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ENGLAND AND WALES

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PRIVACY & THE INTERNET

COMMUNICATIONS LAW CENTRE
UNIVERSITY OF TECHNOLOGY SYDNEY, AUSTRALIA

7 DECEMBER 2012

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(1) Introduction

1. Can I start by thanking the Communications Law Centre at UTS for the invitation to attend and speak at this important Seminar? I am delighted to be here.

2. I doubt that it comes as a surprise to anyone to learn that I have spent the last 17 months engaged in an Inquiry in connection with the culture, practices and ethics of the press in the United Kingdom. My Report, which with an Executive Summary, runs to over 2,000 pages was published on 29 November – just over a week ago – and already a great deal of water has passed under the bridge in connection with it. It may be some of you are hoping that I will elaborate or take you behind the scenes of the Inquiry. I am afraid that you are going to be disappointed. When I launched the Report which must be read in the context of the Terms of Reference for the Inquiry, I said this:

> *I believe that the Report can and must speak for itself; to that end, I will be making no further comment. Nobody will be speaking for me about its contents either now or in the future.*

3. I should explain that this is not because I am concerned about the debate; indeed, I am watching developments in the UK with interest. It is because I treat the Report as a judgment and judges simply do not enter into discussion about judgments they have given; they do not respond to comment, however misconceived; neither do they seek to correct error. The judgment, or in this case, the Report, has to speak for itself.

4. That does not mean that I cannot talk about the law. It is common for judges to give lectures or to make speeches about areas of the law within their expertise or issues of legal public concern, provided only they do not touch upon their own decisions or others which might fall to them for determination. The issues that the internet raises might be said to be tangential to the culture, practices and ethics of the press and it was described as the elephant in the room both in relation to the debate about the press and the debate about privacy. What I want to talk about this morning, however, are some of the issues which the internet age is creating or, if not creating, bringing into sharp relief.

5. I hope you will not mind if I start my remarks with a short consideration of the past, not the recent past, but the past when different new technologies created unforeseen issues which society and the law had to address. It may well provide important lessons and insight into discussions, such as the seminar which you are holding today and others in similar liberal, democratic societies. It is by examining what has happened in the past, when latter day equivalent issues arose, that we can adjust and learn for the future. Obviously, we cannot now foresee what changes future technology will make to our lives but it ought to

be possible to map out an approach to rights and responsibilities which can be either a bedrock or, at least, a touchstone for the coming years.

(2) Echoes of the Past

6. The story starts in the UK and America. It is not my story because I am only borrowing it from Daniel Solove, Professor of Law at George Washington University and an acknowledged expert on the issues we are discussing today. In his book *The Future of Reputation – gossip, rumor, and privacy on the internet* he draws attention to a time when innovative technology first had a significant impact on society's approach to privacy and free speech.[1] He describes it this way:[2]

> … *in the second half of the nineteenth century, we were in the throes of another information revolution – the rise of the newspaper. This revolution had its roots in the 1830s in England, with the innovation of the 'penny press.' New printing technology enabled newspapers to be sold much more cheaply than before – for just a penny. These new papers were filled with news of scandals, family squabbles, public drunkenness, and petty crimes. They were tabloids, and people loved them.*

7. As he notes, Dickens famously parodied this innovation in *Martin Chuzzlewit*. As the eponymous hero arrives in New York he is instantly assailed by the product of this technological revolution as he finds himself surrounded by a host of eager paperboys cacophonously advertising their wares:[3]

> *'Here's this morning's New York Sewer!' cried one. 'Here's this morning's New York Stabber! Here's the New York Family Spy! Here's the New York Private Listener! Here's the New York Peeper! There's the New York Plunderer! Here's the New York Keyhole Reporter! Here's the New York Rowdy Journal!'*

8. The penny press was only the start. The telephone was soon to follow, and shortly afterwards the development of the wiretap technology. Meanwhile, in the early 1880s the Kodak 'snap camera', the first easily portable and affordable camera, was invented. Cameras were no longer the preserve of the wealthy, the specialist or the enthusiast. It was now possible, as Professor Solove concludes, for anybody to take 'candid photos of people.'[4] The era of the paparazzi might not have dawned in the last years of the 19th century, but the conditions for its birth were in place.

9. Taken together these three innovations were widely understood at the time to pose a new and significant threat to privacy. No one was, for instance, safe from journalistic curiosity or, in short order, the camera lens. Journalists eager for stories to sell were everywhere. Nothing, it seems, was off limits. The honeymoon of the then US President, Grover Cleveland, was, for instance, the subject of unwanted press attention. Peering through binoculars, journalists from the penny press spent their time, as he put it, 'in ghoulish glee desecrat[ing] every sacred relation of private life'.[5] As the recent holiday in France of the Duke and Duchess of Cambridge and, more particularly, the photographs taken of the Duchess show, little perhaps has changed. I say nothing about the recent Australian intrusion into her private life, while she is in hospital.

10. What was the upshot of these technological changes? First, and unsurprisingly, some commentators drew the conclusion that they posed a threat to members of society. They did so, it was said, by transforming the nature of gossip. Penny papers, candid cameras transformed idle curiosity into 'the chief enemy of privacy in modern life'.[6] For the first time in human history, gossip and comment was not confined to a small number of individuals. In printed form, gossip could now circulate across continents exposing individuals, warts and all, to many thousands if not millions. It was no longer confined to a

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[1] The account given in this section is predominantly drawn from D. Solove, *The Future of Reputation – gossip, rumor, and privacy on the internet*, (Yale) (2007) at 106ff.
[2] D. Solove, *ibid* at 106.
[3] C. Dickens cited in D. Solove, *ibid* at 106.
[4] D. Solove, *ibid* at 107.
[5] Cited in D. Solove at 107.
[6] E.L. Godkin (1890) cited in D. Solove, *ibid*, at 108

limited social circle. Other commentators no doubt took the view that this was no bad thing, that it was simply another means of giving effect to freedom of expression.

11. The second, and the historically significant, consequence of these changes was that they captured the attention of two young American lawyers, who had previously spent their time writing scholarly articles about obscure subjects, such as *The Law of Ponds*. As many of you are doubtless very well aware, the two lawyers were Samuel Warren and Louis Brandeis.

12. The product of their newfound interest was their famous Harvard Law Review article *The Right to Privacy.*[7] In developing their argument that there should be such a right, they described how the world was changing in the face of recent technological advances. In particular they noted how:[8]

> *Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops".*

They went on to note how in their view, and in an era when modern photography was still in its infancy and was yet to really find its way into the press, that:[9]

> *The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle*'.

13. As recently as last week, this article was the subject of comment by Lord Neuberger in a speech on privacy in the 21st century and you will understand why I consider such remarks prescient. In many ways, we are still grappling with the issues which inspired Warren and Brandeis's article. We are doing so not just in respect of, what is now, the established media – print, radio, television – but also new media in the form of the internet, blogs and social networking such as Twitter. We are equally still grappling with the question of balancing the value we place on privacy with the value we place on freedom of speech and expression. The growth of the internet has perhaps just brought into very sharp focus, and further complicated, a debate which has been going on now since the birth of modern media.

14. So much for the 19th century. Let us pass by the 20th century and consider the lessons we might draw from the early frontiers of new technology then to the early frontiers of new technology now. In doing so, I offer no solutions or recommendations. I simply offer issues to be considered.

(3) Modern Parallels – The Internet

15. The first point to take from this brief historical outline is to underline that, in many ways, we have been here before.

16. One of the points that is often made is that in the age of the internet, privacy is dead: there is only freedom of expression. Let me give you some examples. In 1998 David Brin author of *The Transparent Society*, concluded that 'Light is going to shine into nearly every corner of our lives.'[10] Scott McNealy, chief executive officer of SUN Microsystems went further. He concluded that we already 'have zero privacy'. We should, he suggested, simply 'Get over it.'[11] Or as Mark Zuckerberg, who needs no introduction, put it in 2010 privacy is no longer 'a social norm'.[12] Perhaps the conclusion to draw from this is that if privacy is no longer a social norm, anyone can say anything about anyone else.

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[7] 4 Harv. L. Rev. 193 (1890).
[8] 4 Harv. L. Rev. 193 (1890) at 195.
[9] 4 Harv. L. Rev. 193 (1890) at 196.
[10] Cited in D. Solove at 105.
[11] Cited in D. Solove at 105.
[12] Cited in E. Barnett, *'Facebook's Mark Zuckerberg says privacy is no longer a 'social norm"*, (The Telegraph, 11 January 2010)

17. To a certain degree, such conclusions are not new. The birth of the popular press gave rise to similar thoughts. So much so that the view was immortalised by Henry James in his novel *The Reverberator*, in which one of the characters expresses a view no doubt common amongst the penny press of the day that:[13]

> *It ain't going to be possible to keep out anywhere the light of the press. Now what I'm going to do is set up the biggest lamp yet made over and make it shine all over the place. We'll see who's private then.*

18. So we have been here before. The birth of a new technology has seemingly brought an end to privacy not once, but now twice. The mass media did not however kill it off. No doubt it probably felt for a time that it would, and in fact, had done so. But the shadow of the laws of defamation and, later, and breach of confidence, whether these last were introduced by statute or were developed by the courts, undoubtedly acted as a break on the light of the press. I recognise, of course, that, as yet, Australia has no tort of privacy either at common law or by statute whereas breach of privacy as a tort has developed in the UK most significantly following the incorporation into UK law of the European Convention on Human Rights, and, in particular, Article 8 dealing with private life.

19. Perhaps more importantly, public opinion shaped the development of ethical standards on the part of the press and not necessarily to desirable outcomes. It may also be reasonable to draw the conclusion that financial interest proved a limit on the extent to which the media was interested in pushing the boundary between free speech and individual privacy. Interest in a story about the US President's honeymoon may sell a front page and, today, there are many in the public eye who would have a similar effect; consider, for example, the honeymoon of film stars, singers, and footballers. It is doubtful that the same coverage and attention in the honeymoon of two ordinary members of the public who have never been in the public eye would sell as many copies.

20. Given the historical failure to develop limitations on incursions into privacy by the media, it might reasonably be said that it is difficult to assume that any such limitations might evolve in so far as the internet is concerned. It is much more plausible to assume that any such limitations will require some type of intervention. Further, it could be said that in recent years the ethical limitations on the conduct at least of certain sections of the press, have weakened. Further, perhaps, due to commercial pressures including the advent of the internet, they have started to push against ethical boundaries and in some instances have pushed too far. At the very least, without treading into dangerous territory, so much is clear from the background to my Inquiry.

21. But that is not to say that such standards backed up by law enforcement and effective regulation cannot develop and hold. How likely is it that such standards could develop in respect of the internet? This is perhaps where the historical analogy might begin to break down. I am conscious that the Convergence Review here in Australia has recommended that media outlets should be regulated regardless of platform. Obviously, for these purposes, the internet is just another platform and in accordance with this approach neutral to the technology, any Content Service Enterprise which meets the criteria as an influential channel should be regulated. Possible criteria for an influential outlet were suggested to be Australian revenue of $50 million a year and 500,000 Australian users per month. The difficulty, of course, is that this would not include Google.

22. The problem which Warren and Brandeis identified was that, as they put it, gossip was no longer the resource of the idle and the vicious. It had become a trade. Trade has a value, and those who sell it need to protect their investment. Whether it be true or not, it is argued, and argued vigorously by the press, that if newspapers overstep the legal or, perhaps, the ethical boundaries which society holds dear, they will suffer financially as readers would refuse to buy their daily editions or would boycott their newspaper

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<http://www.telegraph.co.uk/technology/facebook/6966628/Facebooks-Mark-Zuckerberg-says-privacy-is-no-longer-a-social-norm.html>.

[13] H. James, *The Reverberator,* (1888) cited in D. Solove at 106.

entirely: the classic example from the UK relates to the collapse of sales of *The Sun* in Liverpool following its utterly false reporting of the behaviour of Liverpool fans during the Hillsborough disaster. Newspapers also stood to suffer financially if they were held liable to pay damages to those they had defamed or those whose privacy, or confidentiality, they had infringed. Again, however, difficult issues arise as to the cost- benefit analysis of profit versus likely damages and costs.

23. The internet has however completed the opposite transformation. It does not trade in gossip. It simply publishes it online, conveys it on Facebook, uploads it onto YouTube, tweets and re-tweets it. In this it not only competes with the media in the transmission of private information which would otherwise only be on the front pages, but it has also provided a global megaphone for gossip about Mr and Mrs Smith. In respect of both it does so without, as yet, any general standards of behaviour, such as those to which the media is held.

24. More importantly it generally does so without ascribing a financial value to the information as the published media does. With some exceptions for bloggers who carry advertising and tweeters who are sponsored, online bloggers or tweeters are not subject to the financial incentives which affect the print media, and which would persuade the press not to overstep society's values and ethical standards. Equally, there is a view that blogging or tweeting is publication without responsibility or accountability and that, in this sense, the internet is beyond the reach of the law. I return to this. But before doing so let me give you some examples.

25. First, during early part of 2011 England and Wales experienced what was described as privacy[14] and super-injunction spring.[15] Super-injunctions were interim injunctions which prohibited disclosure of both the substantive content of the injunction and the very fact of the injunction. It seems that very few such injunctions were ever actually granted. A number of similar injunctions, which anonymised the proceedings, were however made. These injunctions generally speaking stopped newspapers from printing stories about the private lives of celebrities. The media were, understandably, unhappy with this situation.

26. While the media were subject to the various injunctions, the internet was a very different story. Rumour and speculation regarding the number of such injunctions was rife: Twitter in particular and various blogs circulated and discussed names of individuals who were said to have obtained such injunctions. Names of various celebrities swirled around the internet. A number of those celebrities named went on the web, and went to the media, to deny having obtained such injunctions.

27. More pertinently they made the point that they were not, as the internet rumours suggested, seeking to hide from the public gaze details of their private lives, such as extra-marital affairs. On one level individuals were publishing names arguably in breach of court orders. On another level they were arguably making defamatory comments about other individuals.

28. The second example is more recent. On 2 November this year, *Newsnight*, a nightly current affairs programme broadcast on BBC2, broadcast a report alleging that a prominent member of the Conservative Party during the time when Margaret Thatcher was Prime Minister was linked to an historic child abuse scandal. No names were mentioned. Shortly afterwards it seems the internet was once more awash with rumour and speculation. A person was named. It became evident in no time at all that the internet's speculation was wrong: the wrong person had been named. By this time the damage had been done. Apologies from the BBC and other broadcasters have followed, as has, apparently, legal action.

29. Again an obvious difference can be seen. *Newsnight* broadcast no names. Those who went on to the internet were not so restrained. As I said, the BBC has since apologised; it has also settled threatened legal proceedings out of court. I return to those who went on to the internet in a moment.

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[14] http://blogs.lse.ac.uk/politicsandpolicy/2011/06/29/super-injunctions-and-privacy/

[15] http://inforrm.wordpress.com/2011/06/08/superinjunction-spring-publicity-issues-in-the-court-of-protection-judith-townend/

30. These examples are serious ones. They highlight a difference between the established media and the internet. The established media broadly conforms to the law, and when they do not they are potentially liable under the law. In so far as the internet is concerned there has been and, for many, there remains a perception that actions do not have legal consequences. Bloggers rejoice in placing their servers outside the jurisdiction where different laws apply. The writ of the law is said not to run. It is believed therefore that the shadow of the law is unable to play the same role it has played with the established media.

31. What is perhaps most troubling, and it is a point rightly highlighted by Professor Solove, is that there is an element of mob rule in these examples. They are not the only such examples. Instances of naming and shaming are relatively commonplace. It takes but a minute to record someone doing something in a public place and to upload it to the internet. Once on the internet the episode, the behaviour, is there for the world to see and is there permanently at the click of a mouse.

32. Indeed, it is worse than that. Children and the young do not appreciate that uploading a compromising photograph for a laugh can have consequences for the long term future because once the photograph is in the public domain, it can be found, copied and reproduced all, again, at the click of the mouse. It will be difficult if not impossible to retrieve every copy and, in years to come, it is likely that it will still be there for a determined researcher to uncover.

33. Where does this leave us for the future? Given the nature of the internet, the ease and speed with which information can be placed on it and can circulate widely, and the seeming view that it can be placed there with impunity, how likely is it that norms of behaviour will develop as they developed for the media? And how can we hope to police those norms? Or is it the case that, as Eric Schmidt, the former CEO of Google, has it, that only foolish governments would attempt to protect privacy on the internet; foolish because they are unlikely to succeed.[16] Is the protection of privacy in an internet age a possibility or an improbability? Is it even desirable?

(4) Future Considerations

34. Let me take the second of those questions first. If protecting privacy in the internet age is not desirable, there is little reason to attempt to do so. The question then is this: is it desirable to seek to protect privacy?

35. The first point which I think needs to be remembered in this regard arises from a consideration of freedom of expression. Privacy and freedom of speech and expression are often conceived of as in opposition to each other. My privacy is an infringement of your freedom of expression, and vice versa. What is often not fully appreciated is that privacy is in itself both an aspect of freedom of expression and necessary for freedom of expression to be fully realised. It is an aspect of freedom of expression in that an individual can properly choose not publicly to disclose certain aspects of conduct, views or personality. To that extent, therefore, the right to be silent is itself not only exercising a right to privacy but it is also a form of freedom of expression.

36. Private expression is still a form of expression. Privacy is also necessary for freedom of public expression as it is often only in private that we can discuss, debate and form our views, beliefs and ideas. In the absence of a private sphere how could we fully develop those ideas? It seems more than arguable therefore that some protection of privacy is desirable if we are to properly protect freedom of public expression. It is a difficult policy question how to do that though, and different countries approach it differently.

37. It is also arguably desirable for another reason. In many cases, gossip over the internet will be no more and no less harmful than gossip over the garden fence or in a bar. It will be of no great interest to the vast majority of people and, albeit it will be recorded permanently, it will cause no great concern. In other cases this is clearly not the case, as the super-injunction and *Newsnight* examples show.

[16] As cited at <http://blogs.lse.ac.uk/politicsandpolicy/2011/07/13/internet-privacy-social-media-age/>.

38. Equally, where the internet is used to ridicule the behaviour of individuals going about their everyday business, to name and shame people by broadcasting their behaviour on, for instance, YouTube, or by describing that behaviour on blogs, there is a danger of real harm being done, and in some cases harm which is both permanent and disproportionate. I repeat. There is not only a danger of trial by Twitter, but also of an unending punishment, and no prospect of rehabilitation, via Google.

39. Assuming then, without deciding the issue, that some degree of privacy protection is desirable how might we do so?

40. The first point is that we already can do much through an application of the law as it presently stands. Individuals who tweet or use social media platforms are not beyond the reach of the criminal law. Following the riots which took place in England in autumn 2011, two men were prosecuted and convicted of inciting riot via their Facebook pages.[17]

41. In respect of the *Newsnight* case, defamation proceedings are, it seems, to be instituted against a number of tweeters.[18] In principle, there is no reason why individuals who tweet in breach of court orders, including privacy injunctions, cannot be traced via their ISPs and rendered subject to legal proceedings. We can, of course, serve injunctions via Twitter[19] and claims by Facebook.[20] The shadow of the law falls on the internet as it does all other aspects of society. Continued consideration will have to be taken to ensure that search engines heed the risk and that techniques are developed to deal with it.

42. Given that the internet is not entirely out of the law's reach it is likely in time that, as with the media in the 19th century, it will start to have an effect on individual's behaviour. It will start to modulate behaviour, and curb its wilder excesses. Time and the proper application of the law will play the same role for the internet as it has done in all other areas of our lives; it will shape our behaviour and help to reinforce social norms. Just as it took time for the wilder excesses of the early penny press to be civilised, it will take time to civilise the internet.

43. This is not to say that social norms may not change over time. Our view of what is, for instance, private information may change. Our view of privacy may change. I imagine though that individuals will always seek to preserve some degree of privacy and will seek the law's protection to protect it. The question for us in this century will not simply be how to protect it, but what is it that we seek to protect.

44. Perhaps most significantly though, while established legal norms are in many respects capable of application to the internet, it is likely that new ones and new laws will need to be developed. The rise of the media produced Warren and Brandeis's famous dissertation on privacy law. The internet may well – and no doubt will – require us to think as creatively as they did.

45. Only if we do so will we properly understand the role and values which underpin privacy and freedom of expression, the balance to be struck between them and the means to ensure that they are both safeguarded in an internet age. The answers we reach might differ from those we have reached in the past. It is an important discussion. I look forward to today's contribution to it.[21] Thank you.

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[17] *R v Blackshaw & Others* [2011] EWCA Crim 2312 at, for instance, [55].
[18] See <http://www.guardian.co.uk/tv-and-radio/2012/nov/23/mcalpine-libel-bercow-monbiot-davies>
[19] Blaney v Persons Unknown (2009, unreported)
[20] *AKO Capital LLP & another v TFS Derivatives & others* (2012, unreported)
[21] I must pay tribute to John Sorabji who provided invaluable assistance in the preparation of this paper while I was otherwise engaged