PRIVATE LAW RIGHTS IN THE DIGITAL ERA

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Introduction

The digital revolution is often presented as constituting, along with the invention of writing and the printing press, an essential step in the history of mankind. It has profoundly changed our behaviour, our ways of life and even our understanding of reality. Legislatures and the courts had to quickly deal with the consequences of these changes, wherever possible, by using already established concepts or by creating new legal categories.

There have thus been numerous developments in the context of private law. For example, under French law, the civil code has admitted electronic documents which have the same probative force as written documents; the consumer code has introduced specific protective mechanisms for the benefit of consumers who purchases goods or takes out a loan online; the labour code has taken new ways of working into consideration, such as telecommuting. These developments are of course important; they do not, however, constitute real transformations, but rather they show us how private law has adapted itself to our technological environment.

Other rights have, however, undergone more profound changes, such as the right to privacy and the extension of this right to include the protection of personal data, which I will focus on. Both have changed with the advent of the internet.

The right to privacy

The right to respect for private life is affirmed in numerous international and European texts. We only need to refer to Article 8 of the European Convention on Human Rights and Article 7 of the Charter of Fundamental Rights of the European Union. In France, Article 9 of the civil code solemnly affirms that: 'Everyone has the right to respect for his private life.' While the right to privacy was first exclusively considered as providing protection against public or private intrusions within the sphere of intimacy of each individual, it is also now understood, under the case law of the European Court of Human Rights, as a

'right to establish and develop relationships with other human beings'[1] or as a right to 'personal autonomy'.[2]

This extended understanding of privacy, which goes far beyond the right to privacy as traditionally conceived, is accompanied by a large porosity between the notions of private life, social life and professional life, which are being intermixed more and more frequently. This phenomenon has obviously grown with the development of information and communication technologies. According to a study published in February 2016,[3] 86.14% of French people use social networking sites at least once a month. Worldwide, 4.75 billion pieces of content, including 300 million photos, are posted every day on Facebook and celebrity is now measured by the number of followers one has on Twitter or Instagram. This is what the social sciences describe as the 'privacy paradox'[4]: respect for privacy is an increasingly affirmed social value, yet we have never been so exposed.

Such an evolution soon had an impact on the nature of litigation before the courts: civil actions taken to obtain compensation for breaches of privacy are increasingly linked to the internet. This could not have had any consequences, in terms of the law; as the work of the lawyer is precisely to apply new facts into known legal categories. But in reality, the concepts usually applied, such as the reconciliation of the right to privacy with the public's right to information, or the determination of the person responsible for breaches of privacy, had to be reconsidered.

Right to privacy and freedom of expression

The European Court of Human Rights has repeatedly reminded us of the need to strike a balance between the right to freedom of expression guaranteed by Article 10 of the Convention and the right to respect for private life. It stressed that, 'although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest.' It also invariably recalls the indispensable role played by the press in our democratic societies.[5] The French Cour de cassation has similarly asserted that 'the rights to respect for private life and freedom of expression have an identical normative value, thus the court must

[1] ECHR, 16 December 1992, Nimietz v Germany, no 13710/88, paragraph 29
[2] ECHR, 11 July 2002, Christine Goodwin v United Kingdom [GC], no 28957/95, paragraph 90
[3] Médiamétrie, Web observatoire: Réseaux sociaux, T4 2015
[4] see, in particular, S. Barnes, A privacy paradox: Social networking in the United States, First Monday, vol 11, no 9, September 2006
[5] ECHR, 20 May 1999, Bladet Tromsø and Stensaas v Norway, no 21980/93, paragraphs 59 and 62; ECHR, 14 February 2008, July v France, nos 20893/03, paragraphs 63 and 64

strike a balance between them and where appropriate, make a decision which protects the most legitimate interest in a case.'[6]

The search for such a balance leads national courts to consider whether the invasion of privacy, where found to have occurred, cannot be justified by the existence of a debate of general interest. According to the European Court of Human Rights, 'the public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree … especially in that they affect the well-being of citizens or the life of the community … This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue … or which involve a problem that the public would have an interest in being informed about.'[7] This starting point, which very often leads the Strasbourg court and the French courts to find that the freedom of expression prevails over the right to privacy, works well in the context of the traditional press, whether published in paper or electronic format. But can it be applied to all online publications, which are often not subject to any editorial oversight, do not constitute in-depth journalistic work and sometimes propagate 'fake news' and/or false information? Should the criteria set out in the case law on the contribution to a debate of general interest to guarantee the freedom of the press and its pluralism be combined with other criteria?

The case law of the European Court of Human Rights now provides some possible answers to this question. The Court has made it clear that 'although the public has a right to be informed, which is an essential right in a democratic society that, in certain special circumstances, can even extend to aspects of the private life of public figures, particularly where politicians are concerned … this is not the case here. The situation here does not come within the sphere of any political or public debate because the published photos and accompanying commentaries relate exclusively to details of the applicant's private life. As in other similar cases it has examined, the Court considers that the publication of the photos and articles in question, the sole purpose of which was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public.'[8] It also considers that the method of obtaining the information and its veracity should be checked, since 'the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise'

[6] Cass., 1ère Civ., 9 juillet 2003, pourvoi no 00-20.289, Bull. civ. 2003, I, no 172
[7] ECHR, 10 November 2015, Couderc and Hachette Filipacchi Associés v France [GC], no 40454/07, paragraph 103
[8] ECHR, 24 June 2004, Von Hannover v Germany, no 59320/00, paragraphs 64-65, ECHR, 18 January 2011, MGN Limited v The United Kingdom, no 39401/04, paragraph 143

information in accordance with journalistic ethics.'[9] Finally, the Court has added that 'in a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance.'[10]

These criteria are relevant in the context of publications on the internet and may lead judges to reconsider where the balance lies as between the right to privacy and the right to freedom of expression.

Accountability and liability

In addition, online privacy violations are somewhat unique in that the perpetrator is sometimes anonymous and, despite efforts made by the victim to identify them, they may remain so. It is also possible that, although the perpetrator is identifiable or identified, any legal action against that individual may result in insurmountable obstacles for the applicant, for example if the perpetrator is located abroad. How, then, can an individual seek damages resulting from an infringement of privacy rights or, at the very least, seek the removal of images or information online? The victim will often turn to those who are best able to stop this: intermediaries, ie internet service providers and web hosts.

We know that the activity of intermediaries is based on the neutrality principle: electronic communications networks must transport all information in a neutral way, irrespective of their nature, content, sender or recipient. This principle, is based on the idea that the intervention of intermediaries should not limit the choice of users, and has been enshrined in EU Regulation 2015/2120 of the European Parliament and Council of 25 November 2015 laying down measures concerning open internet access, amending Directive 2002/22/EC and also under French law no 2016-1321 on a digital republic. Therefore intermediaries do not, on their own initiative, check the legality of content placed online.

Articles 12 to 15 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (e-commerce directive)[11] have thus established a regime which means that intermediaries are not responsible for content, however a number of conditions apply. Intermediaries are however not under any general obligation to monitor information transmitted or stored on their sites. Applying these principles, the Cour de cassation, in an action for compensation for a breach of privacy, held

[9] ECHR, 7 February 2012, Axel Springer AG v Germany [GC], no 39954/08, paragraph 93
[10] ECHR, 10 December 2007, Stoll v Switzerland, no 69698/01, paragraph 103 and 104
[11] Transposed into French law by loi no 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique (known as LCEN)

that a company whose site 'limits itself to structuring and classifying information available to the public to facilitate use of its service' who 'did not decide on or verify the content on its site' was found to be a web host, and therefore was not liable for its content.[12]

However, recital 45 of the e-commerce directive states that '[t]he limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.' In other words, the mere hosting provisions of the directive do not preclude intermediaries from participating in the fight against illegal content, such as content which infringes on privacy rights. This is provided for under the French LCEN law, as Article 6, I-8 states: 'The judicial authority may prescribe, in summary proceedings or on application [by intermediaries], any measures to prevent damage or to stop harm caused by the content of a communication service to the public online.'

Technical collaboration between intermediaries and web hosts can take the form of measures which allow the filtering or removal of certain content. The Court of Justice of the European Union has, however, made it clear that the provisions of Directive 2000/31 prevent making orders against intermediaries requiring them to put a general filtering system in place at their own expense for an unlimited period of time; the Court therefore called on national courts to order proportionate measures, and to strike a balance between the fundamental rights at issue.[13]

Nevertheless, it must be understood that the obligation of intermediaries to participate in the fight against illegal content, even though they are not legally responsible for such content, is a departure from the usual elements of the law of liability (fault, harm, causal link). Should it be necessary to consider whether the intermediaries are obliged to bear the full cost of the ordered measures? Would this not be tantamount to imposing not a legal responsibility, but an economic one instead? This is a matter which the English Supreme Court appears to have already decided, in *Newzbin2*[14] which the Cour de cassation will soon have to decide on.[15]

The right to protection of personal data

[12] Cass., 1ère Civ., 17 février 2011, pourvoi no 09-13.202, Bull. civ. 2011, I, no 31
[13] CJEU, 24 November 2011, Scarlet Extended, C-70/10; CJEU, 27 March 2014, UPC Telekabel Wien, C-314/12
[14] [2011] EWHC 2714 (Ch) (Arnold J),
[15] appeal no 16-17.217

In France, even though computer technology was only at its infancy, Article 1 of loi no 78-17 du 6 janvier 1978 relative à l'informatique aux fichiers et aux libertés a reconnu à la personne des droits sur les informations qui la concernent included the following principle: 'computer technology must be at the service of every citizen. Its development must take place within the framework of international cooperation. It must not infringe upon human identity, human rights, private life or individual and public freedoms.'

These ever-modern principles are laid down in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and in EU Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, which repeals Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The repeal of this directive will not come into effect in EU member states until 25 May 2018.

The right to protection of personal data, also protected under Article 8 of the Charter of Fundamental Rights of the European Union, appears to be an extension of the right to privacy. It is also on the basis of Article 8 of the European Convention on Human Rights that the European Court of Human Rights has developed its case law in this context, stating that '[t]he protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention.'[16] The Cour de cassation, in the same way, links these two rights, which fall within the broader category of rights relating to personality.[17]

However, the development of information and communication technologies has radically changed the methods of retention and access to personal data, justifying the emergence of a right to be forgotten, the scope of which, however, remains uncertain.

Recognition of the right to be forgotten

The arrival of the internet has undermined the protection of personal data due to a combination of the following three factors:

[16] ECHR, 4 December 2008, S and Marper v the United Kingdom [GC], nos 30562/04 and 30566/04, paragraph 103
[17] Cass., 1ère Civ., 10 septembre 2014, pourvoi no 13-12.464, Bull. civ. 2014, I, no 144

- A greater amount of personal data, of an increasingly varied nature, is now in circulation. Information is uploaded online by the individuals themselves or by third parties to social media websites, while such data is also automatically stored through factors such as the age, sex, income or family situation of individuals, as well as their tastes, the places they frequent or any legal proceedings they have been involved in.

- An increase in storage capacity has made it possible to preserve all data, with virtually no limitation in time and space.

- Search engines make it possible to find information very quickly relating to a given person from all over the web through an algorithm.

The use of search engines thus multiplies the risk of invasion of privacy. Taking this into account, the Court of Justice of the European Union in its judgment in Google Spain[18] found that search engine operators are responsible for processing personal data – this finding as such was not a foregone conclusion. Under a constructive interpretation of articles 12 and 14 of Directive 95/46, the Court found that search engines were under an obligation, when a search on a particular individual was carried out, to delete links to pages containing information relating to that person even where publication of that information was not illegal. The Court of Justice has thus not recognised a genuine right to be forgotten, since the disputed content will always be available on the website itself, but has instead recognised a right to have particular links removed from search results, with access to the content through the search for keywords being removed.

Internet users immediately grasped onto this new right: Google has already processed nearly 700,000 requests for removal of certain results on its search engine and has so far dealt with about 40% of these requests. European legislation has not ignored this matter and Article 17 of the directive on the protection of individuals with regard to the processing of personal data, cited above, introduces a right to erase data, or a right to be forgotten, which is not specific to search engines but can be applied in this context.

The right to erase certain search results arising from the Google Spain judgment is particularly robust: on the one hand, the Court found that 'it is not necessary in order to find such a right that the inclusion of the information in question in the list of results causes prejudice to the data subject'; on the other hand, the right to respect for private life and the protection of personal data 'override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to

[18] CJEU, Grand chamber, 13 May 2014, C-131/12

the data subject's name.'[19] The right also applies to cases where the 'publication in itself on those pages is lawful.'

Does this mean that the question of the lawfulness of the content is totally irrelevant? The Conseil d'Etat recently referred a number of questions to the Court of Justice of the European Union on this very issue.[20] Does this also mean that the right to have certain search results removed always takes precedence over the public's right to information? On this last point, the Google Spain judgment provides some answers, but also raises questions.

The right to be forgotten and the freedom of expression

The Court of Justice has affirmed the primacy of the right to privacy and the protection of personal data over the public's interest in accessing information about a particular person. But it has stated that this 'would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question'.[21] The public's right to information, an element of the right to freedom of expression, appears to be preserved by the Court. Article 17 of the EU regulation on personal data similarly provides that the right to erase data does not apply where 'processing is necessary … for exercising the right of freedom of expression and information'.

However, it must be noted that the balance struck between these competing interests is different to the approach taken by the European Court of Human Rights, in balancing rights under Articles 8 and 10 of the Convention. The Strasbourg court has given a wide definition to what can be said to constitute a contribution to a debate of general interest. As mentioned above, this often leads it to tilt the balance in favour of the freedom of expression. The EU Court of Justice has adopted a much more restrictive approach towards search engines, which is mainly based on the role played by the person concerned in public life. At first glance, this difference can easily be explained: removing certain search results does not result in the deletion of information from the website that originally published it, but instead in the disappearance of certain links from the list of results when an individual searches for another person by name. Since the interference with the right to freedom of expression is far less, the possibility of invoking this right to justify any infringement on the right to privacy and the right to protection of personal data is more limited. But, when considering this issue more closely, the infringement on the public's right to information is perhaps more significant than it appears to be. Once certain search results have

[19] ibid, paragraph 97.
[20] EC, 24 February 2017, Ms Chupin et al, no 391000, 393769, 399999, 401258
[21] Cited above, paragraph 97.

been removed, given the mass of information available online, the internet user will have much more difficulty in accessing the content in question that remains available on the website. If the user is unaware of the existence of that particular content in the first place, then they will be unable to get access to such information.

The Cour de cassation recently had to deal with a case which asked it to consider the relationship between the right to be forgotten and freedom of expression.[22] But this was a missed opportunity: if some consider that the freedom of information concerning the protection of personal data has been given priority, its decision is, in reality, devoid of any legal scope, for reasons relating to the way in which cassation works.[23]

This is a particularly sensitive issue. The Google Spain judgment has been criticised by some for introducing a form of censorship on search engines; while others are worried about its possible consequences for historical research. However, the decision also responds to the fact that internet users have a legitimate expectation that their personal information can disappear into oblivion, as was the case prior to the emergence of search engines.

Conclusion

In the digital era, nothing has changed and everything has changed: respect for privacy and the protection of personal data are, as before, fundamental rights to which individuals are deeply attached, which must be reconciled with other rights of equal value; in particular, the freedom of expression. However, the explosion of available information, their accessibility, data conservation and the emergence of new players such as intermediaries means that these issues have re-emerged in a new form. Both national and European courts are at the forefront in dealing with these issues.

[22] Cass., 1ère Civ., 12 mai 2016, pourvoi no 15-17.729
[23] see, for clarification on this point: L. Truchot, Revue juridique de droit d'affaires no 10/2016, p.5