SOLOVE ROTENBERG SCHWARTZ

Sæconvál Bálistáorn



INFORMATION PRIVACY LAW

Second Edition

Daniel J. Solove

Associate Professor of Law George Washington University Law School

Marc Rotenberg

Executive Director
The Electronic Privacy Information Center &
Adjunct Professor of Law,
Georgetown University Law Center

Paul M. Schwartz

Anita and Stuart Subotnick Professor of Law Brooklyn Law School



111 Eighth Avenue, New York, NY 10011 www.aspenpublishers.com © 2006 Aspen Publishers, Inc. a Wolters Kluwer business www.aspenpublishers.com

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher. Requests for permission to make copies of any part of this publication should be mailed to:

Aspen Publishers Attn: Permissions Department 111 Eighth Avenue, 7th Floor New York, NY 10011-5201

Printed in the United States of America.

1234567890

ISBN 0-7355-5576-1

Library of Congress Cataloging-in-Publication Data

Solove, Daniel J., 1972-

Information privacy law / Daniel J. Solove, Marc Rotenberg, Paul M. Schwartz.—2nd ed.

p. cm.

Includes index.

ISBN 0-7355-5576-1 (hardcover : alk. paper)

1. Privacy, Right of — United States. 2. Data protection — Law and legislation — United States. 3. Confidential communications — United States. 4. Personality (Law) — United States. I. Rotenberg, Marc. II. Schwartz, Paul M., 1959 — III. Title.

KF1262.S66 2005 342.7308'58 — dc22

2005026950

INFORMATION PRIVACY LAW

EDITORIAL ADVISORS

Erwin Chemerinsky

Alston & Bird Professor of Law Duke University School of Law

Richard A. Epstein

James Parker Hall Distinguished Service Professor of Law University of Chicago Peter and Kirsten Bedford Senior Fellow The Hoover Institution Stanford University

Ronald J. Gilson

Charles J. Meyers Professor of Law and Business Stanford University Marc and Eva Stern Professor of Law and Business Columbia University

James E. Krier

Earl Warren DeLano Professor of Law University of Michigan

Richard K. Neumann, Jr.

Professor of Law Hofstra University School of Law

Kent D. Syverud

Dean and Garner Anthony Professor Vanderbilt University Law School

Elizabeth Warren

Leo Gottlieb Professor of Law Harvard University

EMERITUS EDITORIAL ADVISORS

Geoffrey C. Hazard, Jr.

Trustee Professor of Law University of Pennsylvania Distinguished Professor of Law Hastings College of the Law, University of California

Bernard Wolfman

Fessenden Professor of Law Harvard University

E. Allan Farnsworth

On January 31, 2005, Aspen Publishers lost a great author, colleague, and friend with the death of E. Allan Farnsworth, the Alfred McCormack Professor of Law at Columbia Law School and author of the seminal student treatise, Contracts, Fourth Edition, by Aspen Publishers.

About Aspen Publishers

Aspen Publishers, headquartered in New York City, is a leading information provider for attorneys, business professionals, and law students. Written by preeminent authorities, our products consist of analytical and practical information covering both U.S. and international topics. We publish in the full range of formats, including updated manuals, books, periodicals, CDs, and online products.

Our proprietary content is complemented by 2,500 legal databases, containing over 11 million documents, available through our Loislaw division. Aspen Publishers also offers a wide range of topical legal and business databases linked to Loislaw's primary material. Our mission is to provide accurate, timely, and authoritative content in easily accessible formats, supported by unmatched customer care.

To order any Aspen Publishers title, go to www.aspenpublishers.com or call 1-800-638-8437.

To reinstate your manual update service, call 1-800-638-8437.

For more information on Loislaw products, go to www.loislaw.com or call 1-800-364-2512.

For Customer Care issues, e-mail *CustomerCare@aspenpublishers.com*; call 1-800-234-1660; or fax 1-800-901-9075.

Aspen Publishers a Wolters Kluwer business

To my parents and grandparents—DJS To Anna, Chaz and Chloe, my parents, and GG—MSR To Stefanie, Clara, and Leo—PMS

SUMMARY OF CONTENTS

Contents	XI
Preface	xxv
Acknowledgments	xxix
INTRODUCTION	1
A. Information Privacy, Technology, and the Law	1
B. Information Privacy Law: Origins and Types	9
C. Philosophical Perspectives	39
2 PRIVACY AND THE MEDIA	75
A. Information Gathering	76
B. Disclosure of Truthful Information	102
C. Dissemination of False or Misleading Information	159
D. Appropriation of Name or Likeness	188
3 PRIVACY AND LAW ENFORCEMENT	207
A. The Fourth Amendment and Emerging Technology	207
B. Federal Electronic Surveillance Law	263
C. Intelligence, Terrorism, and National Security	300
D. Encryption	320
E. Government Computer Searches	323
4 HEALTH AND GENETIC PRIVACY	345
A. Medical Data and Privacy in the Information Age	346
B. Confidentiality of Medical Information	350
C. Constitutional Protection of Medical Information	394
D. Genetic Information	421

5	PRIVACY OF ASSOCIATIONS, ANONYMITY,	
	AND IDENTIFICATION	451
	A. Privacy of Group Associations	453
	B. Anonymity	470
	C. Identification	504
6	PRIVACY AND GOVERNMENT RECORDS	
	AND DATABASES	523
	A. Public Access to Government Records	524
	B. Government Records of Personal Information	577
7	PRIVACY, BUSINESS RECORDS, AND	
	FINANCIAL INFORMATION	623
	A. The Collection and Use of Personal Data	623
	B. Regulating Business Records and Databases	636
	C. Spam	693
	D. Identity Theft	696
	E. Financial Information	700
	F. Government Access to Financial and Business Records	718
	G. Privacy Policies: Private vs. Public Enforcement	739
8	PRIVACY AND PLACE	765
	A. Privacy at Home	765
	B. Privacy at School	778
	C. Privacy at Work	798
9	INTERNATIONAL PRIVACY LAW	869
	A. The OECD Privacy Guidelines	871
	B. The Protection of Privacy in Europe	873
	C. Privacy Protection in Other Countries	922
	D. International Transfers of Data	929
Та	ble of Cases	969
Table of Authorities		979
Index		1001

CONTENTS

Preface	XXV
Acknowledgments	xxix
1 INTRODUCTION	1
A. INFORMATION PRIVACY, TECHNOLOGY,	
AND THE LAW	1
 Sidis v. F-R Publishing Corp. 	2
B. INFORMATION PRIVACY LAW: ORIGINS AND TYPES	9
1. Common Law	9
(a) The Warren and Brandeis Article	9
 Samuel D. Warren and Louis D. Brandeis, The Right to Privacy 	12
(b) The Recognition of Warren and Brandeis's Privacy Torts	24
• William Prosser, <i>Privacy</i>	26
 Lake v. Wal-Mart Stores, Inc. 	27
(c) Privacy Protection in Tort Law	30
(d) Privacy Protection in Evidence Law	31
(e) Privacy Protection via Property Rights	31
(f) Privacy Protection in Contract Law	32
(g) Privacy Protection in Criminal Law	32
2. Constitutional Law	33
3. Statutory Law	35
4. International Law	38

	C. PHILOSOPHICAL PERSPECTIVES	39
	1. The Philosophical Discourse About Privacy	39
	(a) The Concept of Privacy and the Right to Privacy	39
	(b) The Public and Private Spheres	39
	2. The Definition and the Value of Privacy	40
	• Alan Westin, Privacy and Freedom	41
	• Julie E. Cohen, Examined Lives: Informational	
	Privacy and the Subject as Object	46
	 Daniel J. Solove, Conceptualizing Privacy 	49
	 Anita L. Allen, Coercing Privacy 	52
	 Paul M. Schwartz, Privacy and Democracy in Cyberspace 	54
	 Spiros Simitis, Reviewing Privacy in an Information Society 	56
	3. Critics of Privacy	59
	 Amitai Etzioni, The Limits of Privacy 	59
	 Richard A. Posner, The Right of Privacy 	62
	Fred H. Cate, The Privacy Problem: A Broader View of Information Privacy and the Costs and Consequences.	
	of Information Privacy and the Costs and Consequences of Protecting It	65
	4. The Feminist Perspective on Privacy	67
	State v. Rhodes	67
	• Reva B. Siegel, "The Rule of Love": Wife Beating	
	as Prerogative and Privacy	69
	 Catharine A. MacKinnon, Toward a Feminist Theory 	
	of the State	71
	 Anita L. Allen, Uneasy Access: Privacy for Women in a Free Society 	72
	in a Free Society	72
>	PRIVACY AND THE MEDIA	75
	A. INFORMATION GATHERING	76
	1. Intrusion upon Seclusion	76
	• Restatement (Second) of Torts § 652B: Intrusion	-
	upon Seclusion	76
	Nader v. General Motors Corp.	77
	Dietemann v. Time, Inc. Despielary American Procedure Co. Inc.	81
	Desnick v. American Broadcasting Co., Inc. Shulman v. Crown W. Productions, Inc.	84 90
	Shulman v. Group W Productions, Inc.	
	2. Paparazzi	94
	Galella v. Onassis Galifornia Anti Panaranni Act	94
	California Anti-Paparazzi Act William Managerian Act	96
	3. Video Voyeurism	100
	 Video Voyeurism Prevention Act of 2004 	101

В.	DI	SCLOSURE OF TRUTHFUL INFORMATION	102		
	1.	Public Disclosure of Private Facts	103		
		(a) Introduction	103		
		 Restatement (Second) of Torts § 652D: Publicity 			
		Given to Private Life	103		
		(b) Private Matters	104		
		 Gill v. Hearst Publishing Co. 	104		
		 Daily Times Democrat v. Graham 	108		
		(c) Publicity	114		
		 Miller v. Motorola, Inc. 	114		
		(d) The Newsworthiness Test	117		
		 Sipple v. Chronicle Publishing Co. 	117		
		 Shulman v. Group W Productions, Inc. 	129		
		(e) First Amendment Limitations	131		
		 Cox Broadcasting Corp. v. Cohn 	134		
		 The Florida Star v. B.J.F. 	137		
	2.	Disclosure of Illegally Obtained Information	152		
		Bartnicki v. Vopper	152		
C	DISSEMINATION OF FALSE OR MISLEADING				
	INFORMATION				
	1. Defamation				
		(a) Introduction	159		
		(b) Defamation and the Internet	161		
		• Zeran v. America Online, Inc.	163		
		Blumenthal v. Drudge	166		
		(c) First Amendment Limitations	170		
		New York Times Co. v. Sullivan	170		
		 Gertz v. Robert Welch, Inc. 	173		
	2.	False Light	181		
		(a) Introduction	181		
		• Restatement (Second) of Torts § 652E: Publicity			
		Placing Person in False Light	181		
		(b) First Amendment Limitations	183		
		• Time, Inc. v. Hill	183		
	3.	Infliction of Emotional Distress	185		
		• Hustler Magazine v. Falwell	186		
D	. A	PPROPRIATION OF NAME OR LIKENESS	188		
		Introduction	188		
	SACE	Restatement (Second) of Torts § 652C: Appropriation of Name or Likeness	188		

Contents xiii

2. Name or Likeness	191
 Carson v. Here's Johnny Portable Toilets, Inc. 	191
3. Connection to Matters of Public Interest	197
 Finger v. Omni Publications International, Ltd. 	199
4. First Amendment Limitations	203
• Zacchini v. Scripps-Howard Broadcasting Co.	203
3 PRIVACY AND LAW ENFORCEMENT	207
A. THE FOURTH AMENDMENT AND EMERGING	
TECHNOLOGY	207
1. Introduction	207
(a) Privacy and Security	207
(b) The Fourth and Fifth Amendments	208
(c) The Applicability of the Fourth Amendment	210
(d) Reasonable Searches and Seizures	210
(e) The "Special Needs" Doctrine	211
(f) Administrative Searches	211
(g) Checkpoints	212
(h) Terry Stops	212
(i) The Enforcement of the Fourth Amendment	213
2. Wiretapping, Bugging, and Beyond	214
Olmstead v. United States	215
 Lopez v. United States 	221
 Katz v. United States 	223
 United States v. White 	229
3. The Reasonable Expectation of Privacy Test	
and Emerging Technology	232
(a) Applying the Reasonable Expectation of Privacy Test	232
Smith v. Maryland	232
 United States v. Place 	238
 Illinois v. Caballes 	238
 California v. Greenwood 	243
 Plain View, Open Fields, and Curtilage 	245
• Florida v. Riley	245
(b) Sensory Enhancement Technology	252
 Dow Chemical Co. v. United States 	252
 Kyllo v. United States 	256
B. FEDERAL ELECTRONIC SURVEILLANCE LAW	263
1. Section 605 of the Federal Communications Act	0.00
of 1934	263

2.	Title III of the Omnibus Crime Control Act of 1968	264
3.	The Electronic Communications Privacy Act (ECPA)	
	of 1986	265
	(a) Statutory Structure	265
	 Types of Communications 	266
	• The Wiretap Act	267
	 The Stored Communications Act 	269
	 The Pen Register Act 	271
	 Electronic Surveillance Law and the Fourth 	
	Amendment	272
	The Installation of Electronic Surveillance Devices	272
	Electronic Surveillance Orders	274
	State Electronic Surveillance Law	275
	(b) Video Surveillance	276
	(c) E-mail	277
	 Steve Jackson Games, Inc. v. United States Secret Service 	277
	(d) Unauthorized Access to Password-Protected Web Sites	282
	(e) Content vs. Envelope Information	283
4	The Communications Assistance for Law	
т.	Enforcement Act	285
5.	The Foreign Intelligence Surveillance Act	288
	Global Relief Foundation, Inc. v. O'Neil	291
	United States v. Isa	293
6.	The USA PATRIOT Act	294
CIN	TELLIGENCE, TERRORISM, AND NATIONAL	
	ECURITY	300
	Is National Security Different?	300
	FISA and the "Wall"	
Ζ.		303
	In re Sealed Case Detail String The System of Foreign Letallings	304
	Peter Swire, The System of Foreign Intelligence Surveillance Law	307
	• The 9/11 Commission Report (2004)	309
3	The Attorney General's FBI Guidelines	314
	The Homeland Security Act	317
		317
5.	The Intelligence Reform and Terrorism	217
	Prevention Act • Populd D. Loo St Paul M. Schwartz, Payand the "IMar or	317
	 Ronald D. Lee & Paul M. Schwartz, Beyond the "War on Terrorism": Towards the New Intelligence Network 	318
D. F	NCRYPTION	320
		020

	• Exceptions	384
	Compliance and Enforcement	385
	Effect on Existing Law	385
	Northwestern Memorial Hospital v. Ashcroft	390
	C. CONSTITUTIONAL PROTECTION OF MEDICAL	204
	INFORMATION	394
	 The Constitutional Right to Information Privacy Substantive Due Process and the Constitutional Right 	394
	to Privacy	394
	Whalen v. Roe	396
	• 42 U.S.C. § 1983 and "Constitutional Torts"	404
	Carter v. Broadlawns Medical Center	405
	Doe v. Borough of BarringtonDoe v. Southeastern Pennsylvania Transportation	406
	Authority	409
	2. The Fourth Amendment	415
	 Anonymous Fireman v. City of Willoughby 	415
	Ferguson v. City of Charleston	418
	D. GENETIC INFORMATION	421
	1. Background: Genetic Privacy	421
	2. Property Rights in Body Parts and DNA	422
	Moore v. Regents of the University of California	422
	3. Genetic Testing and Discrimination	436
	 Richard A. Epstein, The Legal Regulation of Genetic Discrimination: Old Responses to New Technology 	436
	 Paul M. Schwartz, Privacy and the Economics of Health Care Information 	437
	4. DNA Databases and Identification	441
	United States v. Kincade	442
)	PRIVACY OF ASSOCIATIONS,	
	ANONYMITY, AND IDENTIFICATION	451
	A. PRIVACY OF GROUP ASSOCIATIONS	453
	 Compelled Disclosure of Group Membership Lists National Association for the Advancement of Colored 	453
	People v. State of Alabama	453
	2. Interrogation About Group Associations	456
	Barenblatt v. United States	456
	3. Surveillance of Group Activities	461
	• Laird v. Tatum	461

Contents

xvii

		Timadelpina rearry Meeting of the kenglous society	
		of Friends v. Tate	467
	В.	ANONYMITY	470
		1. Anonymous Speech	470
		 Talley v. State of California 	470
		 McIntyre v. Ohio Elections Commission 	472
		 Watchtower Bible & Tract Society v. Village of Stratton 	477
		2. Anonymity in Cyberspace	480
		• ACLU v. Miller	481
		 Columbia Insurance Co. v. Seescandy.com 	485
		 Doe v. 2TheMart.com, Inc. 	486
		3. Anonymous Reading and Receiving of Ideas	490
		 Tattered Cover, Inc. v. City of Thornton 	490
		4. Anonymity and Copyright	498
		 Recording Industry Association of America, 	
		Inc. v. Verizon Internet Services, Inc.	498
	C.	IDENTIFICATION	504
		1. Identification Devices and Techniques	504
		2. Identification and the Constitution	506
		 Hiibel v. Sixth Judicial District Court 	508
		3. Social Security Numbers	513
		Greidinger v. Davis	515
		4. National Identification Systems	519
		 Richard Sobel, The Degradation of Political Identity 	
		Under a National Identification System	519
6	P	RIVACY AND GOVERNMENT	
	R	ECORDS AND DATABASES	523
	Α.	PUBLIC ACCESS TO GOVERNMENT RECORDS	524
		1. Public Records and Court Records	524
		• Daniel J. Solove, Access and Aggregation: Public Records,	521
		Privacy, and the Constitution	525
		2. The Freedom of Information Act	526
		 United States Department of Justice v. Reporters 	
		Committee for Freedom of the Press	530
		 National Archives and Records Administration v. Favish 	536
		3. Constitutional Requirements of Public Access	542
		Los Angeles Police Department v. United Reporting	Del 9-51
		Publishing Corp.	544