Can the Law Keep Up with the Brave New World of Social Media?: A Look at Privacy in the United States and Europe

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ABSTRACT

As online and computer technology make it easier and easier for private facts to reach the public, how does the law respond? In the United States, our laws have traditionally favored the free dissemination of information. Just as Americans believe that our First Amendment guarantee of free speech contributes to a robust and vast Marketplace of Ideas, we also believe that our comparatively less-regulated, freewheeling economy encourages these technological innovations. If our privacy is occasionally violated as a result, that is the price we pay for being on the cutting edge. Europeans, on the other hand, often mindful of the horrors of World War II, have tended to favor the protection of people’s privacy, even at some cost to free speech. This paper seeks to compare the American and European approaches to these issues and what their varying attitudes mean for the future of privacy and technological innovation.

INTRODUCTION

More than 150 years ago, several branches of the authors’ family settled and developed farming operations around the then and now small town of Chrisman, Illinois. We still own and farm part of this land. At that time, no doubt, and certainly today, everyone in and around the town knows everything about everybody. There is little if any privacy. In the twin cities of Bloomington and Normal, Illinois, where we currently live, there is a lot more big-city anonymity, at least for now. However, the brave new world of the internet is turning not just Bloomington-Normal, but the entire world into a kind of global Chrisman, IL. Privacy is much more difficult to come by, which presents some interesting legal questions. One of our students once remarked that surely all situations or issues had at some point been decided by the courts, so all new situations would have solid precedents. That would be like saying all possible combinations of plinking piano keys had been tried. Many of the issues we deal with today would have been beyond our imaginations as recently as the turn of the last century; new questions of law come up constantly. We will look at some of the legal issues that arise as the law huffs and puffs to keep pace with technology and its impact on privacy.

Privacy and the Paparazzi

Not at all beyond imagination were the events of September 2012 involving the Duchess of Cambridge, the former Kate Middleton. While vacationing in a secluded private residence in France, a paparazzo using the very latest technology was able to get a picture of the Duchess sunbathing topless on an away-from-the-street balcony. The picture appeared in a French magazine and the Irish and Italian presses picked up on it and a somewhat modified copy appeared on the internet very shortly afterward (Sayare, 2012). Almost all would agree this was a rude invasion of Kate’s privacy. But was it illegal?
Shock, outrage, and hurt followed, especially for Prince William, whose office remarked that the photos were reminiscent of “the worst excesses of the press and paparazzi during the life of Diana, Princess of Wales” (Sayare, 2012). Optical technology and the internet combined in this instance for a clear invasion of privacy, but to what extent is it legally actionable? It is generally well known that photographers, professional and otherwise, lurk in and around beaches, so a photograph taken there would not violate one’s reasonable expectation of privacy. The instant case is different. The picture of Kate was taken from a great distance and at least until now she could not have expected the intrusion.

What might the European law be, and would it be different in America? The answer, thanks to the American First Amendment, is yes. Europe, unburdened by those few words, “Congress shall make no law… abridging for freedom of speech” (U.S. Const. amend. I), goes in a different direction than does the U.S. As the events of the story happened in France, both French law and the European Convention on Human Rights govern (Member States, 1950). Charges may be both criminal and civil under French law. In a civil action, Kate and William may sue for money damages and what in American law is called an injunction, or an order to remove and destroy the offending pictures and not do it again. Criminal actions are brought by the state. The plaintiff and injured party is the state because one under its protection (Kate) was injured. Punishment may be a fine paid to the state, jail, an injunction, or a combination of these penalties (Civil Code art. 9).

Criminal prosecution for invasion of privacy or defamation is so rare as to be almost unknown in the United States, but not so in Europe. Under French law, depending on circumstances, is punishable by up to a year in jail (Penal Code art. 226-1).

Let us dig a little deeper into European law and ways. Privacy is not mentioned in the American Constitution, although there is hint of it in the unreasonable searches and seizures clause of the 4th Amendment (U.S. Const. amend. IV). Largely due to the events of World War II, where personal information was often used as a way of targeting individuals and facilitating genocide, privacy is of greater significance in Europe, being part of criminal and civil codes, as well as the constitutions of most countries. Above that is the European Convention on Human Rights of 1960 which almost all 47 European countries have made part of their law (Member States, 1950). In the United States no international treaty gives additional rights to individual citizens. The United Nations Universal Declaration of Human Rights of 1948, for example, is seen as aspirational (a “common standard of achievement” to which nations “shall strive”) and does not give individuals a cause of action against the government or others (U.N. General Assembly, 1948). The European Convention, on the other hand, has strong teeth, as it is enforced by the European Court of Human Rights (ECHR) located in Strasbourg, France. Article 8 of the Convention is on privacy and Article 10 is on freedom of expression (Member States, 1950). An American might note that, to the extent to which placement indicates priority, free speech gets the very first place in our Bill of Rights (U.S. Const. amend I) rather than the tenth, as in Europe, and that the European convention has more exceptions than freedoms (Member States, 1950). Below are Articles 8 and 10:

**Article 8 – Right to respect for private and family life**
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
**Article 10 – Freedom of expression**

3. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall no prevent States from requiring the licensing of broadcasting, television, or cinema enterprises (Member States, 1950).

To illustrate the application of these articles is the von Hanover case

“I believe the courts...under American influence made a fetish of the freedom of the press,” was a remark by Judge Bostgen M. Zupzancic of Slovenia, serving on the European Court of Human Rights and concurring with the majority in the case Von Hannover v. Germany (2004). The case dealt with pictures taken by an independent paparazzo and published in the German middle class coffee table magazine Bunte Illustrate of Princess Caroline of Monaco, von Hannover being her married name. The pictures were all very innocuous. They were taken in public and while there were no claims of harassment, she claimed that under European norms her privacy was illegally invaded. Among the pictures were one of her leaving her home in Paris, France; another of her horseback riding; one of her combing her hair; and one on the beach. None were in any way embarrassing, but they did show an admitted public figure going about the routine affairs of her private life in various public places (Von Hannover, 2004).

The ruling, the details of which will be dealt with later, was rendered by the European Court of Human Rights in Strasbourg and was an interpretation of the European Declaration of Human Rights, to which 47 European states are parties. (Note that the European Union has only 27 members, so the application of the Declaration is much wider than just the EU member nations.) The court ruled that Article 8 of the Treaty on Rights to Privacy in the circumstances trumped Article 10 on free speech and press. Injunctive relief was granted, the court ruled that the Princess, admittedly a public figure, had a right to be left alone as she went about in public affairs of her life that were essentially private (Von Hannover, 2004).

A Note on French and German Privacy Law

The following is a summary of French privacy law as described by Jean Rivero in “Les libertés publiques” (1991):

French law does not distinguish between public figures and ordinary persons, except for celebrities who choose to live their private lives on the public stage. The liberty of private life is that zone of activity that is improper to penetrate, including religious and moral convictions, family life, private associations, and leisure activities. Violation of another’s privacy is not just a tort (faute), but can result in a jail term of up to one year and a fine. Defamation is an attack on the honor or good name of an individual or group. Truth is no defense if the attack is on the private life of another and, most interestingly, truth is no defense on the public life of another if the events took place more than ten years earlier.

By American standards this right to privacy is quite extreme, as it applies even to words and deeds that are public. What did Presidents Clinton and Bush do during the Vietnam War? That question, while of great interest to many American voters, would be off-limits in Europe. The French law dates from 1970 and one might therefore assume that a number of the authors of this law may not have wanted their activities from the 1940s researched.

Private life is always out of bounds, even for public figures. During François Mitterand’s presidency, there was often gossip among the French about his rumored affair with Prime Minister Edith
Cresson (Tempest, 1991). Everyone in France “knew” this as an established fact, but it was never in the French newspapers and there were certainly no legislative hearings into the scandal.

Following this European tradition of providing much more privacy protection than in the U.S., German law now protects Facebook pages from the prying eyes of employers or potential employers (Jolly, 2010). Employers may search publicly accessible sites, such as Google, or professional networking sites, such as LinkedIn. But they may not look at social networking sites, like Facebook without permission and may not examine Facebook to see what it reveals about potential employees.

By contrast, the Wall Street Journal reported that a number of colleges review Facebook pages of applicants for admission (Hechinger, 2008). College students are also under a general admonition to be careful of what they put on Facebook, as well as other social sites like Instagram and Twitter. Even seemingly private pages are likely to get out as friends copy photos and other items, and it all goes out for eternity to the entire world to see. In contrast to France, where excavation of long-past scandal is illegal, think of what may turn up 20 years hence in the U.S. as political opponents dig through files to search out indiscretions of candidates in the distant past.

**American Privacy Law**

In contrast to Europe, in the United States there is generally no such thing as criminal invasion of an individual’s privacy. Charges might result from stalking, trespass, assault and battery, wiretapping, or other acts that sometimes accompany invasion of privacy, but not from the invasion of privacy on its own. Yet American law has evolved, however differently from that in Europe. In the United States, invasion of privacy is recognized as a tort or a civil wrong. This part of law is mostly judge-made rather than statutory. Sometimes courts are criticized and told that they should interpret the law and not make it. In fact, judges have made tort law for centuries and it is seen as their role. A statement of privacy rights that well applies today appeared in the Harvard Law Review in 1890 written by Samuel D. Warren and the famous future Supreme Court Justice Louis Brandeis (Warren & Brandeis, 1890). They say that with the expansion of newspapers at that time, individuals would be entitled to additional protections to protect their solitude which the lack of communication in the past had protected. But in our day even if one tries to avoid personal information getting out, it may get out nonetheless as friends and others remark and post and send into electronic eternity so much information. It is the authors’ feeling that as the law evolves the expectation of privacy in the United States will diminish. Yet in contrast to general information floating about, malicious, targeted information might remain beyond the pale. Suppose one could publish a list of the good burghers of a town who have gone to porn websites or those who may have had trouble with the law in the distant past? These things would probably be actionable.

For instance, one form of invasion of privacy, intrusion of solitude, occurs where one person intrudes upon the private affairs of another. In 1944, there was a famous case that established the tort of intrusion of solitude, *Cason v. Baskin*. In the case, Marjorie Kinnan Rawlings, author of the memoir *Cross Creek* about her life in rural Florida, was sued by her former friend, Zelma Cason. Cason had objected to the way she had been portrayed in *Cross Creek* (“You have made a hussy out of me.”) and claimed that the book had intruded upon her solitude (Acton, 1993). The Florida Supreme Court found in Cason’s favor; since Rawlings had not gotten Cason’s permission to publish information about her, a private citizen, Cason had suffered harm (Acton, 1993).

A cousin to invasion of privacy is defamation, which covers things written or oral that are untrue and harmful to the subject’s reputation. That law has evolved, too. The original purpose of defamation law was to discourage duals and to allow one’s honor to be protected in courts of law (U.S. State Dept.,
At that time truth was not a defense as honor was at stake. An insult is arguably more serious if true. Today truth is a defense in defamation cases, but invasion of privacy is different. The courts have found (as opposed to legislature enacting) that one is entitled to a certain level of peace and solitude. Public disclosure of personal facts, stating facts in a false light or appropriation of one’s image are all potential examples of invasion of privacy.

Under current American law, as opposed to France, public figures who may be elected officials, candidates, or celebrities are fair game. The last public figure to successfully sue for invasion of privacy or defamation in a high-profile case was Carol Burnett against The National Enquirer in the 1970s. The paparazzi crowd has a lot of protection under our First Amendment, but technology might show us the limits. Hacking into private files would be criminal because it is a form of wiretapping, but also because it is civil invasion of privacy. The long distance photo of the Duchess of Cambridge would be subject to civil action, although the defense would be that she should have been more careful as she should have been aware that she could be seen, although at a great distance, from a place where the paparazzi had a right to be. At least now she has fair warning of the possibility.

Also, the technology is not so far off that would enable paparazzi to place small drones over the backyards of celebrities. That could probably be forbidden by injunction. Somewhat similar are ordinances that forbid picketing a mayor or other elected officials’ private residences. City Hall may be open 24/7 to protesters, but a private residence is entitled to peace and quiet. Even with public figures there are limits.

**The Free Advice Case**

In a recent editorial, columnist George Will considered the case of one Steve Cooksey of North Carolina (Will, 2012). Cooksey had found great success with what has been called a Caveman Diet of hunter-gatherer foods that could be found in a pre-agricultural world. His blog boasts of great loss of weight, restored health, and attendant happiness. He is not shy about advising others sometimes on an individual basis on achieving their goals through a similar diet. Since prehistory people have no doubt given advice on good things to eat.

It is a basic principle of law that our state governments exist to exercise what is called the police power. In simple terms, it means that government is there to protect the health, safety, morals, and welfare of the realm. Control of the food chain is obviously basic to those powers. Whether one thinks it a wise idea or not, New York City is well within its rights to control the size of sugary sodas sold within city limits. North Carolina is also within its rights to regulate dieticians by requiring licensing after lengthy study and examination. But is Steve Cooksey’s giving advice on the Caveman Diet for free the same as the practice of law, medicine, or dietetics? Or is it protected free speech?

No one questions the right of people to discuss and advise on health or legal matters, or to help a neighbor with a clogged drain, but is it different when one sets up a fairly formal website and gives nutritional advice to individuals? An established website or blog can carry quite a bit of authority. Technology has taken things to a new level and one can see both protection of public health and free speech may be dealt with differently when online than when in casual conversation. The Humane Society of the United States on its website promotes a vegan diet to young people (“Humane Eating”). Can, or should, that speech be controlled? The Supreme Court has yet to say.
Street View

In recent years, many people have enjoyed the novelty of seeing their homes online as part of Google’s Street View feature. This view carries a lot more information and interest than satellite photos of all those roofs. A case was quickly thrown out of an American court when a couple claimed those pictures of their house were an actionable invasion of privacy (Kiss, 2009). But the rule is different in Germany. Fortunately for Google, Germany has adopted an opt-out rather than an opt-in policy regarding Street View (Miller & O’Brien, 2013). Approximately three percent of German households have chosen to opt out of appearing on Street View.

Employees and their Private Activities

What is the reach of an employer to govern off-duty activity? The bad news for most employees is that throughout the history of employment and primarily still today, the default relationship between employer and employee has been one of employment-at-will. In other words, barring any contract to the contrary, either party is free to terminate the employment relationship at any time, for any reason or for no reason, no notice required. There are, however, some exceptions to the employment-at-will doctrine, some of which could protect a person’s job in the event that they be terminated for engaging in legal, off-duty behavior.

For instance, a majority of states have passed legislation that protects an employee’s off-duty tobacco use, and several states were motivated to broaden the scope of their statutes beyond tobacco to protect employees who use “lawful products” during off-duty hours. However, four states (Colorado, North Dakota, New York and California) have enacted statutes that attempt to protect a broad spectrum of off-duty conduct. Although these statutes do offer some protection against discrimination for the off-duty use of tobacco and other lawful products, the protection is not absolute. While the precise language differs from state to state, the general intent of the legislation is to prohibit employers from discriminating against and terminating employees for off-duty use of lawful products, unless the employer can show that the employee’s use of that product may adversely affect the employer.

CONCLUSION

It is indeed a brave new world and it does seem the law generally lags behind technology. Yet linking back to Warren and Brandeis, flexibility is built into the law so that it can evolve and take new circumstances into account as it applies long-standing principles (1890). Tort law and partly contract law is judge- and not legislature-made. Hopefully this allows for more reasoned consideration of circumstances in the new world and less emotion.

Consider this example from the state of Michigan. In the 1980s bar codes became popular and made grocery store check-outs and inventory control much more efficient for businesses. But in the early days mistakes were sometimes made; customers were occasionally overcharged and the bar codes remained a source of suspicion. To protect consumers, the state required stores to label the price on each item sold so that a comparison between the label and charged price could be easily made at the register. Surely the labor and materials required to price items, and to re-price them when they go on sale, resulted in substantial costs to businesses and consumers. Yet it was not until the 2011 Shopping Reform and Modernization Act that the Michigan legislature caught up with this decades-old technology (Schuette, 2011).
The law will huff and puff as it tries to keep up with technology but the mechanisms for change are in the system. Legislative action is often out of fear of the new and unknown and should not be in most cases the first response. We know from experience that predictions about the future are often wrong. So let the future happen with as little state interference as possible and keep regulation to a minimum until it is reasonably certain we act with reason and not emotion.

REFERENCES

U.S. Const. amend I, IV.
The law “strongly opposed by the tech industry” puts Australia at the forefront of a global movement to hold companies like Facebook and YouTube accountable for the content they host. “This is most likely a world first,” Mr. Porter said, adding that "there was a near unanimous view among Australians that social media platforms had to take more responsibility for their content.”

The legislation criminalizes abhorrent violent material, which it defines as videos that show terrorist attacks, murders, rape or kidnapping. Social media companies that fail to remove such content expeditiously could face fines of up to 10 percent of their annual profit, and employees could be sentenced to up to three years in prison.