Privacy law in the UK is fairly simple but its application is confusing, and this confusion has not been helped by recent events. Over the last few weeks we have seen intense criticism of the law, and its application by the judiciary, coming from politicians, the media and even the Prime Minister. Not everything being reported by any of these groups is entirely accurate. While this post will attempt to clarify the law to some degree, for a more complete picture, the recent European Court of Human Rights judgment in Mosley v The United Kingdom [2] has a thorough outline of the law, and the Committee on Super-Injunctions produced a very thorough report [3] on the current situation.

Before delving too deeply into the myths surrounding privacy and confidentiality, it is worth starting with some key terms that will be important:

- **Contempt of Court** - This covers a wide range of issues surrounding interference with and disrupting proceedings, as well as disobeying Court orders.
- **Injunctions** - These are general Court orders, binding on individuals or groups, to do something, or stop doing something. They have been one of the basic tools of our civil legal system for hundreds of years.
- **Super-injunctions** - This is an injunction with an added condition that those to whom the injunction applies cannot publish the existence of the order or injunction.
- **Parliamentary Privilege** - This is the principle, laid out in the Bill of Rights, ensuring that the Courts (or Government) do not restrict or interfere with debates or proceedings in Parliament.

### Common Myths About Privacy:

Click on each heading to see a more detailed answer. Similarly, click on a heading to return to the top.

1. **Privacy law has been created recently by judges.**

   False - There are records of privacy injunctions going as far back as 1774 and there are a wide range of Acts of Parliament covering privacy issues. Judges are only able to interpret the law they are given.

2. **There is a special law for celebrities.**

   False - The law applies equally to all - it is one of the basic principles of the rule of law. The same tests and requirements apply to the famous as to the rest of us - although they may give different results (particularly with 'public interest' issues).
3 - Obtaining an injunction is prohibitively expensive.

Partly true - Privacy injunctions can be expensive to obtain, but are a fraction of the cost of a full trial for a privacy breach. They are a relatively quick and cheap way of protecting privacy - the expense represents a wider issue with the entire legal system.

4 - There are currently hundreds of super-injunctions.

Probably false - A recent committee of judges and lawyers was only able to find three super-injunctions granted since the start of 2010, all now lifted. Anonymity orders are much more common, but mainly in Family Courts and the Court of Protection.

5 - Injunctions bind the whole world.

Mostly false - Normal injunctions apply only to those they are issued against (i.e. the defendants in the case). Temporary injunctions can apply to anyone who is notified of them, but there are also more general issues of Contempt of Court.

6 - Injunctions can be used to gag MPs in Parliament.

False - The Courts have no power to limit or prohibit debates or proceedings in Parliament, nor reports of Parliamentary proceedings that are made in good faith and without malice. However, Parliament does have internal rules concerning interfering with Court cases.

7 - Twitter can be sued over privacy.

True in theory - Any lawsuit against Twitter (in the UK) is unlikely to succeed and will be very difficult to enforce if it does. However, Twitter (and similar services) may be willing to co-operate with the UK Courts by handing over user data on request.

8 - Judges are trying to control the Internet through injunctions.

Uncertain - At the moment the Courts seem to recognise and accept the problems with controlling the spread of information on the Internet (and the futility of trying), but are more focussed on preventing the far greater 'damage' that can be inflicted by the press.

9 - 'Hyper-injunctions' can stop you talking to your MP.

Possibly true - Privacy injunctions usually give a general ban on disclosing the relevant information to any person (other than an instructed lawyer) and this will include MPs, unless Parliamentary Privilege protects the conversation.

Any comments, corrections or questions are welcome in the comments below. A more legalistic look at the law of privacy is available in a series of posts over at the LegalPiracy blog. As always, while this is accurate to the best knowledge of the author, it should not be taken as legal advice.

1 - Privacy law has been created recently by judges.

There are records of a case from 1774 in which an injunction was used to prevent publication of some personal correspondence - not too dissimilar to its uses now. Since then, numerous Acts have gone through Parliament which cover elements of privacy (including the Data Protection Act 1998, Official Secrets Acts, RIPA, Protection from Harassment Act 1997 and even the Sexual Offences Act 2003. The most significant, of course, is the Human Rights Act 1998, in which Parliament stated that everyone has the "right to respect for his private and family life, his home and his correspondence", and the Courts should act compatibly with this right (along with others).
As with many laws, the precise nature of this was left to the interpretation of the Courts, but there was a clear instruction from Parliament that privacy needed to be respected. When the Act was passed, Parliament (and indeed the press) were aware that it might cause a rise in the number of privacy injunctions and so an extra section [6] was added to the Act, giving Courts detailed instructions on how to deal with injunctions.

The way to interpret and implement the requirements of the Human Rights Act was laid down in a couple of key [7] cases [8] from the House of Lords in 2004, and it has remained consistent since. Put simply, if there is a "reasonable expectation of privacy" (or confidentiality) about information, its publication will be unlawful unless there is sufficient justification for doing so, such as a significant public interest, or if the information is already in the public domain. This usually involves a careful balancing, by the judge, of the competing rights to privacy and freedom of expression of the parties involved and the public. However, this is remarkably similar to the test for 'breach of confidence' which has been used since the 1960s - while the Human Rights Act may have changed the words and the scope of the law (from confidential to private information), the underlying principles are fairly similar.

There is a special law for celebrities.

In a recent Court of Appeal case [9] that concerned injunctions and privacy, the Court noted that "no special treatment should be accorded to public figures or celebrities: in principle, they are entitled to the same protection as others" [at 21(6)]. The test for whether or not information is private is an objective test anyway; it depends on whether "a reasonable person of ordinary sensibilities" put in the same position as the subject of the information "would find the disclosure offensive" (see ETK v NGN [10]at 10(2)). If anything, it will be harder for celebrities (and especially politicians) to get a favourable privacy judgment as it is more likely that there will be a stronger public interest or public domain argument.

An important thing to note here is that if the same level of privacy applies to celebrities as to us commoners, if we take away that privacy from the rich and famous, we are depriving ourselves of that same protection. The same law that prevents a tabloid from publishing a front-page story about the latest celebrity affair can be used to prevent interference with anyone's private and family life. The "right to respect of private and family life, home and correspondence" has been used to limit the spread of DNA profiling [11], legalise homosexuality in Northern Ireland [12] and stop the 'stop and search powers' [13] of s44 of the Terrorism Act 2000. While it may be unfortunate, the protection of celebrities' affairs is bundled in with the vital protections offered by Article 8 of the ECHR.

Obtaining an injunction is prohibitively expensive.

Estimates suggest that it costs between £10,000 and £50,000 to obtain a privacy injunction (and a similar amount to defend against one). However, this needs to be put into the broader context of the cost of legal access in general. In the rather famous case of Mosley v News Group Newspapers Ltd [14], the unsuccessful defendants (the News of the World, who had interfered with Mr Mosley's private life by publishing various stories) were ordered to pay £420,000 in legal costs - just for the High Court case (he was awarded £60,000 in damages). In the earlier case of Campbell v Mirror Group Newspapers [7], the unsuccessful defending newspaper were ordered to pay legal costs of £377,070 for the High Court case, £114,755 for the (successful) Court of Appeal hearing and £594,470 for the House of Lords appeal - all this for £3,500 in damages.

While the ECtHR later ruled [15] the total of £1,086,295 to be too much, it gives an indication of how much a normal privacy case costs. Rather than being ridiculously expensive, injunctions are a cheap and fast way of protecting privacy. This is a sad reflection of the state of our legal system in general (when £50,000 is cheap), but that is a far deeper problem, across the entire legal profession and Court system. While here, it is worth noting that in both the above cases (and these are obviously not the only ones) it was major newspaper companies paying large sums of money (on top of their own legal costs) after losing privacy cases. Their interest in changing privacy law goes beyond simply wanting to publish stories; the current privacy law is
proving rather costly. When it comes to privacy law and injunctions, the press are anything but impartial.

4 - There are currently hundreds of super-injunctions.

In a recent speech [16] in the House of Lords Lord Thomas of Gresford suggested that there were between 30 and 800 active super-injunctions. However, when the Committee on Super-Injunctions investigate this they found that only three privacy super-injunctions (using the term as defined above - there are other definitions) had been granted since the start of 2010. In LNS v Persons Unknown, John Terry obtained an interim super-injunction that lasted for 7 days. In DFT v TFD, an interim super-injunction was granted on as TFD was allegedly “blackmailing or attempting to blackmail” DFT. Again, it lasted for 7 days. Donald v Ntuli was slightly different as the Court of Appeal removed a super-injunction that had been put in place by the High Court several months earlier. The Committee was unaware of any current super-injunctions and suggest that anyone who was should contact the lawyers or Court involved to investigate them.

Anonymised injunctions are considerably more common. In these cases some details of the injunction (including its existence) are allowed to be published, but the relevant details (either the nature of the private activity; e.g. an affair, alleged fraud or more often, the names of the parties) are kept secret. The Committee listed 18 examples of these since September 2010 (at 2.27 in their report [18]), all of which have public judgments. It is possible there are more that are unreported (in the legal sense), but the number of these should decrease following the recommendations of the Committee.

Part of the problem here is that these sorts of injunctions (particularly super-injunctions) are supposed to be temporary. The theory is that if you think someone is about to breach your privacy, you apply to the Court for an injunction stopping them from doing so. If the Court things there is a good chance you would succeed in a trial, they will grant an injunction on the spot (in at least one case, after 9pm on a Friday night) and then hold a hearing later (with defendants or other parties present) to determine whether or not to keep it. This will then prevent publication of the private information until a full trial can be held and a ruling given. If it finds for the claimant, the injunction will no longer be needed (in theory) as the defendant will know that publishing will be unlawful.

In practice, however, these cases often do not make it to a full trial, so the injunctions (if they do not have an 'expiry date' and are never challenged) last indefinitely. Similarly, the civil penalties for misuse of private information may not be enough to prevent publication after a trial, so the injunction (with its threat of criminal sanctions) is still needed. Again, this situation should diminish as Courts are being encouraged to add expiry dates onto interim injunctions.

5 - Injunctions bind the whole world.

While there is such a thing as an order contra mundum (literally ‘against the world’, although they are hard to enforce abroad) they are very rare in these sorts of cases - with only two on record. They tend to be used more in cases involving children or vulnerable individuals. As a general rule, injunctions are only binding on those they are ordered against (i.e. the defendants in the case). There is, however, an exception for temporary injunctions in privacy cases (known as the Spycatcherprinciple) which states that such an injunction is binding on anyone notified of it. This means that an individual can get a temporary injunction against one newspaper and then send it to several others, preventing them from publishing as well. However, once the temporary injunction expires, a permanent junction replacing it only applies to those it is made against.

There seems to be some uncertainty as to what is required for 'notifying' someone of an interim injunction; whether they need a copy of the entire order (including the confidential information being protected) or if it is enough for them just to know of its existence. However, if a temporary injunction is in place it means that the legal proceedings are 'active' and so the rules on Contempt of Court apply and anything that might prejudice the case could be an offence. As a result, it is not necessary for there to be an injunction preventing publication of details for doing so to be a crime (hence the current Contempt of Court proceedings [19] against
Injunctions can be used to gag MPs in Parliament.

Parliamentary Privilege provides absolute protection to MPs and Lords against sanctions from Courts and the Government over what is said in debates and Parliamentary proceedings. However, this does not mean that MPs cannot be held to account; the theory is that Parliament is supposed to have its own rules and enforce them. One of these rules (the sub judice [20] rule) prevents MPs and Lords from speaking about active cases, but seems to be being ignored recently without consequence.

There is some doubt as to how far Parliamentary Privilege extends; there is an Act of Parliament that makes it clear the absolute privilege extends to official and authorised reports of Parliamentary proceedings (such as Hansard or Parliament Live), other reports or extracts from reports of Parliamentary proceedings are only covered by privilege if proved to be in good faith and without malice. It is uncertain as to whether or not reports can be made without malice if they break a court order.

Twitter can be sued over privacy.

In theory, it is possible to bring a claim against anyone, but what is important is the likelihood of it succeeding. Twitter is a US-based company and so does not have to accept the jurisdiction of the High Court (which only covers England and Wales). While there may be extradition treaties or similar with the US, Twitter would likely be protected by something along the lines of the US's SPEECH Act [21](although that itself only applies to defamation). In any case, Twitter would likely have some sort of immunity from liability under EU law through the Electronic Commerce Directive which offers some defences for service providers. Whatever happens, it is unlikely that anyone will be able to enforce any successful claim against Twitter in the UK.

However, it is possible to take Twitter to court to seek a disclosure order [22] requiring that Twitter hand over identifying information about particular users (possibly some anonymous accounts that first 'broke' the injunctions). These are similar to the NPOrders obtained against ISPs to link IP addresses to individual subscription accounts (until recently used in online copyright infringement cases). Twitter, like most companies, will not want to hand over personal data without a Court order (and may be legally forbidden from doing so) and so the purpose of suing them is to get such an order. Twitter can then chose to fight it, comply with it or ignore it, but they have indicated that they will probably comply [23]. This is not the first time such an order has been made; in 2009 two individuals known only as G obtained a similar order against Wikimedia [24], and while Wikimedia refused to recognise the High Court's jurisdiction over them, they were willing to comply with the Court order.

Judges are trying to control the Internet through injunctions.

While it is impossible to speak for all members of the judiciary, it seems to be the case that many individual judges have a reasonably good idea of how the Internet works, and how futile it can be to keep information from spreading once there. Many of the judgments in privacy cases noting that there is a completely different "degree of intrusion under privacy" between a story being on the web and being "emblazoned on the front page of a national newspaper" (Lord Neuberger MR, in a recent press conference [25]).

Similarly, judges have noted that, while the law may be "unpopular or unenforceable" online (to a degree), "the courts are obliged to apply the law as it currently stands" and should not "buckle every time one of [their] orders meets widespread disobedience or defiance". It is for Parliament to change the law as and when they see fit, not the Courts (Eady J in CTB v NGN [27] (23rd May) at paragraphs 15-16). The injunctions also have a secondary purpose (aside from keeping secrets) of preventing intrusion or harassment, and while they may not prevent "taunting" on the Internet, they can still protect against "taunting and other intrusion and harassment in the print media" (Tugendhat J in CTB v NGN [28] (23rd May, second judgment) at paragraph 3).
'Hyper-injunctions' can stop you talking to your MP

The term 'hyper-injunction' was coined by John Hemming MP in a debate in Parliament [29]. The suggestion was that new injunctions were being granted that not only stopped parties from disclosing matters to the public, but even their MP. Three examples were given in the debate, one from proceedings under the Mental Capacity Act 2005, one in Family proceedings and the other in a shipping case (concerning confidentiality). All seem to have involved that specific MP, and all would seem to have been broken. The Committee on Super-injunctions could not find any other examples, and noted that in one of these orders, the restriction on talking to an MP was merely a commitment made by one of the parties, rather than a Court order itself. Two examples, from several years ago, does not reflect a worrying development in the law.

In any event, the Committee noted that there was "no available evidence that ... the court was seeking to limit the application of the protections afforded to constituents" under our legal and political system (at paragraph 6.19). Injunctions which prohibit someone from disclosing or discussing matters with any third party do not need to specify a particular third party. An injunction will often prevent disclosure to any "other person", and so this would naturally include an MP, whether or not they are specified in the order. In this sense, there is nothing new, or unusual, about these 'hyper-injunctions'. On the other hand, it may be that a discussion between a constituent and their MP is covered to a degree by Parliamentary Privilege (discussed above), in which case no Court order can interfere with it. Either all injunctions prevent discussion with an MP (unless the MP is specifically exempted) or none do so, as the conversations would be protected by Parliamentary Privilege.

Any comments, corrections or questions are welcome in the comments below. A more legalistic look at the law of privacy is available in a series of posts over at the LegalPiracy [4] blog. As always, while this is accurate to the best knowledge of the author, it should not be taken as legal advice.

Tags:

Privacy [30]
Super Injunctions [31]

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