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Research Note

The Law: The Right to be Forgotten

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Abstract: *While online privacy is a concern for all, there is no international standard for users to limit personal information that has been either intentionally or inadvertently released to the public. The Right To Be Forgotten is a law enacted recently in the European Union. The law requires search engines to limit content about citizens that they themselves deem inadequate, irrelevant, or outdated. The new legislation has thrown the global online community into an uproar due to its broad and vague nature. Questions regarding free speech, censorship and legality abound. Similar laws exist and continue to evolve in other countries as well. There are very few federal laws in the U.S. to protect users at this time.*

Introduction

On a Friday night in early November, Vinita Hegwood posted a few thoughts to her Twitter account, as she did on most evenings. However one particular tweet was so racially charged that it went viral and swiftly led to Ms. Hegwood's dismissal from her teaching position at Duncanville High School the following Monday[i]. Annmarie Chiarini, a college English professor, was traumatized after a former lover posted nude images of her, along with her name and place of employment, on several websites from 2010 to 2012[ii]. John and Jessica Kier have been dogged by multiple online images of their mug shots from an arrest for a minor crime of which they were later found Not Guilty. Mrs. Kier believes that she has been turned down for multiple jobs due to these images that appear when searching for her name on Google[iii].

Countless individuals make conscious decisions to post personal and often damaging information on the Internet on a daily basis. People around the world are reporting loss of employment, rejection from universities and other repercussions from social media postings. Others are the victims of "revenge porn", and may have private photographs and other personal details about them released to the public without their consent. Still more have criminal records that are available for anyone to find simply by typing in their name. These damaging stories and images may now be forever linked with these ordinary citizens, and are available to anyone who performs an Internet search on their names in the future.

Some might argue that people should have the right to expunge this negative personal information from the Internet. Others feel that to do so would be a dangerous and slippery play on free speech rights.

Scholars and historians might object to what is perceived as a whitewashing of history. There are even more who would argue for victims who did not willingly volunteer any of their personal data or images. Legislation currently exists in the US to protect some victims of Internet harassment, but these laws do not exist across all fifty states, and are often difficult to prosecute and enforce.

The European Union has recently instituted a legal avenue for erasing Internet content, but it has yet to be truly tested and faces extreme criticism both domestically and abroad. It remains to be seen what new laws and regulations might arise due to unflattering Internet content, and how they will be applied in a global context.

The Right to Be Forgotten – European Union

In response to recent lawsuits in the European Union, the EU has recently passed "The Right To Be Forgotten", an addendum to the European Data Protection Directive[iv]. The European Court of Justice (ECJ) issued this ruling on May 13, 2014, following the outcome of a court case brought by a Spanish citizen[v]. Mario Consteja Gonzales brought the case to trial through the Spanish Data Protection agency after several national news outlets printed reports of his financial insolvency in 1998. Gonzales, a businessman, felt that although he had rectified his financial problems, the continued availability of this information would hurt his business prospects in the future. He petitioned to have this information removed from Google search results and from the newspaper articles themselves. While the Spanish agency was not successful in having the references from the actual articles removed, the ECJ ruled that Google bore the responsibility to remove the search engines' capability to register and display these references[vi].

Paragraph 93 of the ruling states "that even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where those data are no longer necessary… That is so in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed"[vii]. This language directly correlates the difference between the European definitions of privacy versus the American definition. Certain European rights dictate that convicted criminals, once they have served time for their crime, may petition to have their criminal records obscured[viii], while in America these facts are considered to be a matter of public record. However this new ruling does not pertain only to criminals or those with negative publicity. Under this law, all citizens of the European Union have the right to request that pertinent information about themselves be hidden from Internet searches.

While this law is directed at all search engines, it primarily affects Google, Inc., as the company has over 90% of the market share in the European Union[ix]. The law requires that search engines such as Google remove links to content as requested by the individual. It does not require that the original reporting agency remove the information. Therefore, while the information is still available on the Internet, it will now be much more difficult to locate[x]. In response to the ruling, Google set up a page to receive and process requests from members of the 28 countries in the European Union and also Iceland, Lichtenstein, Norway, and Switzerland. Google makes it clear that their team will consider all requests to limit certain search results, but that not all requests may be granted, based upon the nature of the content:

"When evaluating your request, we will look at whether the results include outdated information about

you, as well as whether there's a public interest in the information — for example, we may decline to remove certain information about financial scams, professional malpractice, criminal convictions, or public conduct of government officials[xi]."

To date, Google has processed over 175,000 requests, and has removed hundreds of thousands of links to content[xii]. These requests have come from child predators, politicians, and celebrities, among other private citizens.[xiii] The BBC recently reported that over half of the requests from the UK were from criminals seeking to have their information concealed[xiv].

Criticisms

The most obvious criticism to the EU's new Right To Be Forgotten is censorship. It is easy to question why a citizen should be able to simply erase items from the public record that they deem to be negative. There are several arguments both for and against this practice. Obviously, not many would argue against the right to have libelous or slanderous content removed from the Internet. Incorrect information would certainly qualify as something that could easily be remedied by limiting search results. However, the argument against targeting search engines like Google is that the content remains on the internet, and is just a little more difficult to recover, not gone completely. In cases of libel or slander, it would be more effective to petition the actual publishers of the content and to have the information truly removed, not simply obscured. The European court's opinion of this line of thinking is "that the results of a Google search often matter more than the information on any individual Web site.[xv]"

While it does make sense to limit the availability of libelous or slanderous information that was posted erroneously or without the consent of an individual, it is unclear why a law would be written in such a way to allow for the obliteration of content an individual willingly posted in a public forum. If such a law was to exist in the U.S., persons like Vinita Hegwood could simply petition to have all evidence of their politically incorrect musings removed from search results, potentially giving the impression that she was an upstanding educator who valued diversity, or at least, had never publicly issued discriminatory sentiments. We cannot simply have a "do-over" in this new paradigm of over-sharing. While it is one thing to regret posting a photograph of oneself while intoxicated, it is quite another to post a series of hateful rants and then ask the world to pretend that it never happened. The Internet could quickly devolve into an environment in which evidence of any egregious act can simply be washed away in an instant. Users should bear some responsibility for their actions. In the face of an environment in which everything we write and post is public, people should simply be more vigilant about how, where and of whom they speak. The House of Lords in the United Kingdom has vociferously spoken out against the Right To Be Forgotten for this very reason:

"We do not believe that individuals should be able to have links to accurate and lawfully available information about them removed, simply because they do not like what is said."[1]

Another criticism of this new ruling is that the language is too vague, and leaves a lot of room for

[1] House of Lords EU Home Affairs, Health and Education Sub-Committee, "'Right to Be Forgotten' Is Misguided in Principle and Unworkable in Practice, Say Lords."

interpretation on behalf of the data provider. As it is written, the law allows for deletion of data deemed no longer relevant, or for information pertaining to an event that occurred a reasonable amount of time in the past. This new law did not provide for a governing body to preside over these requests, it placed the onus directly on the data provider. Thus, Google had to quickly develop a system of criteria for making decisions about these requests, including assembling a group of lawyers and other professionals to weigh in on individual issues. Microsoft Bing, Facebook, Wikipedia and Yahoo also have subsidiaries in Europe and are currently devising their own guidelines for complying with the new regulation[xvi]. While Google and these other large companies have large teams of legal professionals to help make these determinations, smaller search engine companies may not have those resources available to them and would have no choice but to indiscriminately grant these requests or face financial ruin[xvii]. The UK House of Lords also voiced these objections:

> "We believe that the judgment of the Court is unworkable. It does not take into account the effect the ruling will have on smaller search engines which, unlike Google, are unlikely to have the resources to process the thousands of removal requests they are likely to receive…We also believe that it is wrong in principle to leave search engines themselves the task of deciding whether to delete information or not, based on vague, ambiguous and unhelpful criteria, and we heard from witnesses how uncomfortable they are with the idea of a commercial company sitting in judgment on issues like that."[xviii]

A task force has been set up to assist with definition of the regulation, in the interest of the public, but spokespersons have admitted that the team is still in the learning phase[xix].

Lastly, the current assumption is that link removal only occurs in the country of which the requestor resides. For example, if a user in Belgium requests that content about them is removed, one supposition is that Google is only responsible for removing those content links from Google.be. However it is unclear as to whether the removal requests should be applied across all of the Google European subsidiary search engines, or strictly for the country in which the citizen currently inhabits[xx].

A case has already been tried in France that challenges these boundaries. The plaintiff first sued Google in August 2013 to have falsely reported information removed from search indexes. The French court ordered Google to remove the links to the erroneous content. Google complied with the order, but now more recently been accused of removing links only on the Google France site. The French court is now demanding that Google remove the information across all of its subsidiary sites, including the Google site in the U.S.[xxi]. A precedent such as this could quickly lead to chaos on the Internet, with radically different information being available in each country.

The Right to Be Forgotten in Other Countries

The European Union is not the first community to institute Right to Be Forgotten laws. The majority of Latin American countries have some form of data protection laws, most notably in Argentina. An Argentinian law was created in 2000 (Ley 25.326), stating "that data be destroyed when it ceases to be necessary or relevant for the purposes for which they were collected" and also decrees that databases are required to remove such data when it is deemed no longer relevant[xxii]. Most notably, this law has been applied in situations where female performers are finding their images associated with pornographic sites

or sites promoting illegal activity, the most famous being Da Cunha v. Yahoo and Google. The initial lawsuit did not allege any wrongdoing on behalf of the search engines that link to this content, but did demand that the search engines remove the links to the content associated with the actress' name[xxiii]. Later appeals on behalf of Yahoo and Google saw this ruling overturned, a decision hailed by some as a successful win against censorship[xxiv]. Even in the wake of this decision, still more Argentinian celebrities have been waging battle with the Internet to have damaging content removed.

Australia has recently been investigating a reform to their data privacy laws. According to a report by the Australian Law Reform Commission, Australia does not currently have any laws in place for invasion of privacy, and has been growing increasingly concerned in the digital era[xxv]. Australia's proposed new regulation differs from the EU in that it only makes provisions for content that was placed on the Internet by the individuals themselves[xxvi]. This is contradictory to a 2012 lawsuit in Melbourne in which an Australian citizen successfully sued Google for defamation after his name repeatedly appeared in Google search results in relation to Melbourne's Most Wanted, even though he had never been associated with any crimes[xxvii]. The problem with this proposed legislation is that it does not appear to allow for victims of revenge or libel to clear their names.

A plaintiff in Tokyo recently won a suit against Google for similar issues involving wrongful accusation, however Japan has made this a one-time ruling and has not decreed any changes to Japanese law[xxviii].

U.S. Internet Privacy Laws

No legislation like the European Union's Right To Be Forgotten law exists in the U.S.. U.S. Internet users can make a request to Google to have certain information removed from search results. Google has stated that the search engine will remove Personally Identifiable Information such as bank account and credit card numbers[xxix], but makes it clear that this service is very limited. Google also allows for removal of illegal information, primarily copyright violations[xxx].

Citizens who speak indelicately on social media run the risk of having their indiscretions be permanently accessible to all. Those who are lucky enough to have their behavior picked up by major news outlets, such as Ms. Hegwood will face real difficulty when attempting to hide their past. There are currently no US laws in place protecting employees from being terminated based upon social media activity. Online services (such as Reputation.com) exist to assist users in cleaning up their online image, by flooding the Internet with alternate information, the intent being to obscure the damaging data. Other companies (CleanSearch.com, ClearMyRecord.com) claim that they can have information such as arrest records and online mug shot images removed, for a fee.

Only a handful of US states have enacted legislation to assist victims of revenge porn, by prohibiting the transmission of sexually explicit images of someone without their consent[xxxi]. These laws can help victims when requesting removal of their personal images and data, but only within these thirteen states. No federal laws of this nature exist. In most states, it is not a crime to post sexually explicit images of an individual without their consent. Therefore it is most often the responsibility of the victim, like Ms. Chiarini who must pursue these sites for the removal of images and data, but they are often unsuccessful and have no legal recourse. Even ordinary users who have a clean criminal history but who want to remove some or all of their online presence face an almost impossible set of tasks that would take days to

accomplish[xxxii]. Simply deleting a Facebook account takes fourteen days, and the company still reserves the right to keep some of your images and data[xxxiii].

Conclusion

Many Internet users are guilty of self-publishing damning information on social media outlets that they later regret. Others face having their private mistakes reported in multiple news outlets across the world. While some citizens feel that they have ownership over their public image and of content that pertains to them, there is no global standard for how, when and if this information should be obscured from the public. The legal understanding in Europe and Latin America is that private citizens should and do have control over their public image, and should have the ability to make adjustments to Internet content they feel is unflattering, including criminal records. The U.S. steadfast dedication to the First Amendment right to Freedom of Speech directly opposes this type of censorship.

The European Union has recently enacted legislation to enable users to erase online content from search engine results. While this new functionality has already been heavily used, the new law has been met with much criticism. It is important that people have an avenue to resolve incorrect or slanderous information, but some critics feel that the law was passed in haste and is deeply flawed. Private enterprise has been left to interpret and enforce a public law without much regulation. Much concern has been voiced about the obfuscation of criminal history, while others are worried that this law sets a dangerous precedent in that it could be used to erase major historical events.

Obviously, more discussion and research is needed. While the laws of countries may not always align, usage of the Internet is global. Perhaps an International summit is needed to come to a more cohesive solution to this issue. If regulations vary wildly from country to country, we will soon have a lack of transparency and trust in our global neighborhood, which may lead to disastrous consequences.

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[i] Young, Stephen. "A Duncanville Teacher Tweeted That 'Dumb Duck Ass Crackers' Should Kill Themselves." *Unfair Park*. 10 Nov. 2014. Accessed Dec. 2014 <www.blogs.dallasobserver.com>.
[ii] Chiarini, Annmarie. "I Was a Victim of Revenge Porn. I Don't Want Anyone Else to Face This." *The Guardian*. 19 Nov. 2013. Accessed Dec. 2014 <www.theguardian.com>.
[iii] Fields, Gary, and John R. Emshwiller. "As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime." *Wall Street Journal*. 19 Aug. 2014. Accessed Dec. 2014 <www.wsj.com>.
[iv] European Commission. "Fact Sheet on the 'Right To Be Forgotten' Ruling (C-131/12)." European Commission. 13 May 2014. Accessed Dec. 2014 <www.ec.europa.eu>.
[v] Neal, Ryan W. "Google Search Removal Requests: European Criminals, Politicians and Pedophiles Exercising 'Right To Be Forgotten.'" *International Business Times*. 30 May 2014. Accessed Dec. 2014 <www.ibtimes.com>.
[vi] Toobin, Jeffrey. "Google and the Right to Be Forgotten." *The New Yorker*. 22 Sep. 2014. Accessed Dec. 2014 <www.newyorker.com>.
[vii] Court of Justice of the European Union, *Directive 95/46/EC — Articles 2, 4, 12 and 14*. 13 May 2014. Accessed Dec. 2014 <www.curia.europa.edu>.
[viii] Stefanou, Constantin, and Helen Xanthaki. *Towards a European Criminal Record*. Cambridge University Press. 2008. Accessed Dec. 2014 <www.books.google.com>.
[ix] Goldman, Eric. "Primer on European Union's Right to Be Forgotten." *Technology & Marketing Law Blog*. Aug. 2014. Accessed Dec. 2014 <www.blog.ericgoldman.org>.
[x] Ibid.
[xi] Google.com. "Legal Help: Search Removal Request under Data Protection Law in Europe." Google.com. N.D. Accessed Dec.

2014 <www.support.google.com>.
[xii] Preece, Caroline, and Rosie Clark. "Google 'Right to Be Forgotten': Everything You Need to Know." *IT PRO*. 2 Dec. 2014. Accessed Dec. 2014 <www.itpro.co.uk>.
[xiii] Neal, Ryan W.
[xiv] Lee, Dave. "Google Offers 'Right to Forget' Form." *BBC News*. 30 May 2014. Accessed Dec. 2014 <www.bbc.com>
[xv] Toobin, Jeffrey.
[xvi] Preece and Clark.
[xvii] Rosen, Jeffrey.
[xviii] Vincent, James. "House of Lords Criticises Right-to-Be-Forgotten Laws as 'Unworkable and Wrong in Principle.'" *The Independent*. Accessed 3 Dec. 2014 <www.independent.co.uk>.
[xix] Preece and Clark.
[xx] Toobin, Jeffrey.
[xxi] Vaas, Lisa. "Google Fined for Not Taking down 'Right to Be Forgotten' Links Worldwide." *Naked Security*. Accessed 3 Dec. 2014 <nakedsecurity.sophos.com>.
[xxii] Carter, Edward L. "Argentina's Right to Be Forgotten." Emory University School of Law. 2013. Accessed 1 Dec. 2014 <law.emory.edu>.
[xxiii] Condon, Stephanie. "Argentine Judge: Google, Yahoo Must Censor Searches." *CNET*. 12 Nov. 2008. Accessed Dec. 2014 <www.cnet.com>.
[xxiv] Whitney, Lance. "Google, Yahoo Win Argentine Celebrity Search Case." *CNET*. 20 Aug. 2010. Accessed Dec. 2014 <www.cnet.com>
[xxv] Australian Law Reform Commission. *Serious Invasions of Privacy in the Digital Era (ALRC 123 Summary)*. Australian Law Reform Commission. 9 Mar. 2014. Accessed Dec. 2014 <www.alrc.gov.au>.
[xxvi] Australian Law Reform Commission. *A New Privacy Principle for Deletion of Personal Information*. Australian Law Reform Commission. 31 Mar. 2014. Accessed Dec. 2014 <www.alrc.gov.au>.
[xxvii] Khalid, Amrita. "Google Loses Lawsuit in Australia Over Defamatory Search Results." *Slate*. 12 Nov. 2012. Accessed Dec. 2014 < www.slate.com>.
[xxviii] "Japan Court Orders Google to Delete Data." *Yahoo News*. 10 Oct. 2014. Accessed Dec. 2014 <www.news.yahoo.com>.
[xxix] Google.com, "Removal Policies - Search Help." Google.com. N.D. Accessed Dec. 2014 <www.support.google.com>.
[xxx] Google.com, "Removing Content From Google - Legal Help." Google.com. N.D. Accessed Dec. 2014 <www.support.google.com>.
[xxxi] "State 'Revenge Porn' Legislation." National Conference of State Legislatures. 19 Nov. 2014. Accessed Dec. 2014 <www.ncsl.org>.
[xxxii] Pinola, Melanie. "This Infographic Shows You How to Delete Yourself from the Internet." *Lifehacker*. 5 Mar. 2014. Accessed Dec. 2014 <www.lifehacker.com>
[xxxiii] Gibbs, Samuel. "How to Delete Your Facebook Account." *The Guardian*. 4 Feb. 2014. Accessed 3 Dec. 2014 <www.theguardian.com>.