

# Online Privacy Protection in China: Present and Future

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# Privacy

- An important right in modern society, but no clear definition for the concept
- Generally, a type of human right protecting citizens' private information from unlawful interference, knowledge, use and disclosure
- Such private information include personal life, personal information, private communication

# Challenges from Cyberspace

- Cyberspace: geographical boundaries not important
- Internet allowing corporation to collect, store and analyze personal information at a low cost; amount of personal information increased
- Boom of online sharing culture and citizen participation posed challenge
  - The contents of online privacy is expanding (not only data in the traditional sense, but also online personal information, such as IP address, user name, email, online account)
  - Privacy right: more active (how to ensure legal and reasonable use of personal information)
  - Privacy right: both personal and economic terms: valuable as to consumer's preference

# Online privacy

- In Privacy and Human Rights Report 2006, privacy is divided into (a) information privacy; (b) bodily privacy; (c) privacy of communications (d) territorial privacy
- Online privacy: information privacy should be the primary concern—the right of an individual to control the collection, use and dissemination of information on the Internet

# The Constitution

- Privacy right partly recognized
  - Article 38: personal dignity is inviolable (Insult, libel, false charge or frame-up is prohibited)
  - Article 39: residences not trespassed
  - Article 40: freedom and privacy of correspondence protected

# General Principles of Civil Law

- Legal basis for civil rights protection, reputation as a general right, but privacy not an independent right
  - Article 99: right to name where false representation of personal names is prohibited
  - Article 100: right to portrait so that use of a citizen's personal portrait for commercial purposes without consent is prohibited
  - Article 101: right to reputation; the personality protected; prohibition of libel, slander or other means to damage reputation
  - Article 120: compensation, stop the infringement, rehabilitate the reputation; an apology

# General Principles of Civil Law

- Judicial Interpretation (1988): privacy right is merged with reputation right (need to show damage to reputation)
  - “any act, written or oral, that exposes another person’s private secrets to the public, that fabricates facts in order to defame publicly a person’s dignity, or that employs insult or defamation which clearly damages another person’s reputation, must be deemed an infringement of a citizen’s right to his reputation. Any act, written or oral, that damages or defames the reputation of a legal person, and that causes loss to the legal person, must be deemed an infringement of the right of a legal person to its reputation.”

# General Principles of Civil Law

- Judicial interpretation (1993): the right to reputation as the cause of action for an invasion of privacy
  - “anyone who discloses the privacy materials of others without the consent of them, or promotes the privacy of others in writing or orally, which causes damages to the reputation of others, should be punished for infringing the reputation right of others.”
  - Focus on right to reputation



# General Principles of Civil Law

- Judicial interpretation (2001): the plaintiff is entitled to compensation for distress (emotional damage) caused by the violation of privacy and the harm to reputation. (recognition of privacy as an independent personal right)
  - “the people’s court shall accept according to law cases arising from the violation of societal public interests or societal morality by infringing upon a person’s privacy or other interests of personality, and brought to the court by the victim as a civil tort for claiming emotional damages”
  - Identifying “the unlawful disclosure or use of a deceased’s privacy, or the infringement of the deceased’ privacy by means that violate societal public interests or other societal morality” as torts that entitle the deceased’s family to seek compensatory damages

# Tort Law 2010

- Tort liabilities in areas such as medical negligence, work-related injuries and product liabilities, and liabilities on Internet users and ISPs
  - Article 2 broadly defines “civil rights and interests” includes the right to privacy as an independent right
  - Article 22: possibility to claim compensation for mental distress and emotional damage (similar to Judicial interpretation 2001)
  - Article 36: a network user or network service provider who infringes upon the civil right or interest of another person through network shall assume the tort liability (notice and take down system)
  - Providing only for remedies when privacy has been intruded. But it does not deal with proper handling of personal information at all stage to ensure proper use and security.

# Criminal Protection

- Criminal Law
  - Art. 252: whoever conceals, destroys or unlawfully opens another person's letter, thereby infringing upon right to correspondence, shall be held liable
  - Art. 253: any postal worker opening without authorization or concealing or destroying mail or telegrams shall be held liable
  - Amendment VII (2009):
    - any staff member of a state organ or an entity in such a field as finance, telecoms, transportation, education or medical treatment, selling, or illegally providing personal information on citizens, which is obtained during the organ's or entity's performance of duties or provision of services, to others, shall be liable.
    - Whoever illegally obtain the above information by stealing or any other means shall be liable
    - Where any entity commits either of the above crimes shall be fined, and the direct liable person in charge and other directly liable persons shall be punished.

# Specific regulations for Internet privacy (I)

- Administrative Measures for Security Protection of the International networking of Computer Information Networks (1997) (art. 7): the users' freedom of communication and communications secrecy are protected. (Ministry of Public Security)
- NPCSC Decisions in Safeguarding Internet Security (2000): it is a crime to illegally intercept, tamper with, delete other people's email or other data and violate citizens' freedom and privacy of correspondence.
- Provisions on the Technical Measures for the Protection of the Security of the Internet (2006): ISPs and entity users of the Internet shall be responsible for carrying into effect the technical measure for the protection of the Internet security and they should guarantee the normal functioning of the technical measure for the protection of the Internet security. (Ministry of Public Security)

# Specific regulations for Internet privacy (II)

- 2000 MIIT Administrative Measures for Internet Electronic Messaging Services Provisions: providers of Internet electronic messaging services should keep the personal data of their users confidential, no disclosure without the users' consent
- 2006 MIIT Administrative Measures for Internet E-mail Services (Art.3): keeping users' personal information and email address confidential; protecting citizens' privacy of correspondence in using Internet email services. Unless the public security organ or procuratorial organ makes an inspection on the contents of the correspondence according to law when required by national security or investigation of crimes, no infringement shall be allowed.

# Specific regulations for Internet privacy (III)

- 2010 Ministry of Culture Interim Measures for the Administration of Online Games: online game operators should keep user registration data, operation data, maintenance logs, etc in accordance with the law to protect state secret, commercial secrets, etc.
- 2010 SAIC Tentative Measures for the Administration of Online Commodity Transactions and Related Services: online commodity business operators and online service operators have certain obligations towards consumers in relation to the collected data from them, including safe custody, reasonable use, limited retention period, etc.
- 2011 Ministry of Commerce Regulation on Administration of Platforms for Online Transactions with Third Parties: without the users' consent, the platform operators shall not disclose or transfer to any third party the user list, transaction records and other data.

# Problem with privacy protection

- Scope of privacy?
  - Balancing of public interests: value of information, the motivation, the status of the subject, the place and availability of less invasive alternatives, etc.
  - Information: personal identifying data (name, ID, address, etc.) and non-identifying data (age, gender, hobbies)
  - Cookies (detecting browsing patterns) and personalized services (registration for free email)
- Determination of damage?
  - Reflecting the harm caused by the defendant

# Data Protection

- 2012 Draft on Information Security Technology—Guide of Personal Information Protection (MIIT for comment), recognizing five user rights:
  - Right of security: necessary measures to protect against unauthorized disclosure
  - Right of notice: informed of being collected and privacy policies
  - Right of choice: right to agree or refuse collection
  - Right of rectification: maintain completeness and accuracy
  - Right of objection: right to request stopping handling
  - First of its kind in China—a draft set of national standards on a comprehensive basis. However, this is only a guideline, not a law



# Internet Information Services 2012

- MIIT Several Provisions on Regulating the Market Order of Internet Information Services
  - First time elaboration of “personal data”: information relating to an online platform user which, when used either alone or in combination with other information, can identify that person.-- “personal identifier”

# Internet Information Services 2012

- Five fundamental data protection principles
  - Consent principle: duty to obtain users' consent for collecting data and providing such data to a third party;
  - Purpose specification: duty to stipulate the manner, purpose and scope of collecting and processing data and not to use for any purpose beyond those consented to by the user
  - Collection limitation: duty to only collect data that is essential for providing the services
  - Security safeguard: duty to keep data in safe custody and take immediate remedial measures to safeguard the data in case of a leakage or potential leakage
  - Use limitation: duty not to use the data other than for the purpose of providing the services

# Internet Information Services Regulations (Consultation)

- 2000 State Council Administrative Regulations on Internet Information Services
- Duty of confidentiality on the part of an ISP and interconnection service provider towards users in respect of personal data, including identity and log record, is explicitly spelt out
- New provisions on government's enforcement against offenders (rectification order, confiscation of profits, fines, termination of license)

# Future

- China cautious in comprehensive regulation of online privacy
- Privacy protection and Chinese ideologies and values
  - Ethical standards?
    - Respect for the right to privacy in networks
    - Informed consent for collection of personal information
    - Equilibrium between the safety of personal privacy and the safety of society
    - Social rectification for any infringement upon the right to privacy in networks

# Future

- Possible supervisory authority?
- International cooperation: data transfers across border (minimum standards?)
- Comprehensive Data Protection Law?
  - Technology neutrality
  - “privacy”; “personal data” or “personal information”
  - Scope of “sensitive information”?
  - Exemptions
  - Enforcement and education (public awareness)