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Delicate balance between right to be forgotten and information access

The right of oblivion (le droit a l'oubli) has a distinctly French air, perhaps more reminiscent of existentialist philosophy than of legal codes. That right, though, is enshrined in French law, providing convicted criminals with a sort of de facto expunction. Under the law, an individual who has served his sentence and completed all aspects of his criminal rehabilitation may petition to prevent the media from publishing accounts of his crime and punishment.

The European Union is now attempting to transfer this doctrine of a right of oblivion to the Internet. The 1995 European Union Data Protection Directive established a variety of rights concerning the collection and use of an individual's personal data. Among those rights is a right to seek from a data controller the "rectification, erasure or blocking" of personal data.

Although the language of the 1995 directive is fairly opaque, the European Court of Justice drew on the directive in recognizing a "right to be forgotten" in a landmark May 2014 ruling.

The court considered a Spanish man's request to have Google remove links to a newspaper article addressing his past financial problems and found that Google was a data controller subject to data protection laws. Although the ruling does not actually expunge old records or prevent the publication of new materials relating to old affairs, it did recognize an individual's right to have search engines remove links to online content that is "inadequate, irrelevant or no longer relevant."

But what exactly does that mean?

The right to be forgotten does not create a right to have information (such as newspaper articles) removed from Internet sites that published the information. Instead, it allows individuals to request that search engines remove links to those sites that result when a user searches on the individual's name.

If a newspaper, for example, published an otherwise allowable (non-defamatory) article about an individual's bankruptcy 20 years ago, that individual cannot now demand that the newspaper retract the story or remove it from its online archive. He can, however, request that Google remove or "delist" links to that story so that the story is not retrieved when someone performs a search on his name.

In this way, the European Court's ruling does not create a true right of expunction. The article still exists on the host site, and someone who knows where to look can still retrieve it. Delisting the article from name-based searches only means that the article will remain relatively obscure. Prospective employers or former classmates, for example, would not see the bankruptcy article in search results if they Google that individual's name.

PRIVACY, TECHNOLOGY AND LAW

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In explaining the court's ruling, the European Commission has emphasized that the right is not absolute. Requests to remove information must be evaluated on a case-by-case basis, balancing the individual's right to privacy against the public's right to information:

"This balance may depend on the nature of the information in question, its sensitivity for the person's private life and on the public interest in having that information. It may also depend on the personality in question: The right to be forgotten is certainly not about making prominent people less prominent or making criminals less criminal."

Implementation presents a host of problems — not to mention financial costs, particularly for Google and other search engines. The ruling provides little concrete guidance — referring to the delisting of information that is "inadequate, irrelevant or no longer relevant." "Inadequate" for what objective? "Irrelevant" to whom and for what purposes?

However nebulous this standard, search engines are still bound to comply with the court's directive to delist sensitive content, and since May, many have staffed large teams to develop strategies for processing the deluge of requests. Meanwhile, European data regulators are negotiating policies to define the scope of the right and provide guidance for its practical implementation.

Even if clear and consistent standards are developed and then applied, and even if these standards guidelines are objective (relating, for example, to the information's age or staleness), the analysis will often involve fairly subjective determinations. It will be labor intensive in terms of both a search engine's initial decision-making process, and any appeals that follow declined delisting requests.

Although this aspect of the European consumer privacy model is still evolving, there is little question that it will affect American data privacy — sooner rather than later. Countries outside of Europe are already contemplating similar laws — right to be forgotten legislation has been introduced in Brazil, for instance.

Most obviously and directly, however, American companies (such as Google) will have to assume a significant burden and expense to comply with European law, and European regulators continue to add to this burden.

In November 2014, a body of

European regulators issued guidelines that clarify, among other things, that the protection of Europeans' privacy rights does not stop at local domains. In practice, this would require Google to delist data from all domains — Google.com as well as European sites such as Google.es (i.e., Google Spain).

The European ruling also is influencing the tone and vocabulary of the ongoing American debate over online privacy rights. In the United States, some opponents characterize the right to be forgotten (and the suggestion that U.S. companies must comply with court decisions and regulations from the EU) as a form of censorship and immediately invoking the First Amendment.

While free speech unquestionably enters into the broad discussion about how to regulate the Internet, the censorship argument may not be especially apt or productive. The question is not whether individuals or organizations can publish potentially damaging or embarrassing personal information online in the first instance but how to regulate the dissemination and accessibility of that information once it has been posted.

Existing U.S. laws already provide some protections to individuals in terms of what can and cannot be posted — an individual can seek the removal of defamatory material or copyrighted material (although eliminating all traces of illegally posted material is nearly impossible in situations where the material has been reposted widely or even gone viral). U.S. law also provides some safe harbors against liability for Internet service providers who merely provide the platform for that copyrighted content posted by users.

The right to be forgotten, however, relates to an individual's right to control the searchability (and therefore the availability) of online content after it has been posted, regardless of the legality of the original publication.

In a world where the use of Big Data by both the public and private sectors has been the subject of increased dialogue in the context of consumer privacy — the right of individuals to control the data about them that is available online seems both necessary and elusive.