

International Privacy Day (#Brazil)

Originally published (Portuguese) in IDG NOW (Brazil) IDG News Service,
author invited by journalist Cristina De Luca. (@DeLuca) – January, 28th 2014.
URL: <http://idgnov.com.br/blog/plural/2014/01/28/privacidade-voce-sabe-o-que-e-isso/>

Paulo Sa Elias, Prof. Ms.*

* Professor of Law. Master of Law from UNESP
(Programa de Pos-Graduacao em Direito – Mestrado)
Universidade Estadual Paulista – Franca – SP
(Sao Paulo State University) (2004) – Brazilian-barred Attorney-at-Law
J.D. Juris Doctor & LL.B (1995) - OAB/SP 155.603
<http://www.direitodainformatica.com.br>
Twitter @PSAEL

Abstract. In this paper, an overview of the constitutional protection of privacy and the “right to informational self-determination” (Direito a autodeterminacao Informativa) in Brazil. Spying (*the active of secretly observing and gathering information*) has been with us since ancient times. It is part of human nature since ancient Egypt. Risks posed to privacy and intimacy from the progress of information technology and its omnipresence in practically all aspects of modern life.

Keywords: Privacy – Civil Law (Brazil) – Constitutional Law – Cyberlaw (Direito da Informatica) – Informatikrecht – Droit de l’informatique – Derecho Informatico.

**“Every man takes the limits of his
own field of vision for the limits of the world.”**

(Arthur Schopenhauer – 1788-1860)

Today is International Privacy Day. Its main purpose is to raise global awareness about the profound importance of privacy. Data Privacy Day has always received wide coverage in the United States (a country that has taken issues concerning privacy and constitutional protection of privacy seriously since Samuel D. Warren and Louis D. Brandeis published their landmark text “The Right to Privacy” in the prestigious Harvard Law Review in 1890).

The date January 28 was chosen to coincide with celebrations held in Europe as a tribute to the famous Convention n. 108 (from January 28, 1981) enacted by the Council of Europe: “*Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*”.

The celebration this year is very special, since it occurs in the aftermath of the leaking of top-secret information by **Edward Snowden** (former employee of the CIA/NSA/Booz Allen Hamilton) and, obviously, the international community expects that the United States (honoring its tradition of serious considerations on the issue) and other countries alert to

these issues (like Brazil and Germany) will take effective, serious and decisive steps against the risks posed to privacy and intimacy from the progress of information technology and its omnipresence in practically all aspects of modern life. Spying (the active of secretly observing and gathering information) has been with us since ancient times. It is part of human nature. There are stories of it in ancient Egypt. With the advances in information technology, we have seen the ingenious and extraordinary work developed by the **National Security Agency (NSA)**. Brazil is surely many years behind in this field.

I'm reminded again of the words of Professor Sergio Mascarenhas of the Physics Institute at the University of Sao Paulo at Sao Carlos: "(...) In Brazil we do not need trained workers. We need thinking, innovative workers. Education alone is not enough. We need cultural change. **Despite being the same age, Brazil and the United States are vastly different. Harvard was founded in 1636. The first Brazilian University was founded in 1934. Practically 300 years later. This is why Brazil is different from the United States. This is why we are a colony; this is why we are technologically colonized. We want a new culture. Not just a culture of carnival and football, which are nice. Brazil is very weak in science, technology and innovation.** If we continue on the path of blah blah blah, football and carnival — we will be at a disadvantage in the globalized world. We must systematically consider the convergence of science and technology. They are inseparable. The 21st century is marked by this convergence. And the basic elements for education are easily understood through the “Sabato Triangle” (Jorge Alberto Sabato)—which says that for a country to progress, to develop, **there must be interaction between companies, government and universities.** The interaction of universities with companies in Brazil is sadly lacking.”

And he's 100% right. In the land of the NSA, for example, this relation between company, government and university is extremely well developed. Research is not published just to fill up shelves in libraries. Consider the emblematic example of **Google (\$GOOG)**. If we consult the paper that led to the creation of Google: “*The Anatomy of a Large-Scale Hypertextual Web Search Engine / Computer Science Department, Stanford University - USA*” by **Sergey Brin** and **Lawrence Page**, you can see in item 7 “Acknowledgments,” the following information inserted by the two young researchers, sons of leading scientists at NASA (Eugenia Brin and Carl Victor Page):

*“(...) Finally we would like to recognize the generous support of our equipment donors IBM, Intel, and Sun and our funders. The research described here was conducted as part of the Stanford Integrated Digital Library Project, supported by the National Science Foundation under Cooperative Agreement IRI-9411306. **Funding for this cooperative agreement is also provided by DARPA and NASA, and by Interval Research, and the industrial partners of the Stanford Digital Libraries Project.**”*

(* **IRI-9411306-4:** *The following patents were filed by Larry Page and assigned to Stanford University. Both inventions were supported in part by the National Science Foundation grant number IRI-9411306-4. **The U.S. Government has certain rights in the inventions.***

Note that there is significant interaction between companies, the government and universities. We need something similar. In Brazil, academia appears to enjoy gazing at its own reflection and attending red carpet events. There, in the United States, practical application is immediate. The university “is hired” by a company (or by the government itself) to develop some real-life project (and they all make money: the university, students and professors). Here in Brazil it's a melodrama. Where have you ever heard of a professor making money? It's a cardinal sin.

Previously I highlighted the fact that we will not be able to protect the “free Internet” (or privacy or intimacy) without firmly and constantly questioning **the association between the Internet (and everything that gravitates around information technology) and military, political and economic power.** The philosopher Jürgen Habermas stressed the importance that public spaces (outside state control) had on the 18th century by providing a venue for criticism and freethinking.

The Internet as a new public space (a new public sphere) has an inestimable importance for society, despite its military origin (ARPANET/ARPA—today DARPA—Defense Advanced Research Projects Agency/Defense Department)—**and the fact that various Silicon Valley companies were financed by the Central Intelligence Agency (CIA), NSA, DARPA and by the US Defense Department,** which still provokes doubt and perplexity in some people.

“The world was forever changed when the Defense Department, CIA and the National Security Agency (NSA) acted like today’s venture capitalists funding this first wave of entrepreneurship.”

~ Prof. Steve Blank. The Secret History of Silicon Valley. 2008 – Stanford University/Computer History Museum)

What's interesting is that the Internet developed in an open format and, precisely for this reason and its ramifications (some unexpected, by the way), it became an essential and fundamental tool for the purposes of freedom of speech and voicing of opinion, as well as for the defense of privacy and intimacy, while being used against these rights at the same time. An interesting paradox. As Werner Karl Heisenberg has already said: “ideas are not responsible for what men do with them”

We need to maintain the Internet, including the other points where information technology and privacy and intimacy intersect, at all costs, outside the absolute (exclusive) control of the state and large economic groups with their powerful algorithms and systems used for surveillance, observation, indoctrination, directing, catechizing, regardless of denomination. It is no longer possible for us to ignore that the hardware in pieces of IT equipment present inside our homes and offices (including vehicles, medical equipment, portable devices, cell phones, military and civilian aircraft, etc.) —(**“the Internet of**

things’)—could be the target of surveillance by the state and large economic groups for a wide variety of reasons, especially commercial and strategic purposes.

“(…) How do we draw the line—draw the line between protection of national security, obviously the government's need to obtain intelligence data, and the protection of civil liberties, particularly the sanctity of my home? You've got no right to come into my home!”

From final scene of the film *Enemy of the State* (1988)

The expansion of the public sphere, as Habermas would say in other times and I now repeat, offers a valuable opportunity for society to question the authority of the representative culture of the state. There is no doubt that we find ourselves before a powerful and extremely valuable space to exercise this expansion and protection of the interests of citizens with regard to power and surveillance.

Reminiscent of Noam Chomsky, when he called attention to **the incompatibility between rhetorical allegations of the state and the way it actually exercises power. States are not moral agents; people are. It is our obligation to fight for privacy, intimacy and freedom, since we have been aware since the start of the previous century (John Dewey) that politics is the shadow cast on society by big business.** Informatics, telematics and the Internet of things: all of them, without a doubt, form a large, extremely powerful and lucrative business. There are interests on every side: from infrastructure, telecommunications and Internet companies and governments to anything that you can imagine intersecting these marvelous benefits that modern technology has bestowed upon us.

In the field of law, this subject is addressed as the **“Right to informational self-determination”** which ensures the individual, not only protection from use of his personal information, but also the right to authorize the use and disclosure of information about him. Information self-determination is not aimed only at protecting intimate information. It protects intimate and non-intimate personal information. This right determines whether information has been manipulated or managed legitimately (prior consent) by people for these purposes, and for appropriate and legal purposes, that is to say, those permitted by law.

The right to privacy (which prohibits the meddling of third parties in one’s private affairs) forms the basis of informational/information self-determination—which, in turn, is an even broader fundamental right and stronger in the sense of ensuring—in addition to all those guarantees contained in the right to privacy—the ability to control the movement, publication and storage of personal information. Victor Gabriel Rodriguez (2008) aptly said, *“(…) The right to privacy has aspects of third-generation rights (or even fourth, depending on the author), to*

the extent that it is born out of a reaction to technological progress. In this sense, it takes on a diffuse character, aimed at keeping information from being gathered and collated in an undue manner. The right to information self-determination cannot be separated from privacy, since the violation of information self-determination only becomes relevant when it crosses the line of privacy. The right to protect one's personal information from a certain entity is, therefore, an aspect of privacy, and its criminal protection must curb conduct that entails the undue use, storage and collation of personal information."

Subjectively, Catarina Sarmiento Castro (2005) stresses that informational (information) self-determination *"constitutes a right that ensures the respective individual legal positions before the state to defend against abuses regarding the use of his personal information, whether reactively — obliging someone to stop using one's information, or proactively, by taking steps to protect it. In its objective, common, external and horizontal aspects, information self-determination imposes upon the state the adoption of provisions to defend against the aggression of third parties."*

In previous papers I have emphasized that the right to informational (information) self-determination was developed significantly through German law (Recht auf Informationelle Selbstbestimmung), especially from a 1983 court ruling. And in the United States, as highlighted by the distinguished professor of the **USP law school at Ribeirao Preto, Sergio Nojiri (1998)**, in reference to the famous text by Warren and Brandeis:

"(...) From this work, the famous American judge Cooley extracted the following maxim: **Right to be alone**. Nevertheless, modern authors tend to define the right to privacy more broadly: "The body of information about an individual that he can decide to maintain under his exclusive control, or communicate, deciding to whom, when, where and under what conditions, without being legally bound to do so." In turn, John H. Shattuck, in an investigation on the meaning of privacy in jurisprudence and in North American legal theory, reduced its reach to four major themes: **1) Freedom from unreasonable search**, freedom and safety from any type of meddling in the private sphere; **2) Privacy of association and belief**, guarantee of respect for personal choices with regard to association and belief; **3) Privacy and autonomy**, protection of freedom of choice, without interference; **4) Information control**, access (and control) by groups and individuals to information about them. Although we may consider this last topic (information control) as being only a part of what is known as right to privacy, we side with those who understand that—in view of the enormous technological development regarding the storage, manipulation and dissemination of personal information — the creation of a new independent "right," already christened the "right to information self-determination," a concept derived from the notion of privacy (intimidad, privacy, riservatezza or vie privée, in foreign doctrines), but with which it is not to be confused. If it is true that they have many points in common, it is also true that the right to informational (information) self-determination, in view of rapid technological progress, has its own characteristics that allow it to be differentiated from the right to privacy (which was conceived in an era before information technology). The right to privacy is characterized by protection and support on issues

that are intimate and reserved by a person (private life), as, for example, the protection against someone opening your mail or invading your home. However, in the right to informational (information) self-determination, the information protected does not have to necessarily be intimate. (...) This new right, however, is aimed at preserving intimate and non-intimate personal information. There are enough reasons to justify the systematic division of the right to privacy and the right to information self-determination. (...) Currently, in various corners of the world, legislative progress on the subject, aimed at fair regulation of the processes of obtaining, storing and disseminating information that information technology currently provides.”

Unlike other countries, where there is specific legislation, the protection for information self-determination in Brazil is achieved indirectly by means of interpretations of a series of regulations.

“What is at issue here is evaluating the danger of what might happen to our humanity in the present half-century, and distinguishing between what we want to keep and what we are ready to lose, between what we can welcome as legitimate human development and what we should reject with our last ounce of strength as dehumanization. I cannot think that choices of this kind are unimportant. Modern technology has become a total phenomenon for civilization, the defining force of a new social order in which efficiency is no longer an option but a necessity imposed on all human activity.”

(Jacques Ellul)

Finally, when we speak of modernity and privacy, it is always important to remember that information technology is not offering an intelligent reduction of work. Though it should. We need to remain alert and act.

It was Bertrand Russell (1872-1970) who reminded us that history is full of examples of people working hard their entire lives, permitted only enough to support themselves and their families — while the surplus of their labor has always been appropriated by idle ruling classes. It has been that way for a long time, especially here in Brazil: idle rulers on one side and common people and employees on the other. The laboring classes do not live, they survive. It so happens that one of the benefits of modernity (especially after the advent of informatics and telematics) was the ability to denounce this situation to a much larger number of enlightened people — or in other words, that it is possible to live — and not just survive. **Russel said that “moving matter about is emphatically not one of the ends of human life.” — work cannot occupy all hours of waking life, under the threat of not living**

fully. “Our capacity for recreation, creativity and a worry free existence has been eclipsed by the cult of efficiency.”

The idle ruling class (and also the governing state) likes to talk about efficiency and effectiveness, but they take good advantage of their lives (in the company of their families) with the surplus produced by others. This discourse is packaged as politically and professionally correct. But it is not. Information technology (informatics and telematics), despite the difficulties, is fortunately raising this issue and, in turn, should lead to important transformations. We need to defend a future with intimacy, privacy, recreation and creativity, to be able to live our lives (and who knows, extend it). Calico¹ is the hope.

¹ <http://googlepress.blogspot.com.br/2013/09/calico-announcement.html>