

REVISITING THE PUBLIC DISCLOSURE OF PRIVATE FACTS IN CYBERWORLD

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SUMMARY

Traditional jurisprudence holds that a person who posts private information onto a social networking website does not have a legitimate expectation of privacy, however online social networking has revolutionised the way people communicate and share information with one another.¹

This article considers ways in which a person could have a legitimate expectation of privacy on the internet by attempting to answer questions such as whether privacy can exist where there is no physical space or inherently private subject matter, secrecy or seclusion and, more pertinently, whether the established jurisprudence can be applied within the phenomenon of social networking sites.

1 INTRODUCTION

Privacy has been described as a broad value that represents concerns about autonomy, individuality, personal space, solitude, and intimacy,² and according to Neethling, a person's right to privacy means that a person should have control over his or her personal affairs, reasonably free from unsolicited intrusions.³ Already in 1976 Neethling pointed out, that most authors would agree, that individuals should be able to decide for themselves if their personal information could be collected and used and that this power of self-determination should enjoy legal recognition.⁴

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¹ Beniger *The Control Revolution: Technological and Economic Origins of the Information Society* (1986) 436, describes how mass media has gradually replaced interpersonal communication as a socializing force.

² South African Law Reform Commission (hereinafter "SALRC") *Privacy and Data Protection* Project 124 Discussion Paper 109 Chapter 1 (2005) 2.

³ Neethling, Potgieter and Visser *Neethling's Law of Personality* 2ed (2005) 31 fn 334. See also *National Media Ltd v Jooste* 1996 3 SA 262 (A) 271-272, where Harms JA refers to the fact that the right to privacy "encompasses the competence to determine the destiny of private facts".

⁴ Neethling *Die Reg op Privaatheid* (1976) (LLD Thesis UNISA) 358, where he states "Die meeste skrywers is dit eens dat die individu self behoort te kan besluit of inligting aangaande homself versamel en gebruik mag word en dat hierdie selfbestemmingsreg van

Online social networking websites facilitate hundreds of thousands of social interactions in a day and new technology has enabled unique social situations that create the potential for unprecedented invasions of privacy.⁵ Verini pointed out that, when Rupert Murdoch bought MySpace.com for a reported \$580 million, he in fact received “a goldmine of market research, a microscope into the content habits and brand choices of America’s capricious youth market”.⁶ Marketers, school officials, governments business and online predators all have access to information available on the internet and are actively engaged in collecting it.⁷

Add to this the reality that the internet is creating a realm of human interaction in which the limitations of distance and geography are no longer relevant,⁸ and without an ability to conceptualise location or boundaries in cyberspace easily, the differentiation between the private and public boundaries of social interaction has become somewhat obscured.⁹

However, an attempt to apply traditional public disclosure or privacy jurisprudence to online social networking sites is a convoluted area of the law. It is the intention of this article to investigate and to endeavour to answer some of the questions within a South African context, posed by Abril.¹⁰ The question is addressed whether such privacy can exist where there is no physical space or inherently private subject matter, secrecy or seclusion and more pertinently whether the established jurisprudence can be applied within the phenomenon of social networking sites such as Facebook,¹¹ MySpace,¹² or Bebo.¹³

2 ONLINE SOCIAL NETWORKING

Online social networking has revolutionised the way people communicate and share information with one another.¹⁴ MySpace,¹⁵ Bebo¹⁶ and

regsweë erkenning behoort te geniet.” The translation is the author’s own but see also Neethling *et al* (2005) 31.

⁵ Abril “Recasting Privacy Torts in a Spaceless World” 2007 *Harvard Journal of Law and Technology* 5.

⁶ Verini “Will Success Spoil MySpace?” March 2006 *Vanity Fair* 238 <http://www.vanityfair.com/commentary/content/articles/060308roco01> (accessed 2008-05-05).

⁷ Fuller “Employers Snoop on Facebook” 2006 <http://daily.stanford.edu/article/2006/1/20/employersSnoopOnFacebook> (accessed 2008-05-05); and Barnes “A Privacy Paradox: Social Networking in the United States” http://www.firstmonday.org/issues/issue11_9/barnes/index.html (accessed 2008-05-05).

⁸ Post and Johnson “Chaos Prevailing on Every Continent: Towards a new Theory of Decentralized Decision-making in Complex Systems” 1998 73 *Chicago-Kent LR* 1055 1057-1058.

⁹ Barnes in fn 7 above, where she acknowledges that the private versus public boundaries of social media spaces are unclear and that an illusion of privacy creates boundary problems on the internet. See also Abril 2007 *Harvard Journal of Law and Technology* 5-6.

¹⁰ Abril 2007 *Harvard Journal of Law and Technology* 3-4.

¹¹ <http://www.facebook.com> (accessed 2008-04-04).

¹² <http://www.myspace.com> (accessed 2008-04-04).

¹³ <http://www.bebo.com> (accessed 2008-04-04).

¹⁴ Beniger 436, describes how mass media has gradually replaced interpersonal communication as a socializing force.

Facebook,¹⁷ are worldwide among the most visited websites on the internet¹⁸ and it is estimated that these sites have over 100 million users and that they are still experiencing a phenomenal growth rate.¹⁹

Online social networking usually refers to websites whose main purpose is to act as a link between users through the use of computer software to build online social networks. They provide various ways for users to communicate with one another, by using visible profiles and a display of an articulated list of friends who are also users of the system.²⁰ Anyone with a valid e-mail address can create a profile on an online social networking site.

The type of information typically contained in a profile includes the user's photo along with the user's name, country, gender, sexual orientation, marital status and date of birth. The profile often also includes a list of friends (with their respective photos), a list of groups to which the user is affiliated,²¹ blogs,²² news bulletins, interests, personal photos, favourite music and video clips, in fact, as Abril states, these profiles constitute an online social networking website user's detailed digital identity in cyberspace.²³

The end result is an online combination of a billboard and a scrapbook, a résumé and a diary, a glossy magazine and a family photo album.²⁴

Online social networking sites create connectivity by finding people (discovering, rediscovering, or locating them), building directories, network maps and social networks. After joining an online social networking site, users are prompted to identify others in the system or to invite others to join

¹⁵ <http://www.myspace.com> (accessed 2008-04-04).

¹⁶ <http://www.bebo.com> (accessed 2008-04-04).

¹⁷ <http://www.facebook.com> (accessed 2008-04-04).

¹⁸ <http://www.hitwise.com.au/press-center/hitwiseHS2004/facebook-most-visited-social-net-work-australia.php>; cf <http://www.prnewswire.co.uk/cgi/news/release?id=205171>; and cf <http://www.bebo.com/Press.jsp?PressPagelD=4597991093> (accessed 2008-08-01).

¹⁹ <http://www.facebook.com/press/info.php?statistics>. Some estimate the growth to be at a rate of approximately 250 000 new accounts opened everyday, and Abril "A (My)Space of One's Own: On Privacy and Online Social Networks" 2007 *Northwestern Journal of Technology and Intellectual Property* 73 <http://www.law.northwestern.edu/journals/njtip/v6/n1/4> (accessed on 2008-05-18), notes that if MySpace were a country with 100 million citizens it would be the 12th most populous country in the world.

²⁰ These systems have sometimes also been referred to as computer-mediated communication or CMC. Other possible variations of these systems include dating websites, party-planning websites, personal blog websites or video-sharing websites such as <http://www.youtube.com>. Boyd and Ellison "Social Network Sites: Definition, History and Scholarship" 2007 13(1) *Journal of Computer-Mediated Communication* Article 11 <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html> (accessed 2008-05-18).

²¹ An online group is similar to any other social group, except that the members never have to actually meet to communicate. Groups are created by online social networking site users who share similar points of view or interests. On Facebook for e.g. you will typically find groups such as "Save the Gorillas" or "University of Pretoria Law Graduates 2005" etc.

²² Weblogs or blogs are a type of interactive online journal, diary or journalistic commentary which have become commonplace on the Internet. They are a *fora* for expressing, representing and communicating ideas, music culture. Fitzgerald, Middleton, Lim and Beale *Internet and E-Commerce Law: Technology, Law and Policy* (2007) 279.

²³ Abril 2007 *Harvard Journal of Law and Technology* 14.

²⁴ Abril 2007 *Harvard Journal of Law and Technology* 15.

the system and their friend network.²⁵ Online social networking sites thrive on a sense of community and are therefore designed to reflect human interaction so as to suggest intimacy in a cyber-world, so friends can “wink”, “kiss”, “hug”, or “send coffee”.²⁶ The friends’ lists contain links to each friend’s profile, and viewers navigate the network by navigating through the “friends” lists. On most sites the list of friends is visible to anyone who is permitted to view the profile, although there are exceptions.²⁷

A common restriction is to set a profile as visible to friends of the user. However, this in itself does not restrict the information posted to the list of friends on one particular user’s profile as it may still be visible to the entire interlinked chain of the user’s friends.

If the option for the user to select a privacy setting, where only the user’s friends have access to the information, is not selected, a profile is public, and the user’s first name, picture and profile information will accompany all of the user’s activities within the website. Any information posted on a public profile is searchable by anyone regardless of membership.²⁸

Most literature about privacy on the internet concentrates on the collection of personally identifiable data such as a person’s address, spending habits and financial information.²⁹ Against the backdrop of South African jurisprudence, this article, however, concentrates on truthful, shameful, embarrassing or otherwise harmful disclosures of personal information, that are posted onto online social networking websites. These could include a user’s intimate thoughts, multimedia not intended for a public audience and other explicit information that would in the words of our Constitutional Court

²⁵ Boyd and Ellison 2007 13(1) *Journal of Computer-Mediated Communication* Article 11 <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html> (accessed 2008-05-18).

²⁶ Abril 2007 *Harvard Journal of Law and Technology* 15.

²⁷ Boyd and Ellison 2007 13(1) *Journal of Computer-Mediated Communication* Article 11 <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html> (accessed 2008-05-18).

²⁸ Abril 2007 *Harvard Journal of Law and Technology* 14. For eg Bebo’s privacy policy states that profile information on the Bebo Service will only be shared with people you have specifically agreed to share such information with and to other members of groups you choose to belong to. You can choose to make your profile visible to non-members of Bebo by editing your profile and opting in to an accessible profile. For users under the age of 18, the default setting for profiles is private <http://www.bebo.com/Privacy2.jsp>. To compare see also <http://www.facebook.com/policy.php> (accessed 2008-09-09).

²⁹ Benoliel “Law, Geography and Cyberspace: The Case of On-line Territorial Privacy” 2005 23 *Cardozo Arts and Entertainments Law Journal* 125 <http://www.cfp2004.org/spapers/benoliel-caseOfTerritorialPrivacy.pdf> (accessed 2008-06-21); cf Roos *The Law of Data (Privacy) Protection: A Comparative and Theoretical Study* (2003) (LLD thesis UNISA); Roos “Data Protection Provisions in the Open Democracy Bill 1997” 1998 61 *THRHR* 499; SALRC (2005) Discussion paper 109; Rautenbach “The Conduct and Interests Protected by the Right to Privacy in Section 14 of the Constitution” 2001 *TSAR* 115; Ebersöhn “Internet Law: Cookies, Traffic Data, and Direct Advertising Practices” 2004 *SAMLJ* 741; Geldenhuys “Die Regsbeskerming van Privaatregtelike Belange ten Aansien van Inligting” 1997 *THRHR* 254; and Roos “Data Protection: Explaining the International Backdrop and Evaluating the Current South African Position” 2007 *SALJ* 400.

lie closer to the “intimate core of privacy”,³⁰ but for the fact that they appear on the internet.³¹

3 THE ELUSIVE AND AMORPHOUS RIGHT TO PRIVACY

In South African law the right to privacy is protected in terms of both our common law³² and the Constitution.³³

3.1 Privacy

Privacy is a personality interest and in turn a personality interest is a non-patrimonial interest that cannot exist separately from the individual.³⁴

Under the South African common law a person can rely on the law of delict for the protection of his or her right to privacy. A delict is the wrongful, culpable conduct of a person causing harm to another.³⁵

The Constitution guarantees a general right to privacy, with specific protection against searches and seizures, and the privacy of communications.³⁶

The identification of a suitable definition for privacy has always been the topic of much debate and scholarly literature; however, it is important to define the concept, since a definition assists in articulating, developing and applying legal protection.³⁷

Neethling’s widely accepted definition informs us that privacy is “an individual condition of life characterised by exclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has determined himself to be excluded from the knowledge of outsiders and in respect of which he has the will that they be kept private.”³⁸

³⁰ *Bernstein v Bester* 1996 2 SA 751 (CC) 788-789.

³¹ Croswell “Can a Reasonable Expectation of Privacy Exist in Cyberspace?” 2008 *Illinois Business LJ* 1 http://iblsjournal.typepad.com/illinois_business_law_soc/2008/03/can_a_reasonabl.html (accessed 2008-08-10).

³² The *locus classicus* for the recognition of an independent right to privacy in South African law is *O’Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 (C).

³³ S 14 of The Constitution of the Republic of South Africa Act, 1996 (hereinafter “the Constitution”).

³⁴ Neethling *et al* (2005) 14; and Roos (2003) (LLD thesis UNISA) 545.

³⁵ *Ibid.*

³⁶ Roos (2003) (LLD thesis UNISA) 563-564. S 14 of the Constitution, provides that everyone has the right to privacy, which includes the right not to have – (a) their person or home searched; (b) their property searched; (c) their possessions seized; (d) the privacy of their communications infringed. This list is, however, not exhaustive and may be extended to other methods of obtaining information or to making unauthorised disclosures.

³⁷ Neethling “The Concept of Privacy in South African Law” 2005 *SALJ* 18; and *Bernstein v Bester supra* 787.

³⁸ Neethling (1976) (LLD Thesis UNISA) 287, *cf* Neethling *et al* (2005) 32. Accepted in among others *National Media v Jooste supra*; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T); *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 2 SA 451 (A); and referred to in *Bernstein v Bester supra*.

3 2 Infringement of the right to privacy

According to the South African Law Reform Commission the courts seem to be developing the common law by instilling into it the spirit of the Constitution. Therefore any action in this sphere of the law is a hybrid action based on a mixture of the common law and constitutional directives.³⁹

However, it has been pointed out that caution must be exercised when attempting to assign common law principles to the interpretation and/or limitation of constitutional rights. A distinction is drawn between the two-stage constitutional enquiry into whether or not a right has been infringed and if such an infringement is justified, and a single enquiry under the common law, where it has to be determined whether or not an unlawful infringement of a right has taken place.⁴⁰

In order to establish common law liability for an infringement of a personality interest such as the right to privacy the plaintiff would have to establish that (i) there is an impairment of privacy (either intrusion or disclosure); (ii) wrongfulness and (iii) intention (*animus iniuriandi*).⁴¹

In the South African Constitutional Court in the matter of *Bernstein v Bester*,⁴² it was held that while “[I]t must of course be remembered that the American constitutional interpretative approach poses only a single inquiry, and does not follow the two-stage approach of Canada and South Africa”, it nevertheless seems to be a sensible approach to say that the scope of a person’s privacy extends *a fortiori* only to those aspects in regard to which a legitimate expectation of privacy can be harboured.”⁴³

The South African Constitutional Court has followed an approach that is consistent with that of the US Supreme Court in *Katz v United States*,⁴⁴ where the court described the test adopted as follows.⁴⁵

“[F]irst that a person has exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable’. Thus a man’s home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the ‘plain view’ of outsiders are not ‘protected’ because no

³⁹ SALRC (2005) Discussion Paper 109 Chapter 2 17; and generally Neethling *et al* (2005) 73-79.

⁴⁰ *Bernstein v Bester supra* 790. Neethling *et al* (2005) 32; and SALRC (2005) Discussion Paper 109 Chapter 2 6.

⁴¹ Neethling *et al* (2005) 33 and 221, where it is stated that “it is obvious that privacy can be infringed only by acquaintance with personal facts by outsiders contrary to the determination and will of the person concerned. Such acquaintance can occur in two ways. Firstly by *intrusion* into the private sphere, that is, where an outsider himself becomes acquainted with private personal facts ... Secondly, by *disclosure* or revelation of private facts, that is, where an outsider acquaints third parties with the individual or his personal affairs which, although known to the outsider, remain private.”

⁴² *Bernstein v Bester supra* 792.

⁴³ *Ibid.*

⁴⁴ *Katz v United States* 389 US 347 (1967) 361; and *Abel v United States* 362 US 217 (1960) 241.

⁴⁵ Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2000) 185.

intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard for the expectation of privacy under the circumstances would be unreasonable.”⁴⁶

Therefore, to establish an infringement of the constitutional right to privacy, South African law applies a two-part test that requires a person to have a subjective expectation of privacy that society has recognised as objectively reasonable.⁴⁷ This is similar to the common law understanding of a wrongful infringement of the right to privacy, that is, a person subjectively determines the extent of his or her right to privacy, and that the *boni mores* considers this determination to be reasonable.⁴⁸

According to Currie and De Waal, the subjective expectation of privacy is more than whatever feels private while objectively this has to be reasonable within the context to qualify for protection.⁴⁹ The subjective component of this test determines that a person cannot complain about an invasion of privacy if he or she has explicitly or implicitly consented to it.⁵⁰ The objective component is more difficult to establish and requires one to establish the *boni mores* or reasonable legal views of the community at large.⁵¹

3 3 Grounds of justification

A ground of justification or a defence may exclude wrongfulness or fault on the part of the transgressor.⁵² The traditional grounds of justification are consent, private defence, necessity, impossibility, provocation, statutory or official authority and the power to discipline.⁵³

The common law ground of justification most relevant to this discussion is that of consent.⁵⁴ Consent may be given expressly or tacitly and when validly granted there can be no question of wrongfulness.⁵⁵ The harm experienced will be justified and therefore lawful provided the person giving consent is

⁴⁶ *Katz v United States* supra 361.

⁴⁷ *Bernstein v Bester* supra par 75.

⁴⁸ Neethling *et al* (2005) 221; and Roos (2003) (LLD thesis UNISA) 574 and 577-578. Under the common law whether or not a factual infringement of a personality interest should be considered wrongful, is determined by the *boni mores* or legal convictions of the community. It is an objective test based on the criterion of reasonableness. Subjective factors such as honesty, motive or knowledge are not relevant in determining wrongfulness. The criterion of reasonableness is also used to determine wrongfulness of an infringement of the constitutional right to privacy.

⁴⁹ Currie, De Waal and Erasmus *The Bill of Rights Handbook* 5ed (2005) 318-319. Cf Cheadle *et al* 183-189.

⁵⁰ Roos (2003) (LLD thesis UNISA) 556 where she states that “[T]he individual himself or herself determines which information is private, coupled with the will or desire to keep the particular facts private. If the will to keep facts private (*privaathoudingswil*) is lacking, the individual’s interest in privacy is also lacking. Cf Neethling *et al* (2005) 31 in fn 332 and 334.

⁵¹ Currie *et al* 318-319; and Cheadle *et al* 183-189.

⁵² Neethling *et al* (2005) 240 and 253; and SALRC (2005) Discussion Paper 109 Chapter 2 28.

⁵³ Roos (2003) (LLD thesis UNISA) 574 and 589. Grounds of justification are an expression of the *boni mores*.

⁵⁴ The reason for this is that this article concentrates on truthful disclosures made by an online social network user on his or her own profile.

⁵⁵ Neethling *et al* (2005) 250-251; and SALRC (2005) Discussion Paper 109 Chapter 2 28-29.

legally capable of expressing his or her will freely and lawfully and that he or she has consented to the specific conduct.

In terms of the Constitution, if it is established that a legal subject's right to privacy has been infringed, the defendants' conduct may not be wrongful if they can show that the invasion of privacy was reasonable and justifiable.⁵⁶

3 4 A legitimate expectation of privacy

Critics of the American tort system argue that the US courts rely on factors such as physical space, secrecy, seclusion and subject matter to determine whether or not there is a legitimate expectation of privacy, and that reliance on these factors is an Achilles heel for privacy breaches on the internet.⁵⁷

A similar trend can be found in South African law where this link between space, secrecy, seclusion, subject matter and privacy is clearly demonstrated in various decisions of our Constitutional Court.

In *Bernstein v Bester*,⁵⁸ the court held that "[P]rivacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly." In *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security*,⁵⁹ it was held that, "[W]hat erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine." In *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In Re: Hyundai Motor Distributors (Pty) Ltd v Smit NO*,⁶⁰ Langa DP held that "[T]hus, when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the State unless certain conditions are satisfied."

These decisions clearly place the right to privacy as lying along a continuum in which the more a person interacts with the world, the more the right to privacy becomes diluted.⁶¹

It would therefore seem, in light of the discussion above, that on the subjective component of the test for a legitimate expectation of privacy, or

⁵⁶ S 36 of the Constitution states that the rights of the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account relevant factors, including – (a) the nature of the right; (b) the importance and purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

⁵⁷ Croswell 2008 *Illinois Business LJ* http://iblsjournal.typepad.com/illinois_business_law_soc/2008/03/can_a_reasonabl.html (accessed 2008-08-10); and Abril 2007 *Harvard Journal of Law and Technology* 7.

⁵⁸ *Bernstein v Bester* *supra* 789; and Neethling (2005) *SALJ* 18-20.

⁵⁹ *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 3 SA 617 (CC) 656.

⁶⁰ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In Re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 1 SA 545 (CC) 557.

⁶¹ Cheadle *et al* 184.

the common law interpretation of wrongfulness, most parties would agree that by posting truthful private facts onto an online social networking site, where the information is available to an indefinite number of people, that the online social networking website user has no will, wish or desire for the facts to be kept private and that where there is no will to keep a fact private there is no interest that can be protected, or that the user, has consented to the harm which is then justified and lawful.⁶² Furthermore, if one applies the decisions of the Constitutional Court to truthful disclosures on an online social networking site, the information posted there would not guarantee a legitimate expectation of privacy for the user. This is because the space would be considered a public space, that is not particularly secret or secluded and the subject matter is not always inherently private.

Therefore anyone wanting any protection of privacy would have to disconnect from the internet, pull down the shades and isolate themselves from the world.⁶³ One might have to concede, though, that this type of suggestion is not a practical solution; some even suggest it is tantamount to cyber-suicide.⁶⁴

However, as Neethling explains, in order to define privacy, it is necessary to understand that every personality interest has a pre-legal existence in factual reality, and if those legal principles are based on an inaccurate understanding of factual reality it may lead to uncertainty, ambiguity and that it may produce unfair results in law.⁶⁵

Central to the questions posed earlier, as well as to the resolution of the issues surrounding social networking sites, is a determination of whether an online social networking site is a public space equal to a social gathering or billboard or if it can be viewed as a more private arena which our law could treat more like a telephone call or an email. Similarly, to take note that the objective component of the test for legitimate expectation, that is, the *boni mores* surrounding internet usage is taking on a slightly different hue, that may force us to re-evaluate how our established jurisprudence is applied.⁶⁶

4 PRIVATE OR PUBLIC SPACES?

In her analysis of the public disclosure tort in the US legal system, Abril asserts that “[t]raditionally, privacy has been inextricably linked to physical space. In turn, space often defines our notions of personhood and identity. Consider, for example, the social stature ascribed to sitting in a corner office. Spatial concepts are interrelated with cultural norms prescribing social

⁶² Neethling *et al* (2005) 31 fn 332, where he states that “absent a will to keep a fact private, absent an interest (or a right) that can be protected” accepted in *National Media v Jooste supra*.

⁶³ Abril 2007 *Harvard Journal of Law and Technology* 27.

⁶⁴ Mcanearney “Facing the Facts” 2007 *Without Prejudice* 26 27-28 who concludes that “[F]eeling bombarded by all the threats to privacy that we open ourselves up to on Facebook ... that ultimately I was left with no choice but to deregister my Facebook profile and say goodbye to Facebook forever. Anyone else up for cyber suicide?”

⁶⁵ Neethling 2005 *SALJ* 18-19.

⁶⁶ Abril 2007 *Harvard Journal of Law and Technology* 19-20. Cf discussion 4 1 2 below.

organization and human behavior, interaction and expectations.” She goes on to argue that an examination into proxemics (the study of personal space) reveals a circular relationship between humans and space, and that human expectations often define space as much as physical space defines human expectations.⁶⁷

It has been said that cyberspace has a unique structure and that it is made up firstly of the “internet’s ‘public roads’ or backbone transit infrastructure” which is regulated according to telecommunications law,⁶⁸ and secondly of “a mosaic of private allotments-namely, neighboring proprietary web sites”.⁶⁹

Benoliel argues that this territorial facet of privacy has not been adequately applied to privacy in cyberspace because cyberspace is not considered to be a physical space. Instead, he argues firstly that there has been an over-emphasis on information or database privacy and secondly that private and public localities could coexist on the internet just as they do in the physical world.⁷⁰ He suggests that the courts could be “required to differentiate and identify public locales and then fence them out from private ones”. This, he proposes, could be achieved through the creation of legal fictions for online locales.⁷¹

Undeniably online social networking sites could be identified as a locale where private acts occur, where personal information is recorded and therefore one would have to agree with Abril’s argument that the customs and usages of this space, and not the objective facts of space, could define the territory in which one could legally claim a right to privacy.⁷² To distinguish between private and public spaces on the internet the emphasis should be on whether or not the online social networking profile is password protected and labeled private, where custom and usage could indicate that a person demonstrates a will to keep the information private,⁷³ and that the mere visibility of a cyber-identity should not automatically imply consent to an invasion of privacy.⁷⁴

⁶⁷ Abril 2007 *Harvard Journal of Law and Technology* 3-4.

⁶⁸ Such as The Electronic Communications and Transactions Act 25 of 2002, The Regulation of Interception of Communications and provision of Communication-related Information Act 70 of 2002 and Independent Communications Authority of South Africa Act (ICASA) 13 of 2002.

⁶⁹ Benoliel 2005 23 *Cardozo Arts and Entertainments Law Journal* 3 <http://www.cfp2004.org/spapers/benoliel-caseOfTerritorialPrivacy.pdf> (accessed 2008-06-21).

⁷⁰ Benoliel 2005 23 *Cardozo Arts and Entertainments Law Journal* 6, 9 and 16 <http://www.cfp2004.org/spapers/benoliel-caseOfTerritorialPrivacy.pdf> (accessed 2008-06-21), where he argues that the reliance on information or database privacy results in serious limitations.

⁷¹ Benoliel 2005 23 *Cardozo Arts and Entertainments Law Journal* 16 <http://www.cfp2004.org/spapers/benoliel-caseOfTerritorialPrivacy.pdf> (accessed 2008-06-21). He states that for the legal fiction to be effective a comprehensive boundary framework for cyberspace has to be agreed on.

⁷² Abril 2007 *Harvard Journal of Law and Technology* 34.

⁷³ Abril 2007 *Harvard Journal of Law and Technology* 35.

⁷⁴ Abril 2007 *Harvard Journal of Law and Technology* 34.

5 RE-EVALUATING THE CYBERSPACE *BONI MORES*

The *boni mores* and our own privacy expectations are constantly challenged and as technology advances, social norms and privacy infringements, as well as the public's tolerance of these infringements change.⁷⁵

Celebrity sex tapes are a good case in point. A personal sex tape would generally be considered an inherently private matter, but internet releases of such recordings (deliberately, maliciously or negligently) have been used to increase the infamy of several celebrities. Within the ethos of a cyber-age it would appear that there is a subtle shift in privacy standards that challenges the perception that certain subjects are inherently public or private.⁷⁶

Could this be, because, privacy expectations in cyberspace are significantly generation-specific?⁷⁷

5.1 Immigrants v Natives

Palfrey⁷⁸ makes a distinction between internet users who grew up with the internet and those who did not. The latter group termed "digital immigrants" view the internet as a tool for the mass distribution of information, while the former group, termed "digital natives", perceives the internet as an essential part of interpersonal relationships and their identity.⁷⁹

This is easier to understand if this new type of communication behaviour is seen within a larger context of teenagers and young adults exploring their identities, experimenting with behavioural norms, dating and building friendships.⁸⁰

Studies have shown that digital natives have complex privacy expectations when it comes to online social networking sites. Their expectations rely on a combination of technology and obscurity in the masses,⁸¹ and it is said that their concept of privacy is based on a "perceived entitlement of selective anonymity".⁸²

⁷⁵ April 2007 *Harvard Journal of Law and Technology* 11. Warren and Brandeis, the fathers of the privacy tort in the USA, found their inspiration in the "numerous mechanical devices" that threatened the "bounds of propriety and of decency".

⁷⁶ April 2007 *Harvard Journal of Law and Technology* 23.

⁷⁷ April 2007 6 *Northwestern Journal of Technology and Intellectual Property* 73 <http://www.law.northwestern.edu/journals/njtip/v6/n1/4> (accessed on 2008-05-18).

⁷⁸ Palfrey "HBR Case Commentary: We Googled You" 2007 *Harvard Business Review* 5.

⁷⁹ Gibbard "Social Sites Can Aid Parents: Kids May Vent Issues Online" 14 March 2007 *Chicago Tribune*. Boyd "Social Network Sites: Public, Private, or What?" 2007 *Knowledge Tree* http://kt.flexiblelearning.net.au/tkt2007/?page_id=28 (accessed 2008-05-15).

⁸⁰ April 2007 6 *Northwestern Journal of Technology and Intellectual Property* 73 <http://www.law.northwestern.edu/journals/njtip/v6/n1/4> (accessed on 2008-05-18).

⁸¹ Boyd 2007 *Knowledge Tree* http://kt.flexiblelearning.net.au/tkt2007/?page_id=28 (accessed 2008-05-15).

⁸² April 2007 6 *Northwestern Journal of Technology and Intellectual Property* 73 <http://www.law.northwestern.edu/journals/njtip/v6/n1/4> (accessed on 2008-05-18); and Slatalla "Cyberfamilias: 'OMG my Mom Joined Facebook'" 7 June 2007 *NY Times*

Digital immigrants on the other hand believe that privacy on an online social networking site is impossible. These internet users would argue that if it is privacy that one wants then don't open a social networking website profile. This attitude, however, is rooted in an idea that privacy is control over personal information and the mistaken belief that control over personal information is still possible in a digital era. They are also the main proponents of the assertion that if one has exposed oneself to the public eye one cannot claim a reasonable expectation of privacy.⁸³

Abril argues that this is an ill-fitting and impossible conception of privacy that places the burden of privacy protection on the individual, who is ultimately without recourse.⁸⁴ It fails to acknowledge that technology is designed to meet the information requirements of governments and business and it has effectively deprived individuals of the power to control their personal information. Technology easily facilitates the collection of detailed personal data, and it has enabled collectors to share data between themselves for a wide range of purposes. Moreover, information technologies that have enabled the collection, sharing and distribution of personal information, regularly do so, without the knowledge or consent of online users, despite a wide range of data protection legislation.⁸⁵

5.2 Billboards or telephone calls

In 1890 in a *Harvard Law Review* article, Brandeis and Warren published an article that led to the recognition of a right to privacy in the USA.⁸⁶ Justice Brandeis is also famous for later rejecting the majority reasoning in *Olmstead v United States*.⁸⁷ The majority held that in order to protect privacy, it was necessary for there to be a search and seizure of a person or a seizure of papers or of tangible material effects or an actual physical invasion of a house. Brandeis argued instead, that telephone technology had changed the way that private life was conducted and the way that society conceptualised privacy. He was of the opinion that the protection of privacy should not be limited to the tangible material aspects or to the constraints of a physical space.⁸⁸

<http://www.nytimes.com/2007/06/07/fashion/07Cyber.html> (accessed 2008-05-05). In this article it is noted that teenagers are horrified at the thought of a parent joining a social networking site and viewing their profiles.

⁸³ Abril 2007 6 *Northwestern Journal of Technology and Intellectual Property* 73 <http://www.law.northwestern.edu/journals/njtip/v6/n1/4> (accessed on 2008-05-18).

⁸⁴ *Ibid.*

⁸⁵ Centre for Democracy and Technology, CDTs Privacy Guide <http://www.cdt.org/privacy/guide/protect> (accessed 2008-05-15). They also state here that most privacy protection online (if it exists at all) takes the form of a lengthy privacy policy. Although these notices purport to protect sensitive private data, many of them contain fine-print provisions that explain how information is, in fact, disclosed and used for other purposes.

⁸⁶ Brandeis and Warren "The Right to Privacy" (1890) 4 *Harvard LR* 193.

⁸⁷ *Olmstead v United States* 277 U.S. 438 (1928).

⁸⁸ *Olmstead v United States* *supra* 479. Where he held that "[T]o protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as

It would seem 80 years later that the US courts are beginning to apply the same sort of logic to the subject of computers and the internet, to the recognition of the digital native's perception that the internet is an essential part of interpersonal relationships and a person's identity and a changing *boni mores*.

In the matter of *The State of New Jersey v Shirley Reid*,⁸⁹ the Supreme Court of New Jersey unanimously held that during the past twenty five years, there had been an expansion in privacy rights. They proceeded to find that when internet users use the internet from the privacy of their homes, they have reason to expect that their actions are confidential. The Supreme Court came to this decision by drawing a parallel between the internet and a telephone, both of which, they found, had in their respective eras become essential instruments in the carrying out of personal affairs and for this reason they deserved protection through the expansion of privacy jurisprudence.

While this matter did not deal with information posted on an online social networking site specifically, it does establish a basis for recognising that a person has a legitimate expectation of privacy in cyberspace and that this medium of communication may be more akin to a telephone than has previously been acknowledged.

6 CONCLUSION

"The much quoted 'right to be left alone' should be seen not simply as a negative right to occupy a private space free from government intrusion, but as a right to get on with your life, express your personality and make fundamental decisions about your intimate relationships without penalisation."⁹⁰ The question remains however, how can we give effect to the words of our constitutional court and ensure that privacy exists where traditional jurisprudence dictates that there is no physical space and no inherently private subject matter, secrecy or seclusion?

South African law readily protects the privacy of telephone calls or emails sent between parties communicating with each other, and it found a way to apply traditional privacy jurisprudence to these modes of communication. Therefore, just as telephone technology challenged the notions of privacy in the USA in 1928, online social networking websites and the internet are challenging our notions of privacy now.

To rise to this challenge, South African jurisprudence will have to firstly, determine whether or not there is room for the recognition of the internet as an integral part of interpersonal relationships, in the same way that foreign

evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth." *Cf* Abril 2007 *Harvard Journal of Law and Technology* 46.

⁸⁹ *State of New Jersey v Shirley Reid*, No. A-105-06, N.J. Sup, http://epic.org/privacy/nj_reid/reid_superior_ct.pdf (accessed 2008-10-02).

⁹⁰ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) par 116.

jurisprudence has.⁹¹ Once the law has recognised the internet as integral to modern society's interpersonal relationships, along with the possibility that the *boni mores* is taking on a different hue, the second determination will have to be: When exactly does an internet user have a legitimate expectation of privacy in cyberspace? To assist in this determination it will be useful to take note of the theories surrounding public and private spaces on the internet, and the fact that it is possible to demonstrate a will, to keep the information private such as when a profile is set as private.

⁹¹ *State of New Jersey v Shirley Reid*, No. A-105-06, N.J. Sup, http://epic.org/privacy/nj_reid/reid_superior_ct.pdf (accessed 2008-10-02).