

The emergence of tort liability for online privacy violations in China

Scott Livingston and Graham Greenleaf*

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Between 2009 and 2014, China's legislative organs promulgated a series of fundamental data privacy laws and regulations governing, inter alia, the collection, processing and transfer of "citizen's personal information" by companies and individuals. These laws cut across a number of sectors and demonstrated Chinese authorities' growing attention to privacy and data security as China's internet population grew to be the world's largest. In the latter half of 2014 and through 2015, China has begun to provide further uniformity with legislative amendments and interpretations that appear to be standardizing China's data privacy requirements across the civil, administrative, and criminal spheres.¹

Notable amongst these developments, and the focus herein, is an increased attention to providing individuals a civil recourse in instances where their personal privacy has been violated by online activities. Although such protections existed in some form via China's 1986 General Principles of the Civil Law (GPCL),² and were later codified explicitly in the 2009 Tort Liability Law (TLL)³, there has been, to date, a notable lack of reported court cases involving online privacy violations. This relative dearth of reported cases – suggestive of a general absence of litigated cases more generally -- stands in marked contrast to the comparatively large amount of privacy-related criminal prosecutions carried out following amendments to the PRC Criminal Law in 2009, and it is all the more surprising when one considers the size and population of China's vast online ecosystem.⁴

According to legal scholars, one reason for the discrepancy may be that Chinese practitioners and courts have lacked understanding on how to apply Article 36 (the provision permitting civil suits against network service providers or network users for online infringement of personal rights) in practice, with the result that few actions have been initiated by practitioners or accepted by courts since the passage of the TLL in 2009.⁵

* Scott Livingston is an American lawyer specialising in Chinese technology and data privacy laws; Graham Greenleaf is Professor of Law & Information Systems at UNSW Australia and PLBIR's Asia-Pacific Editor.

¹ See e.g., *9th Amendment Draft of the Criminal Law of the People's Republic of China* (National People's Congress, 2014) (Clarifying the circumstances under which an action by a company or individual is deemed to constitute illegal sale or provision, and bringing the language found in the criminal law provision into greater consistency with data privacy requirements found in the *Decision of the Standing Committee of the National People's Congress on Maintaining Internet Security*

² *General Principles of the Civil Law* (National People's Congress, 1986).

³ *Tort Liability Law* (Standing Committee of the National People's Congress, 2009, effective July 1, 2010).

⁴ Livingston, S and Greenleaf, G "[ChinaWhys and wherefores: Illegal provision of personal data under Chinese law](#)" (2014) 131 *Privacy Laws & Business International Report*, 1-5. (Examining China's use of Article 253(a) of the PRC Criminal Law to prosecute instances of illegal purchase or sale of a citizen's personal information]

⁵ Rogier Creemers, *Parsing the New Internet Rules of China's Supreme Court*, China Copyright and Media, October 11, 2014, <<https://chinacopyrightandmedia.wordpress.com/2014/10/11/3701/>>.

In a bid to clarify some of these existing uncertainties, China's Supreme People's Court passed a regulation in October 2014 entitled "The Supreme People's Court Regulations Concerning Some Questions of Applicable Law in Handling Civil Dispute Cases Involving the Use of Information Networks to Harm Personal Rights and Interests." (SPC Regulation).⁶

The SPC Regulation instruct Chinese courts on how to handle cases based on Article 36 of the TLL. Though the bulk of the SPC Regulation focuses on procedural matters such as joinder of parties, notice and liability, the regulation also include a number of important substantive additions to the TLL. Most notably, the SPC Regulation confirms that a civil right of action exists for illegal disclosures of personal information, where such information does not fall under certain listed exceptions.⁷ Such actions are common in civil law countries in Asia, where there are often statutory rights of action for interferences with privacy. Such actions are not commonly found in Asia's common law jurisdictions. Other than in the Philippines, no other common law jurisdiction has created such statutory rights, or developed a tort of invasion of privacy (or its approximation via extending the law of breach of confidence)..⁸ With the additional clarifications offered by the SPC Regulation, we can expect to see a rise in privacy-related civil actions in China that should provide important future guidance for defining the contours of China's "right to privacy" in the online era.

This article is divided into two parts. In Part One, presented here, we provide a brief summary of how the statutory basis for civil law privacy actions in China has evolved over time. In Part Two, to be presented next issue, we analyse the specific content and likely effects of the 2014 SPC Regulation.

1. General Principles of the Civil Law and the Wang Fei Case

General Principles of the Civil Law

Before the TLL recognized a specific "right to privacy" in 2009, privacy was protected in a piecemeal manner through assorted provisions scattered amongst various Chinese laws and regulations.⁹ Foremost among these was the GPCL's protection of the "right to reputation" found in its Article 101:

The personality of citizens shall be protected by law, and the use of insults, libel or other means to damage the reputation of citizens or legal persons shall be prohibited.¹⁰

⁶ *Supreme People's Court Regulations concerning Some Questions of Applicable Law in Handling Civil Dispute Cases involving the Use of Information Networks to Harm Personal Rights and Interests* (Supreme People's Court, 2014) unofficial English translation at <<https://chinacopyrightandmedia.wordpress.com/2014/10/09/supreme-peoples-court-regulations-concerning-some-questions-of-applicable-law-in-handling-civil-dispute-cases-involving-the-use-of-information-networks-to-harm-personal-rights-and-interests/>>

⁷ *Id.*, at Art. 12.

⁸ Such statutory rights, with considerable variations in scope, are found in Japan, South Korea, Macau SAR, Taiwan and Vietnam: see 'Civil Code or tort actions', in Graham Greenleaf *Asian Data Privacy Laws: Trade and Human Rights Perspectives* (OUP, 2014), p474, with details in the respective chapters on each country.

⁹ See e.g., Article 3 of the *PRC Postal Law* (prohibiting the opening, hiding, or destruction of mail by postal employees). The *PRC Constitution* also includes a number of provisions related to privacy, but the Constitution has been ruled non-justiciable and civil suits relying on it for a legal basis have not been allowed to move forward.

¹⁰ GPCL, at Art. 101. For a detailed discussion, see Rebecca Ong, 'Recognition of the right to privacy on the Internet in China' (2011), 1(3) *International Data Privacy Law*, pp. 172–9; see also Graham Greenleaf *Asian Data Privacy Laws: Trade and*

In a 1988 judicial opinion, the Supreme People's Court stated that disclosure of personal, private information may be treated as an invasion of the "right to reputation" and protected under the General Principles of the Civil Law.¹¹ As a result, actions involving privacy actions were often litigated as "right to reputation" claims prior to the promulgation of the 2010 PRC Tort Liability Law.¹²

Wang Fei v. Zhang Leyi, Daqi.com and Tianya.cn

The most significant privacy-related decision under the GPCL, and one which gave prominence to the phenomenon (not restricted to China) of 'human flesh search engines', is the 2008 case *Wang Fei v Zhang Leyi, Daqi.com and Tianya.cn*.¹³

The Wang Fei case involved a memorial website set up by a man named Zhang Leyi for a university friend that had killed herself after discovering her husband, Wang Fei, was involved in an extra-marital affair. The website included many personal details of Wang Fei, including his address, family details, photographs, and other information, as well as articles about and by his deceased wife. This information, along with its accompanying user comments and discussion, was stored on two websites, with the result that Wang Fei (the husband) was tracked down and harassed and both he and his current partner were forced to resign from their jobs.

The aspect of the court's decision in the *Wang Fei Case* that was significant then, and likely to be of continuing relevance now, is the court's explanation of what constitutes "privacy." As Ong explains:¹⁴

According to the court, privacy means private life, information, space, and peace of private life related to a person's interests and personality that he does not intend to share with others. Therefore, the right to privacy is infringed by the disclosure or publication of private information that a person does not want to disclose to others concerning his private life, private areas, or domestic tranquillity and connected with his interests or his body.

The court went on to identify five factors important in determining whether privacy had been infringed: '(a) the manner by which the private information was acquired; (b) the manner in

Human Rights Perspectives (OUP, 2014), pp. 200-203. In addition to its protection of an individual's "right to reputation," the GPCL also includes provisions providing specific protections to aspects of a person's name, portrait, and honour.

¹¹ *Opinion of the Supreme People's Court on Several Questions Concerning the Implementation of the General Principles of the Civil Law of the People's Republic of China*, (Supreme People's Court, 1988, promulgated by judicial interpretation No. 22, July 14 1992), at 140. ("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.")

¹² One Chinese legal scholar has suggested that the right to reputation (i) "ensures the legal subjects to enjoy [sic] the interests brought by social appraisal and the right to privacy ensures individual's personal information [is not] obtained or disclosed illegally," and (ii) information disseminated in the case of reputation is normally false and wrong, and the results of invading reputational are always negative; by contrast, the information disseminated in the case of privacy is normally [true] and the release of [this] personal information usually cause[s] great emotional damage." Hao Wang, *Protecting Privacy in China: A Research on China's Privacy Standards and the Possibility of Establishing the Right to Privacy and the Information Privacy Legislation in Modern China* 71 (1st Ed. 2011).

¹³ *Wang Fei v Zhang Leyi, Daqi.com and Tianya.cn*, Beijing Chaoyang District Court, No. 10930 of 2008.

¹⁴ Ong, 'Recognition of the right to privacy on the Internet in China', p. 175.

which the information was disclosed; (c) the scope of disclosure; (d) the purpose of disclosure; and (e) the consequences of disclosure'.¹⁵ Although the *Wang Fei Case* arose before the TLL was in effect, this analysis may well have continuing relevance given a lack of definition of 'privacy' in the TLL or the SPC Regulation

IISP liabilities under the GPCL and the *Wang Fei Case*

The court in *Wang Fei* also held that Internet information service providers ('IISPs')¹⁶ had a duty to ensure that the information they provided was lawful, and 'upon discovery of such unlawful information must immediately remove the unlawful publication, keep relevant records of the publication, and report the alleged unlawful information to the relevant authorities.' While this part of the court's decision merely reiterated certain content monitoring provisions applicable to IISPs, it clarified that in this instance "unlawful information" could also include information violating a citizen's civil rights. China is a civil law country where an earlier court's opinion (as in *Wang Fei*) does not create a binding precedent (the principle of *stare decisis*) in later court decisions. However, the general concept that IISPs should ensure that content appearing on their networks does not harm another's civil rights was later taken up and codified in Article 36 of the TLL, which states that "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."

The result of the *Wang Fei* case was that the court required Zhang Leyi to pay 5,000 yuan (US\$732) damages and Daqi.com to pay 3,000 yuan (US\$438) damages to Wang Fei. Tianyi.com was found not liable because it had taken the disputed content off its website before proceeding commenced. The court found that the harm to the plaintiff was foreseeable, and that there was direct causality between the actions of the plaintiffs and the damage.¹⁷

2. Right of privacy under the Tort Liability Law 2009

China's protection of civil interests took a historic step forward with the passage of the PRC Tort Liability Law 2009 (TLL), which came into force in July 2010.¹⁸ The Tort Liability Law included two significant privacy-related provisions: Article 2, which protects a number of individual civil rights and interests, including the "right to privacy," and Article 36, which protects these rights in the online context.¹⁹

But although TLL Article 2 includes the "right to privacy," as well as "reputation," in its list of protected "civil rights and interests," it does not further define what is meant by "privacy."²⁰

¹⁵ Ong, 'Recognition of the right to privacy on the Internet in China', p. 175.

¹⁶ For our discussion of 'IISP', see the article in the next issue.

¹⁷ Ong, 'Recognition of the right to privacy on the Internet in China', p. 175.

¹⁸ Tort Liability Law, Standing Committee of the National People's Congress, 26 December 2009, <http://www.procedurallaw.cn/english/law/201001/t20100110_300173.html>.

¹⁹ Privacy of medical records is also protected in Arts. 61 and 62.

²⁰ See TLL Art. 2, ("Those who infringe upon civil rights and interests shall be subject to the tort liability according to this Law. "Civil rights and interests" used in this Law shall include the right to life, the right to health, the right to name, the right to reputation, the right to honor, right to self image, right of privacy, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to use a trademark, right to discovery, equities, right of succession, and other personal and property rights and interests.

Two reported cases involving Article 2's "right to privacy" have defined privacy in somewhat differing terms, as a "citizen's right to control their own personal secrets and life free from any other person's intervention,"²¹ and as "a natural person's right to control and keep their personal information and personal activities which are not related to public interests from being illegally known, utilized, and disclosed by any other person."²² A consequence of China not adopting *stare decisis* (discussed above) is that such judicial definitions do not create precedents binding on other courts. So there remains no formal definition or other authoritative guidance on the specific contours of the "right to privacy."

There have been some other cases under Article 2 of the TLL where definitions of privacy have not been advanced. They include cases where a TV station that had obtained and used the plaintiff's phone number was held not liable because it had not publicised the phone number; where cameras recording events in the public area between two residences were ordered to be removed; and where disclosure of nude photos of a person by one of her work colleagues to another work colleague resulted in liability and a small fine.²³

Compensation is not restricted to pecuniary losses under the TLL, but is also available to compensate 'a serious mental distress'.²⁴ This was also the case for the GPCL.²⁵ Thomas notes that the TLL 'places civil litigation firmly at the heart of the law of tort in China', rather than a stress on regulation by state agencies, or any significant role for intermediaries.²⁶

TLL, Article 36

In addition to the general protection of individual rights and interests found in Article 2, TLL Article 36 also includes a provision specifically protecting an individual's civil rights from being violated in the online context:

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.

Where a network user commits a tort through the network services, the victim of the tort shall be entitled to notify the network service provider to take such necessary measures as deletion, block or disconnection. If, after being notified, the network service provider fails to take necessary measures in a timely manner, it shall be jointly and severally liable for any additional harm with the network user.

²¹ *Zhang Desheng, Zhong Guifang, and Zhang Zhong v. Yang Hongyan, Lu Ying and Yang Jun*, (Shanghai 2nd Intermediate People's Court, Order Number 335 (2014)). In this case, the intermediate court upheld a decision finding a right to privacy violation where an upstairs neighbour had installed a camera monitoring the entrance to the downstairs neighbour's apartment.

²² *Yang v. a Property Management Company*, (Shanghai 1st Intermediate People's Court, Order Number 798 (2013)). In this case, the court dismissed a complaint alleging a "right to privacy" violation where a building's management had installed a camera monitoring a common area that included views of the plaintiff's doorway.

²³ These cases are discussed in Greenleaf *Asian Data Privacy Laws*, pp. 202-3.

²⁴ TLL (China), art. 22.

²⁵ 'The court should accept the cases that involve the violation of other people's privacy and harming public interests and social morality when victims request compensation for moral damage to the people's court on the ground of tort': art. 1 of *The Interpretation of the Supreme People's Court on Issues Regarding the Determination of Compensation Liability for Moral Damages in Civil Torts* [Chinese version] at <http://blog.sina.com.cn/s/blog_9b13f5da01016hbs.html>. See Ong, 'Recognition of the right to privacy on the Internet in China', p. 173.

²⁶ Kristie Thomas, 'PRC Tort Liability Law 2009: Implications for enterprises operating in China' (Nottingham Business School, November 2011) <<http://ssrn.com/abstract=2000164>>.

Where a network service provider knows that a network user is infringing upon a civil right or interest of another person through its network services, and fails to take necessary measures, it shall be jointly and severally liable for any additional harm with the network user.

A search of reported case decisions under Article 36 reveals that, to date, the bulk of reported actions carried out under this provision have involved copyright infringements carried out over the Internet. Actions for privacy-related violations, on the other hand, have been insignificant as yet. In the following part of this article, we will examine the specific provisions of the SPC Regulation, and why their likely effect will be to encourage such civil privacy actions in future.

The following issue will include the second part of this article 'Tort liability for online privacy invasions in China: The 2014 SPC Regulation'.