

Mr Pype’s perspective in relation to the Belgian legal system is that in general it provides a fair balance between the right of privacy and the right of freedom of expression. However, given that it is always up to the courts to strike that balance, the legal certainty is not always guaranteed. On the other hand, he thinks most of these cases depend on the actual circumstances, which makes it difficult to provide uniform guidelines.

Dr. Blind and Mr. Brommer believe that the privacy right protection under the German system is well established and efficient. They feel there is actually a sensible balance between freedom of speech/freedom of the press and, on the other side the privacy rights. The problem that Germany is having is the frequent leakages to the press of public authorities and companies’ confidential information. They see in this a problem especially in relation to pending criminal investigations.

Mr Tsimikalis’ point of view in relation to the Greece legal system is that the manner in which the current system ensures individuals an adequate level of protection. This is due to the fact that the term “right to privacy” is quite vague so there is elasticity in the definition. He points out that this was an intentional choice so that the right can be constantly redefined. It therefore falls upon the judge to decide on a case-by-case basis whether a specific claim falls within the scope of the right to privacy. In his opinion no reforms should be sought at this point because the actual system is working properly.

Dr. Gyorgy’s thoughts on this matter, as national reporter from Hungary, is that personality right should be regulated similarly as in the case of intellectual property rights through the Enforcement Directive

Philip Nolan, Ireland national report, thinks it is arguable that privacy rights are sufficiently protected in Ireland. There has been Bill attempts but, despite these, advances in technology and the development of the Internet have highlighted gaps in the law that the courts are, in his opinion, playing catch up to fill.

Mrs Feenstra and Mr Elshof comment that the new privacy regulation in Europe is about to come. Furthermore, they believe that apart from new legislation, parties which control and process personal data should be conscious of its responsibilities and the vulnerability of the individual.

Mr Martin thinks that Spanish law should be of a better quality. Some of his reasons are that Law 1/1982 uses confusing terms, does not make a clear separation between the three rights involved (intimacy, honour 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 should be clearer and the law should better establish the person responsible and some regulation about the new means of communication.

Mrs Rehn and Mr Ulberg believe that improvements can be done in Sweden in relation to the compensation that can be awarded for breach of privacy rights under the Instrument of Government.

Ülkü Solak considers that in Turkey substantial reforms in order to create a convenient legal infrastructure for the protection and development of individual privacy have been taken: Draft Code on data protection has been prepared in accordance with the EU Data Protection Directive 95/46/EC; omnibus bill empowering the police with compelling authorities, allowing them to take restrictive measures, including conducting search on persons or inside their cars without the prior permit of a prosecutor or a court warrant; and the content removals and internet access preventions should be more strictly regulated.

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?

In Argentina the protection of personal data in online media is not specifically regulated.

In Canada, national reporters highlight that there is no legislation that is similar in breadth to the European Union's *Data Protection Directive*. Rather, online privacy protections for Canadians stem from application of *PIPEDA* to the online world, and also from the courts.

China, for example, has no data protection law.

Finnish national reporter, Mrs Leppäkorpi, summarizes the data protection law. She points out that the key data protection provisions in Finland are included in the Personal Data Act, which applies to the processing of personal data. The same rules also apply in the

online environment and online media. The Act imposes (i) a duty of care to controllers (ii) the purpose of the processing of data must be defined before the collection of the data (iii) the controller shall see that no erroneous, incomplete or obsolete data is processed (accuracy requirement).

Gonzalo Menendez, highlights the fact that there is no specific data or online privacy protection law in Guatemala. It is the Constitutional Right of Privacy, which protects all information.

Irish data protection law sets down a range of obligations for data controllers, which are alike to those provided under the European Data Protection Directive (95/46/EC). Ireland national reporters point out that the data controllers must: obtain and process personal data fairly; keep information only for one or more specified, explicit and lawful purposes; use and disclose information only in ways compatible with these purposes; keep information safe and secure; keep information accurate, complete and up-to-date; ensure that information is adequate, relevant and not excessive in relation to the purpose(s) for which it was sought; and retain information for no longer than is necessary for the purpose(s) for which it was collected.

Mrs Wojciechowska points out that under Polish data protection law there are several tools, which aim at more effective protection of privacy and personal data of an individual. Firstly, the Constitution stipulates that an obligation to disclose personal data related to a specific person must result only from the provision of law and public authorities, who may process only such data which is necessary in a democratic state ruled by law. An individual has a right of access to data collections concerning him/her, as well as a right to demand the correction or deletion of untrue or incomplete information, or information acquired by illegal means. Furthermore, the Act on Personal Data Protection provides for rules of processing of personal data. Moreover, the controller is obliged to implement technical and organizational measures to protect the personal data being processed.

In Spain, the Organic Law of Data Protection regulates data protection. In this regard, Jose Luis Martin highlights the main points of this law: The quality of the data: all the personal data shall be appropriate, relevant and not excessive; the person concerned shall be informed of the treatment of personal data, the aims and the person to whom they are addressed; person concerned shall give their consent; the people who store, treat or access the data must fulfill some security standards; duty of secrecy and custody.

Florian A. Stamm indicates that individual privacy in the US is not well balanced with public interest, especially in relation to non-public persons. In his opinion an EU style right to be forgotten would add valuable protections for US individuals.

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

Really interesting is the information provided by Mr. Leite and Mr Avila, that under Brazilian law there is no effective right of opposition for data collection. The project for

the bill of law on the protection of personal data provides for the right of opposition. Currently this legal tool does not exist in the Brazilian legal system.

Under the Finnish Personal Data Act, Mrs Leppäkorpi underlines the fact that a data subject has the right to prohibit the controller from processing personal data for purposes of direct advertising, distance selling, other direct marketing, market research, opinion polls, public registers or genealogical research. This may be done by a notice directly to a specific controller or to certain authorities who maintain the data files.

German national reporters inform that the consent is an important basis for the use of data. Article 2 of the German Data Protection Act grants the affected persons the right of opposition against the collection, storage and use of data.

Under Hungarian law there is an actual right of opposition to data collection which is regulated in Section 21 of the Data Protection Act.

The Italian Data Protection Codes included an effective right of opposition. In general, Italy has a high level of privacy protection.

The Netherlands national report mention that under the Dutch Data Protection Act an individual can solicit a data controller to provide an overview of the personal data of the individual collected by the data controller. The individual can demand the rectification, erasure or blocking of its personal data.

Anna Wojciechowska highlights the fact that under Polish Law there is no real right of opposition to collection of data. Just in some cases a data subject may have the right of opposition in processing his/her personal data.

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.

Mr. Pringles from Argentina mentions that Law No. 25.236 provides for the protection of data when there is a presumption of false, inaccurate and outdated information, and bans the publication of data whose registration is banned by the said Law, with a right to demand the rectification, removal, confidential handling or updating of the information at issue. Section 26.4) of Law No. 25.236 refers to the financial and commercial data of the individuals and sets forth that they may be kept on databases for 5 years since the date of default. After that term, the individual may request the removal of such information.

Denmark is part of the European Union and is therefore obliged to interpret consistently with EU law and EU case law. Therefore, as pointed out by Mr. Kundert, "the right to be forgotten" does exist in Denmark as a result of the ECJ Google Spain v. AEPD and González case.

Dr. Blind and Mr. Brommer call the attention to the fact that before the Google Spain ECJ decision there was not a clear outlined right to be forgotten.

In Greece, this right has been case law based and there have not been many cases (Areios Pagos 1020/2004).

In Ireland, where the data controller has failed to comply with its obligation under the Data Protection Act the right of opposition may arise. This right of opposition is regulated under Section 6 and 6A of the Data Protection Act.

In Switzerland, Mr Steinemann identifies that 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.

The “right to be forgotten” is not recognized under Turkish law. Ülkü Solak points out that individuals may refer to the legal protections granted for personal rights, privacy rights, or freedom of communication in order to request their content be removed under some conditions

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”.

Juan Pringles highlights the judgement *Rodríguez, María Belén vs. Google Inc. on damages*. In this case the model brought suit against Internet search engines (Google and Yahoo) for unauthorized commercial use of her image in association with erotic and pornographic sites. The Supreme Court dismissed the complaint by majority opinion, and ruled as follows:

“The eventual liability of search engines must not be examined under the rules of strict liability, irrespective of negligence. Instead, it must be examined under the principles of liability due to negligence.”... “After the search engine has gained effective awareness of the unlawful contents of a website, the “detachment” of the engine regarding those content disappears and, if the search hits are not blocked, the engine shall be held negligently liable. ““In absence of a specific regulation, we must set a rule to clearly distinguish between cases in which the damages are patent and gross, and those in which the damages are uncertain, dubious or subject to examination”...“: On the contrary, in cases in which the offensive contents imply potential lesions to the honour, or otherwise, but which require a clarification that must be examined or determined by the courts or by an administrative authority, the search engine must not be demanded to replace competent authorities and, least of all, courts of law. Consequently, in these cases the notification of the competent court or of the relevant administrative authority is required, and the mere communication by the individual that believes to be damaged or by another interested party shall not suffice.”

The Austrian National Reporter mentions that the Austrian Society for Data Protection supports the request for extinction of data against Google. In case Google rejects such a request, the persons affected may apply to the Austrian Data Protection Authority.

Mr. Avila and Mr. Leite bring up two pending cases at the Brazilian Supreme Court that refers to the offline right to be forgotten. Both of them are related with content produced for TV shows that re-enacted old criminal cases. On the assessment made by the lower courts, the right to be forgotten was granted in one of the cases. The main argument was that citing the name of the plaintiff, who was acquitted from the criminal investigation, was not necessary to tell the story described on the TV show. The same argument was used in the other case, however the court ruled that the citing of the name of the plaintiff (the plaintiffs were the family of the individual) was necessary to understand the context of the criminal case described on the TV show.

Cyprus, as member of the EU, is bound by the ECJ decision. However there has not been any national legislation or case law implementing or interpreting the “right to be forgotten” as established by the ECJ in the Google Spain v AEPD and Gonzalez case.

Mr Martin points out that 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. Even so, there are also some other national cases. For example, 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.

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?

Daniel Avila and Renato Leite draw our attention to the fact that this case had a big influence on the current discussions and several cases have even been filed using the right to be forgotten guidelines of the EU Court as arguments, adapting them to Brazilian personality rights. Even so, up until this time there has been no case law that applied such guidelines.

Joachim Kundert highlights the fact that this judgment rapidly changed the view on the right to be forgotten under Danish Law, but there has not yet been any case law in Denmark arising from the decision.

Mr. Carvasse lets us know that on 19 December 2014, the Paris High Court (*Tribunal de Grande Instance de Paris*) has ordered, by way of interim relief, for the first time since the ECJ Google Spain decision, that Google Inc. remove certain references from search algorithms under the “right to be forgotten.”

In Belgium the courts have heard cases after the ECJ Google Spain decision. Mr Pype points out that the interesting part is that the court in the *Luik 25 September 2014, JLMB 2014, 1952* case established requirements in order to acknowledge the existence of the right to be forgotten: the initial publication of the facts has to be occurred validly; the nature of the facts has to be judicially inspired; there cannot be a present-day interest to re-publish the facts: the facts cannot have a historical interest; the person concerned cannot lead a public life; the person concerned has to establish an interest in his/her rehabilitation; the person concerned has to have fulfilled his/her debt or punishment

Dr. Julia Blind and Mr. Andreas Brommer draw attention to the fact that there have been already three decisions in Germany that refer to the Google Spain ECJ decision. The first one is from the Regional Court of Berlin (Judgment of 21.08.2014, file no. 27 O 293/14) where they dismissed the complaint against Google Germany GmbH. The plaintiff claimed the deletion of some information about him that was available on Google. According to the Court, he would have had to sue Google Inc. instead of Google Germany GmbH. The second decision is from the Regional Court of Hamburg (Judgment of 07.11.2014, file no. 324 O 660/12) where untrue and slanderous assertions about the plaintiff could be found on the Internet. When searching for the plaintiff's name on Google, the search engine displayed the links and little snippets of the websites containing the untrue statements. Google was sentenced to delete the links and snippets. The last one is from the Regional Court of Heidelberg (Judgment of 09.12.2014, file no. 2 O 162/13) where they had to decide whether a search engine is obliged to delete search results. The plaintiffs had previously informed Google about the search hits and requested their erasure. At the beginning Google did so, but the information was published again and could be retrieved under a different link that Google did display again. Google did not fulfill the plaintiffs' request to entirely ban the entire site from the search results. The Regional Court of Heidelberg decided that such a request is going too far, but Google must ensure not to display search hits that refer to sites with content that infringes the plaintiff's personality rights.

Dr. Gyorgy mentions that even though there is no case law in relation to the right to be forgotten in Hungary, the view on this right changed. The president of the Hungarian National Authority for Data Protection and Freedom of Information (NAIH) wrote a letter to the Minister of Justice in which he praises the decision of CEJU and urges for the modification of relevant national rules.¹¹

Carlo Eligio Mezzetti highlights that the Italian Supreme Court in its judgment 5525/2012 April 5 2012 anticipated the Conclusions of the Advocate General in the Google Spain decision. So it is not completely consistent with the final ECJ decision in the case. Mr. Mezzetti points out that in the understanding of the Court of Cassation, search engine providers have no responsibility vis a vis the right to be forgotten. It is up to the source web page's publisher to devise a method to update and contextualize old articles, or even delete them if the news reported lately proved to be untrue. Furthermore, on April 26 2013 the Court of Milan was stricter: quoting the Supreme Court's 2012 ruling, and considering

¹¹ <http://www.naih.hu/files/NAIH-1410-4-2014-J-140624.pdf>

the time which had elapsed from the facts reported and the lack of a significant public role of the claimant, ordering the newspaper's publisher to remove the article from its on-line archive, allowing it to only keep a hard copy for documentary purposes, and sentenced it to pay compensation for moral damages. Mr. Mezzetti underlines that after the ECJ Google Spain judgement, the decisional practice of the Italian Data Protection Authorities changed again, apparently making both the search engine providers and the content providers answerable.

Mrs Rehn and Mr Ulberg state that the Google Spain case activated public debate in Sweden. Representatives from the Swedish Data Protection Authority have stated that the ruling is in line with current legislation, while certain other experts in the field found the ruling surprising. Critics are saying that the Court of Justice did not, to a sufficient extent, take the protection of the freedom of expression into account, and that the ruling may have consequences that are difficult to assess at this point in time. There is no case law which it can be said to have arisen out of the Google Spain Case. It has, however, come to their attention that a claim has recently been filed at the District Court of Stockholm which relates to the ruling in the Google Spain Case. The claimant in this matter had unsuccessfully requested that Google should remove certain search results which linked to personal information related to the claimant on a web forum. When Google refused to comply with the claimant's request, he decided to initiate a court process. There is no more information available at the moment on the status of the case, as it is still pending.

Mrs Solak, Turkey national reporter underlines that pursuant to the decision of the ECJ, several questions have arisen regarding the status of the right to be forgotten against the freedom of communication and information. Even so, there are claims in Turkey arising from this decision. A really interesting fact that Mrs Solak brings up is that according to the Google's Transparency Report dated 2013, Turkey has had the most individuals applying to Google pursuant to the recognition of the right to be forgotten. However, Google refused the applications on the basis that the decision of the European Court of Justice has no enforceability for Turkey.

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?

Interesting is the fact identified by Chinese national reporters. They mention that all Internet traffic in China is monitored by and subject to interruption by the PRC authorities at any point of time. China regulates the Internet through its control over value-added telecommunications service providers whose operations or servers are located in the PRC. China requires approval, licenses, permits, inspection and reporting obligations on internet content and service providers in the PRC and VAT business.

General Report composition is work put together by Jerome Debras and Cristina Hernandez-Marti. Some parts are extracts subtracted from each of the national reports submitted for the purpose of creating this General Report.

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