THE KENAN INSTITUTE FOR ETHICS at DUKE UNIVERSITY

Teaching Caselettes

REGULATING THE GOOGLE SEARCH RESULTS OF YOUR NAME

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The results of a search of an individual's name are, in all practical applications, his or her public reputation. The European Union's Court of Justice responded to this reality with the "right to be forgotten." In contrast, the United States has not adopted similar protections for online reputation. This case study will examine how the European Union and the United States protect private information and the flow of information through the lenses of the historical and cultural foundations of privacy and speech, specifically addressing the control an individual has over publicly accessible information about himself or herself.

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Introduction

The Internet is a mass collection of information, including a variety of information about individual persons. Google Search makes the information easily accessible. Facebook collects an individual's personal information, LinkedIn professional information, and Twitter a collection of random thoughts. Depending on a user's privacy settings, Google collects and presents all that information with a search result of the individual's name, and makes information on the Internet accessible to the average user.[1] The results of a search of an individual's name are, in all practical applications, his or her public reputation.

With the new accessibility of one's reputation, different governments have begun to question what are the implications of this. The European Union's Court of Justice responded to the question with the right to be forgotten. This right entitles EU citizens to ask search engines to de-index information about the individual if the information is "irrelevant, inadequate, inaccurate or excessive."[2] EU citizens can determine whether a newspaper article about the forced sale of property or the embarrassing picture is private or public information, and then can request private information from removed from the public sphere.

In contrast, the United States has not adopted the right to be forgotten or similar protections of online reputations. From the American perspective, the right to be forgotten creates tension with the freedoms of press and speech guaranteed in the First Amendment. Many in the United States consider the right to be forgotten akin to censorship and that, "The opportunity for abuse is obvious."[3] Individuals controlling information about themselves restricts the information others can collect; if the government protects an individual's control, the government is restricting the flow of information.

This case study will examine how the European Union and the United States protect private information and the flow of information through the lenses of the historical and cultural foundations of privacy and speech. This case study will specifically address the control an individual has over publicly accessible information about himself or herself; this does not include information that can be obtained through hacking, a warrant or through governmental mass data collection.

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[1] Assuming the person is not trying to be anonymous online and actively concealing their identity.

[2] Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González (European Union Court of Justice June 20, 2014) (InfoCuria, Dist. file).

[3] Baker, S. (2014, June 7). Contest! Hacking the right to be forgotten. Retrieved May 16, 2016, from https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/07/contest-hacking-the-right-to-be-forgotten/

European Union

The modern legal foundation for privacy in the European Union is drawn from the Charter of Fundamental Rights of the European Union (the Charter). Article 7 of the Charter states, "Everyone has the right to respect for his or her private and family life, home and communications."[4] Article 8 specifies privacy in the context of personal data stating that,

"Everyone has the right to the protection of personal data concerning him or her…Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified."[5]

These two articles well establish and protect privacy as a right in the European Union. The European Union prioritizes protecting private information of individuals over the free access of information. As such, EU citizens are guaranteed the protection to live a private life and the protection of the data documenting their lives.

A United States and European Union comparative legal scholar, James Whitman, argues that the European value of privacy originates from social and political traditions that emphasize "respect and personal dignity." [6] These traditions date back to the 17th century and an individual right to "personal honor," or protection from public shame and humiliation.[7] The most prominent threats to dignity and personal honor are "the excesses of the free press and the excesses of the free market."[8] An excessive free press could publish private information that harms the reputation of an individual. As such, European nations confine the press to address matters or individuals only within the public sphere.[9] Similarly, private information that could be considered property -- e.g. intellectual property, art, and photographs -- would be protected in a European free market system. Privacy laws restrict the excesses of the free press and market to protect the privacy of individuals. With this historical and cultural value of dignity for all, the European Union highly values privacy to protect people from shame, humiliation and the public disclosure of private information.

The "right to be forgotten" arose from this culture that highly values privacy. In 2010, Spanish citizen Mario Costeja González lodged a complaint with the Spanish Data Protection Agency that would eventually result in the right to be forgotten. González wanted information about his properties from over 10 years ago removed from the results of a Google search of his name. A Spanish newspaper had published information in 1998 about the forced sale of his properties; these announcements were now appearing in Google search results of Mr. Costeja González' name. Mr. Costeja González argued that since the sale was conducted and completed so long ago, the information was no longer relevant to the search results of his name, and he had already unsuccessfully petitioned Google Spain to remove these results. Ultimately, the European Court of Justice ruled that even this information that was originally publicly available was subject to European Union privacy laws and the European culture of privacy.

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[4] *Charter of Fundamental Rights of the European Union*. (2000, December 18). Retrieved May 16, 2016, from http://www.europarl.europa.eu/charter/pdf/text_en.pdf

[5] Ibid.

[6] Whitman, J. Q. (2004). The Two Western Cultures of Privacy: Dignity versus Liberty. *The Yale Law Journal, 113*(6), 1151. doi:10.2307/4135723. 1161.

[7] Ibid. 1164.

[8] Ibid. 1171.

[9] Ibid. 1172.

In a technological age where a Google Search of an individual's name is that individual's reputation, the right to be forgotten extends privacy online to protect people from shame, embarrassment and publication of private information. It is an extension of the history and culture of privacy in Europe.

However, the Court of Justice's ruling places Google in the position of executing and protecting an individual's right to be forgotten. Google must collect requests to be forgotten, decide whether the request is valid, and, if valid, to implement the request. In response to this Court of Justice's decision, Google convened an Advisory Council to address the "balancing act between an individual's right to privacy and the public's interest in access to information" that is required in implementing the right to be forgotten.[10] Members of the Council publicly discussed the merits and demerits of the right to be forgotten during Fall 2014 in seven cities across the European Union states. With expert opinions from those seven public meetings and in private meetings of the Council, the Council published a report with their advice for Google and Council members' opinions.

During the public meetings, experts presented a variety of opinions in support of and against the right to be forgotten. Experts had varying opinions on whether a right to be forgotten existed, or if there was another right that better fit the mandate of the decision. Some experts considered the Court's decision a right to privacy, right to erasure, right to regret, to one's identity, or to data protection, or even a right to be blameless. Some viewed the Court of Justice's decision as a challenge to a right to have history, a right to information, or a right to memory.[11]

The Council in the final report also presented the limits of the right to be forgotten. The Council argued the right to be forgotten does not state that the information about an individual must be completely removed from the Internet, but established an individual's right to ask Google to remove links from search results to information about himself or herself that is "inadequate, irrelevant or no longer relevant, or excessive."[12] Removing a link from a Google search of the individual's name, or "delisting," does not remove the content from the original location of the link. A "right to be forgotten" request is analogous to removing a book's reference card from a library, but not removing the book itself from the library. As such, the Council agreed that, "The ruling, while reinforcing European citizens' data protection rights, should not be interpreted as a legitimation for practices of censorship of past information and limiting the right to access information."[13] The "forgotten" link is still accessible on Google searches of other terms. The Council also restricted the right to be forgotten to European Union-based Google search, rather than the global Google.com search.[14]

The Council's final report consisted of specific actions for Google and other search engines to handle right to be forgotten requests. The criteria that should be considered when fulfilling a right to be forgotten request is the

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[10] *The Advisory Council to Google on the Right to be Forgotten* (Final Report). (2015, February 6). Retrieved May 17, 2016, from Google website: https://drive.google.com/file/d/0B1UgZshetMd4cEI3SjlvV0hNbDA/view. 1.

[11] *The Advisory Council to Google on the Right to be Forgotten* (Madrid). (2014, September 9). Retrieved May 17, 2016, from Google website: https://docs.google.com/document/d/1tFES5cz_n5gtq8WDbNiVxqVk-3NYxhJZsfZ42tbyjjA/pub

[12] *The Advisory Council to Google on the Right to be Forgotten* (Final Report). (2015, February 6). Retrieved May 17, 2016, from Google website: https://drive.google.com/file/d/0B1UgZshetMd4cEI3SjlvV0hNbDA/view. 2-3.

[13] Ibid. 6.

[14] *The Advisory Council to Google on the Right to be Forgotten* (Madrid). (2014, September 9). Retrieved May 17, 2016, from Google website: https://docs.google.com/document/d/1tFES5cz_n5gtq8WDbNiVxqVk-3NYxhJZsfZ42tbyjjA/pub. 27

requester's role in public life, the type of information requested to be removed, and the original source of the information. The Council also recommended a procedure for requesting Google to delist information, specifically the information a requester needs and should provide with the request so Google can adequately balance the request against a public right to information. Furthermore, the Council recommended that individuals could challenge Google's decision regarding the right to be forgotten before the local courts or data protection agencies.[15]

United States

The United States has not integrated the right to be forgotten or other online reputation protections into its legal framework. The legal view of privacy in the United States is physical privacy as protected by the Fourth Amendment[16] and privacy of reproductive rights as protected in the Supreme Court decisions, *Griswold v. Connecticut* and *Roe v. Wade*.[17] However, these privacy protections do not guarantee the protection of private information.[18] In the United States, privacy laws are intended to limit state action and interference into an individual's life, not for the state to limit personal action. The lack of a constitutional right to privacy arises namely because of the First Amendment that guarantees, "Congress shall make no law abridging… the freedom of speech or press."

First Amendment scholar Eugene Volokh states, "Broader information privacy rules are not easily defensible under existing free speech law."[19] A governmental protection of information privacy is a governmental restriction of what can be said about an individual; it would be a restriction of free speech and press and thus conflicts with the Constitution. The freedom of speech and press are explicitly protected in the First Amendment to preserve the marketplace of ideas. The theory of the marketplace of ideas is that a competition of ideas will be "the best test of truth;" the more competing ideas, the closer we come to the (theoretically perfect) one true idea.[20] Information privacy restricts the information that is considered in the marketplace of ideas and thus restricts free speech. The government cannot determine which topics are or are not excluded from the marketplace, and thus cannot generally protect information privacy under the First Amendment.

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[15] *The Advisory Council to Google on the Right to be Forgotten* (Final Report). (2015, February 6). Retrieved May 17, 2016, from Google website: https://drive.google.com/file/d/0B1UgZshetMd4cEI3SjlvV0hNbDA/view.

[16] No search without warrant.

[17] *Griswold* and *Roe* determined couples have the right to make decisions without governmental interference.

[18] The limited protections for an individual's privacy are under privacy torts and defamation laws. However these laws cannot be used against websites that publish or collect material created by separate individuals, like Google or Facebook, those sites are protected from lawsuit by Section 230 of the Common Decency Act.

[19] Volokh, E. (2000). Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking about You. *Stanford Law Review, 52*(5), 1049. doi:10.2307/1229510. 1051.

[20] Zrenner, A. (2015, June). 2015 Summer Fellows Research Journal - The Kenan Institute for Ethics at Duke University. Retrieved May 17, 2016, from http://kenan.ethics.duke.edu/2015-summer-fellows-research-journal/#alex_shame_on_you

Since the First Amendment explicitly protects speech and press, Congress and the Courts have hesitated and resisted adopting any restrictions of speech or the press. Legal scholars and lawmakers have even hesitated to legislate against so-called "revenge porn" or nonconsensual porn -- non-consensual and public sharing of intimate or sexual images of another person -- out of concern of violating the First Amendment. Supporters of laws criminalizing nonconsensual porn argued that the laws can be "narrowly drawn to protect both the right to privacy and the right to freedom of expression."[21] If written properly, the law would only prosecute for posting nonconsensual porn; if crafted poorly, the laws can unnecessarily censor images, online postings, or "chill" an individual's speech as First Amendment scholars describe how laws can discourage speech.

For example, the Arizona nonconsensual porn law was not clearly written and the ACLU has challenged the law in state court. The ACLU argued the law could have led to the censorship of nude art or newsworthy images (the ACLU gives the example of the "Napalm Girl" image of a young Vietnamese girl who was naked when running from a chemical attack during the Vietnam War).[22] Even in dealing with developing legal redress for victims of gross privacy violations such as the nonconsensual porn, the First Amendment protection of speech and press is considered before an individual's privacy.

Within this legal framework of prioritizing free speech protections, the EU's right to be forgotten ruling has been criticized as a governmental protection of self-censorship executed by a corporation. The central and most prominent criticism is that of censorship. Farhad Manjoo, writer of the technology blog "State of the Art" on the *New York Times,* wrote, "free speech advocates, calling the ruling vague and overbroad, warned of dire consequences for free expression…if the right to be forgotten was widely enacted."[23] Free speech advocates fear that individuals who use the right to be forgotten would suppress the information that others can obtain about them. Since the information is not necessary false or defamatory, an individual would be unnecessarily suppressing the flow of information. Furthermore, rather than the original content owner removing the information voluntarily, it is Google making the content effectively disappear. It's another operator obscuring almost completely legal information about an individual.[24]

If the right to be forgotten is equivalent to censorship, a subsequent concern is how the right could be manipulated and abused. Larry Page, the CEO of Google, expressed the concern that, "It will be used by other governments that aren't as forward and progressive as Europe to do bad things."[25] If a government can restrict the

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[21] Franks, M. (2015, November 2). *Drafting An Effective "Revenge Porn" Law: A Guide for Legislators* (Rep.). Retrieved May 17, 2016, from Cyber Civil Rights Initiative website: http://www.cybercivilrights.org/guide-to-legislation/

[22] First Amendment Lawsuit Challenges Arizona Criminal Law Banning Nude Images. (2014, September 23). Retrieved May 17, 2016, from https://www.aclu.org/news/first-amendment-lawsuit-challenges-arizona-criminal-law-banning-nude-images

[23] Manjoo, F. (2015). 'Right to Be Forgotten' Online Could Spread. Retrieved May 17, 2016, from http://www.nytimes.com/2015/08/06/technology/personaltech/right-to-be-forgotten-online-is-poised-to-spread.html?_r=0

[24] Solon, O. (2014, May 13). EU 'right to be forgotten' ruling paves way for censorship (Wired UK). Retrieved May 17, 2016, from http://www.wired.co.uk/news/archive/2014-05/13/right-to-be-forgotten-blog

[25] Williams, C. (2014, May 31). EU's privacy ruling gives Google a big headache; Internet giant warns repressive governments could take advantage of deleted histories. *The Daily Telegraph*. Retrieved May 17, 2016, from

flow of information to and between citizens with the right to be forgotten, the question arises of how the citizens would be able to hold the government accountable.

Furthermore, it is Google that must balance the right to be forgotten requests with freedom of information. Historically, the task of balancing rights has been left to the Courts or governments. Now, Google must "assess each individual request and attempt to balance the privacy rights of the individual with the public's right to know and distribute information." [26] The responsibility of balancing the right to privacy versus the right to inform, a role that has typically been confined to Courts, falls to Google, a corporation rather than a government. The Court of Justice's decision both created a potential for government censorship and paradoxically requires a corporation to do a traditionally governmental task.

A final criticism is the right to be forgotten is the wrong solution to the wrong problem. Coye Cheshire, a social and information network scholar, stated the problem as, "I don't believe that, in many cases, people 'lost' any control over their information at all, because they never really had any real control even before the Internet existed." As such, the solution may not be the right to be forgotten but a cultural shift in how to treat our information. Evan Selinger and Woodrow Hartzog, privacy scholars, assert that the correct solution is not the right to be forgotten, but rather is a right to obscurity. They write, "By accurately identifying the obscurity issues at stake where privacy is being discussed, we can… answer the difficult, but critical policy questions."[27]

According to critics, the right to be forgotten does not fit in this legal and political tradition of limiting state action and protecting the freedom of information and expression. In this view, the right to be forgotten, if implemented in the United States, would be a state action that limits the actions of a private actor, namely Google and those searching for an individual's name. The concern of implementing a protection of privacy in the United States is a violation of other's constitutional rights; as First Amendment Eugene Volokh summarizes, "My right to control your communication of personally identifiable information about me--is a right to have the government stop you from speaking about me."[28]

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http://mediacompolicy.univie.ac.at/wp-content/uploads/2014/10/The-Daily-Telegraph-EUs-privacy-ruling-gives-Google-a-big-Headache.pdf

[26] Ibid.

[27] Selinger, E., & Hartzog, W. (2014, May 20). Google Can't Forget You, But It Should Make You Hard to Find. Retrieved May 17, 2016, from http://www.wired.com/2014/05/google-cant-forget-you-but-it-should-make-you-hard-to-find/

[28] Volokh, E. (2000). Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking about You. *Stanford Law Review, 52*(5), 1049. doi:10.2307/1229510.