#### ASPEN PUBLISHERS

# PRIVACY AND THE MEDIA

#### **SECOND EDITION**

#### **Daniel J. Solove**

John Marshall Harlan Research Professor of Law George Washington University Law School

#### Paul M. Schwartz

Jefferson E. Peyser Professor of Law
U.C. Berkeley School of Law
Faculty Director, Berkeley Center for Law & Technology



Copyright © 2015 CCH Incorporated.

Published by Wolters Kluwer in New York.

Wolters Kluwer serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.wolterskluwerlb.com)

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at www.wolterskluwerlb.com, or a written request may be faxed to our permissions department at 212-771-0803.

To contact Customer Care, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer Attn: Order Department PO Box 990 Frederick, MD 21705

Printed in the United States of America.

 $1\; 2\; 3\; 4\; 5\; 6\; 7\; 8\; 9\; 0$ 

ISBN 978-0-7355-1043-2

## **SUMMARY OF CONTENTS**

Contents	xi
Preface	xv
Acknowledgments	xvii
<ul> <li>INTRODUCTION</li> <li>A. Information Privacy, Technology, and the Law</li> <li>B. Information Privacy Law: Origins and Types</li> </ul>	1 1 10
<ul> <li>PERSPECTIVES ON PRIVACY</li> <li>A. The Philosophical Discourse about Privacy</li> <li>B. The Definition and the Value of Privacy</li> <li>C. Critics of Privacy</li> <li>D. The Feminist Perspective on Privacy</li> </ul>	43 43 45 65 72
3 PRIVACY AND THE MEDIA A. Information Gathering B. Disclosure of Truthful Information C. Dissemination of False or Misleading Information D. Appropriation of Name or Likeness E. Privacy Protections for Anonymity and Receipt of Ideas	81 83 108 178 213 235
Index	257

# **CONTENTS**

Pre	eface	xv
Aci	knowledgments	xvii
1	INTRODUCTION	1
	A. INFORMATION PRIVACY, TECHNOLOGY, AND THE LAW	1
	• Sidis v. F-R Publishing Corp.	3
	B. INFORMATION PRIVACY LAW: ORIGINS AND TYPES	10
	1. Common Law	11
	(a) The Warren and Brandeis Article	11
	• Samuel D. Warren and Louis D. Brandeis, The Right to Privacy	13
	(b) The Recognition of Warren and Brandeis's Privacy Torts	26
	• William Prosser, <i>Privacy</i>	28
	• Lake v. Wal-Mart Stores, Inc.	30
	(c) Privacy Protection in Tort Law	33
	(d) Privacy Protection in Evidence Law	34
	(e) Privacy Protection via Property Rights	34
	(f) Privacy Protection in Contract Law	34
	(g) Privacy Protection in Criminal Law	34
	2. Constitutional Law	35
	3. Statutory Law	37
	4. International Law	40
2	PERSPECTIVES ON PRIVACY	43
	A. THE PHILOSOPHICAL DISCOURSE ABOUT PRIVACY	43
	1. The Concept of Privacy and the Right to Privacy	43
	2. The Public and Private Spheres	44

	B. THE DEFINITION AND THE VALUE OF PRIVACY	45
	• Alan Westin, Privacy and Freedom	46
	• Julie E. Cohen, Examined Lives: Informational Privacy and the	
	Subject as Object	51
	• Daniel J. Solove, <i>Conceptualizing Privacy</i>	54
	• Anita L. Allen, <i>Coercing Privacy</i>	58
	Paul M. Schwartz, <i>Privacy and Democracy in Cyberspace</i> Company of the Company of the Cyberspace	60
	• Spiros Simitis, Reviewing Privacy in an Information Society	62
	C. CRITICS OF PRIVACY	65
	• Richard A. Posner, <i>The Right of Privacy</i>	65
	• Fred H. Cate, Principles of Internet Privacy	70
	D. THE FEMINIST PERSPECTIVE ON PRIVACY	72
	• State v. Rhodes	72
	• Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy	75
	• Catharine A. MacKinnon, Toward a Feminist Theory of the State	77
	• Anita L. Allen, Uneasy Access: Privacy for Women in a Free Society	78
J	PRIVACY AND THE MEDIA	81
	A. INFORMATION GATHERING	83
	1. Intrusion upon Seclusion	83
	• Restatement (Second) of Torts § 652B: Intrusion upon Seclusion	83
	<ul><li>Nader v. General Motors Corp.</li><li>Dietemann v. Time, Inc.</li></ul>	84 89
	<ul> <li>Described v. American Broadcasting Co., Inc.</li> </ul>	91
	Shulman v. Group W Productions, Inc.	96
	2. Paparazzi	100
	• Galella v. Onassis	101
	California Anti-Paparazzi Act	103
	3. Video Voyeurism	106
	<ul> <li>Video Voyeurism Prevention Act</li> </ul>	107
	B. DISCLOSURE OF TRUTHFUL INFORMATION	108
	1. Public Disclosure of Private Facts	109
	(a) Introduction	109
	<ul> <li>Restatement (Second) of Torts § 652D: Publicity Given to Private Life</li> </ul>	109
	(b) Private Matters	111
	• Gill v. Hearst Publishing Co.	111
	2	_

## CONTENTS | xiii

	<ul> <li>Daily Times Democrat v. Graham</li> </ul>	116
	(c) The Newsworthiness Test	123
	• Sipple v. Chronicle Publishing Co.	123
	• Shulman v. Group W Productions, Inc.	133
	Bonome v. Kaysen	136
	2. First Amendment Limitations	143
	<ul> <li>Cox Broadcasting Corp. v. Cohn</li> </ul>	145
	• The Florida Star v. B.J.F.	153
	<ul> <li>Bartnicki v. Vopper</li> </ul>	167
C.	DISSEMINATION OF FALSE OR MISLEADING	
	INFORMATION	178
	1. Defamation	178
	(a) Introduction	178
	(b) Defamation and the Internet	180
	• Zeran v. America Online, Inc.	181
	(c) First Amendment Limitations	188
	<ul> <li>New York Times Co. v. Sullivan</li> </ul>	188
	• Gertz v. Robert Welch, Inc.	192
	2. False Light	199
	(a) Introduction	199
	• Restatement (Second) of Torts § 652E: Publicity Placing	400
	Person in False Light (b) First Amendment Limitations	199 202
	• Time, Inc. v. Hill	202
	3. Infliction of Emotional Distress	204
	Hustler Magazine v. Falwell	205
	• Snyder v. Phelps	208
ъ	APPROPRIATION OF NAME OR LIKENESS	213
υ.		_
	1. Introduction	213
	<ul> <li>Restatement (Second) of Torts § 652C: Appropriation of Name or Likeness</li> </ul>	213
	2. Name or Likeness	216
	• Carson v. Here's Johnny Portable Toilets, Inc.	216
	3. For One's Own Use or Benefit	223
	• Raymen v. United Senior Association, Inc.	224
	4. Connection to Matters of Public Interest	227
	• Finger v. Omni Publications International, Ltd.	229
	5. First Amendment Limitations	233
	<ul> <li>Zacchini v. Scripps-Howard Broadcasting Co.</li> </ul>	233
Ε.	PRIVACY PROTECTIONS FOR ANONYMITY AND	
	RECEIPT OF IDEAS	235

## xiv | CONTENTS

1. Anonymity	236
(a) Anonymous Speech	236
• Talley v. State of California	236
<ul> <li>McIntyre v. Ohio Elections Commission</li> </ul>	237
• Doe v. Cahill	242
(b) Reporter's Privilege	248
2. Privacy of Reading and Intellectual Exploration	250
• Stanley v. Georgia	250
Index	256