THE RIGHT TO BE FORGOTTEN

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Abstract

European Court of Justice ruled that EU citizens have a "Right to be Forgotten", that they could request that search engines remove links to pages deemed private, even if the pages themselves remain on the internet.

The Court in its judgement did not elevate the right to be forgotten to a "super right" trumping other fundamental rights, such as the freedom of expression or the freedom of the media. It only applies where personal data storage is no longer necessary or is irrelevant for the original purposes of the processing for which the data was collected.

It applies to 500 million European citizens whose data are strewn across billions of webpages.

These rights are not absolute; fair balance is required.

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Personal data has become the currency on the Internet. It is collected, stored and used in an ever-increasing variety of ways by a countless amount of different users, producing a "panoptic on beyond anything Bentham ever imagined". Cheap sensors, have made 'little big brothers' out of all of us, producing a complex interaction between our different roles as data controller and data subject. In this 'global village' where every piece of information can be remembered until eternity, the question of control over one's 'personal data' becomes the more important. The idea of a 'right to be forgotten' currently being pondered by the European Commission has been pushed forward as an important materialisation of this 'control-right'.

The right to be forgotten has been defined as an amorphous privilege that would allow individuals more control over their personal information, particularly that information, particularly that information collected and connected with new technology.

In May 2014, the European Court of Justice[1] ruled that EU citizens have a "Right to be Forgotten', that they could request that search engines remove links to pages deemed private, even if the pages themselves remain on the internet.

The right to be forgotten is intended to cope with privacy risks online by empowering individuals to control their own identity and information in the online environment. Thus, if an individual no longer wants his or her own data to be processed and stored by a controller (example: Facebook) and if there is no legitimate reason for keeping it, the data should be removed from their system.

The Court in its judgement did not elevate the right to be forgotten to a "super right" trumping other fundamental rights, such as the freedom of expression or the freedom of the media.

On the contrary, it confirmed that the right to get your data erased is not absolute and has clear limits. The request for erasure has to be assessed on a case-by-case basis. It only applies where personal data storage is no longer necessary or is irrelevant for the original purposes of the processing for which the data was collected. Removing irrelevant and outdated links is not tantamount to deleting content.

Much of the controversy surrounding this case has focused on the impact of the judgment on freedom of expression and the right of access to information, as well as the potentially devastating effect of a large amount of deletion requests. This is understandable, as with the prospect of an even more demanding EU data protection framework looming over the horizon, the decision is a potential game changer for the whole internet industry. However, the Court of Justice of European Union's decision is not only relevant to search engines or internet companies. The implications of the judgment are much wider.

There is understandable discomfort concerning implementation of this ruling by Google and other intermediaries. It applies to 500 million European citizens whose data are strewn

[1] Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González, C-131/12

across billions of webpages. When Google first responded with an online complaint form allowing individuals to identify "irrelevant, outdated, or otherwise inappropriate" links, apparently 40,000 claims were made within the first six days, with another 30,000 in the month following.

The risk is that, in order to manage the interests recognised in the ruling at scale, powerful but blunt tools may be deployed. Such tools, it is feared, may serve the interests of disinformation, rather than better information and more social cohesion.

The European Court of Justice's ruling has been labelled the 'right to be forgotten' – an unfortunate and polarising catchphrase and its legal and practical effect. Legally, this case is just one facet of individual privacy rights derived from the EU Data Protection Directive and the European Convention on Human Rights. Privacy rights inevitably involve boundary problems as they come into conflict with rights to freedom of expression and access to information. These rights are not absolute; fair balance is required.

In this context, and against the current default, the ECJ strongly emphasised the importance of individual privacy interests in otherwise privatised, economically-driven digital curation and navigation, recognising the ubiquity of digital information and the ever-increasing influence of search engines and other intermediaries in shaping who we are and what we do online.

THIS RIGHT HAS ITS SHARE OF PROS AND CONS

The Pros for EU Data Protection Rules are

Each and every single human being has a secret. The exact definition of a secret is: "not known or seen or not meant to be known or seen by others." I would like to put extra emphasis on the second part of this definition, which states that it is not meant to be known by others. As human beings we have a right to do as we wish with our secrets, we deserve to be able to choose who we can trust with it and who we can't. Unfortunately sometimes we are stripped of that privilege. Nerd Herd stated "The right to be forgotten on the Internet sometimes constrains us from viewing things we want to know more about." I would like to flip the perspective on this and view it from the victims point of view, in this case the "right to be forgotten" sometimes deprives us of our personal right to choose what others can think of us. This is a real life example; Nikki Castouras, crashed a sports car. The impact was so forceful that it decapitated Nikki in a horrendous manner. It was so horrible that her parents were not even allowed to identify the image. A few images were taken from the scene and sure enough they surfaced on the Internet. The image spread like wildfire and the family had no way of stopping it. You can only begin to imagine how terrible it must be to have to avoid the Internet all-together because images of your dead daughter are being shown everywhere and there is nothing you can do to stop it. Had the right to be forgotten been implemented when this occurred, it would have spared them from this. The simple matter is that this is a breach of privacy and should be illegal.

Even though some things are rights it doesn't necessarily mean that it can't interfere with other rights. Humans for example have a right, which is freedom of speech, however certain situations remove that right. For example revealing information about the government is a crime, even though they have a so-called 'Freedom of speech' In an article of Stanford law Commissioner Reding states "If an individual no longer wants his personal data to be processed or stored by a data controller, and if there is no legitimate reason for keeping it, the data should be removed from their system."

To conclude I would like to state that the right to be forgotten should definitively be a civil right since it helps people maintain their right of personal privacy. Helps remove a emotional burden on people who have had to undergo some sense of breach of privacy which has emotionally hurt or scarred them, and lastly helps strengthen internet security and safety online. Also history will never be removed. History is usually applying to multiple people for example a war, containing thousands and thousands of humans. The right to be forgotten mainly applies itself to individuals. As such it is highly unlikely that this will interfere with history. I would like to quote the President of the NSW Council for Civil Liberties Stephen Blanks as saying "I think people view information about them-selves as something they want to be able to control".

The Cons for the EU Data Protection Rules are

Many of us had once in our life have been outraged for our right to know in the public eyes. Whether it be from a blocked website or maybe even Area 51. We all question things in our world, but do we know what they are trying to keep from us? The 'right to be forgotten' on the Internet sometimes constrains us from viewing things we want to know more about.

Right to be forgotten: The concept that individuals have the civil right to request that personal information be removed from the Internet.

Ought: Is used to express duty and obligation

Civil Right: The right to personal liberty.

Value: Property

The definition of property according to Dictionary is the right of possession, enjoyment, or disposal of anything, especially of something tangible. Now we may not always want to dispose of some particular site of ours or for it to be blocked from us. This is highly important towards us because we may have ourselves blocked from our own website or photo because it may have been flagged.

Justice demands individuals should be accountable / responsible for their actions Article 19 of the Universal Declaration of Human Rights states: "Everyone has the right to freedom of opinion and expression, this right includes freedom to hold

opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." This is important towards us because there should be no barrier to our freedom of expression and our thoughts and ideas.

By allowing people to remove their personal data at will, important information might become inaccessible, incomplete and /or misrepresentation of reality. The implementation of a fully-fledged 'right to be forgotten' might conflict with other fundamental rights such as freedom of expression and access to information. This information is important because there may come a time when we post personal information about ourselves then it becomes outdated which alleges confusion towards strangers and or employers or schools.

Also, if the 'right to be forgotten' contradicts with other rights (freedom of speech), Then it can't be a civil right. On an article on Stanford Law Review dated on February 13, 2012 a Professor of Law at the George Washington University a man named Jeffrey Rosen said "In America, In contrast to European Law and Practice, publication of someone's criminal history is protected by the First Amendment, leading Wikipedia to resist the efforts by two Germans convicted of murdering a famous actor to remove their criminal history from the actor's Wikipedia page." In America this law implies to criminals.

The important issue is that we also have a freedom of knowledge that needs to be issued in the "right to be forgotten". "Factsheet of the 'Right to be Forgotten' Ruling" June 3, 2014 on European Commission "The proposed European regulation, however, treats take down requests for truthful information posted by others identically to take down requests for photos I've posted myself that have then been copied by others: both are included in the definition of personal data as 'any information relating' to me, regardless of its sources. I can demand take down and the burden, once again, is on the third party to prove that it falls within the exception for journalistic, artistic, or literary exception, This could transform Google, for example, into a censor-in-chief for the European Union, rather than a neutral platform. And because this is a role Google won't want to play, it may instead produce blank pages whenever a European user types in the name of someone who has objected to a nasty blog post or status update. The 'right to be forgotten' should not be a civil right because search engines will become censors rather than true search engines.

DATA RECEIVED BY THE SEARCH ENGINES FOR REMOVING INFORMATION AVAILABLE ON THE NET

Sr. No.	Search Engines	Requests Received
1.	Google	170,706 URLs (41.8 percent)
2.	Facebook	3,332 links
3.	Profileengine.com	3,289 links

4.	YouTube	2,392 links

In addition, the 'right to be forgotten' places an unjust burden on the search engines, the search engines will begin eliminating all material (fearful of lawsuits). The right to be forgotten could make Facebook and Google , for example , liable for up to two percent of their global income if they fail to remove photos that people post about themselves and later regret, even if the photos have been widely distributed already. Unless the right is defined more precisely when it is promulgated over the next year or so, it could precipitate dramatic clash between privacy and free speech, leading to a far less open Internet.

First of all, the 'right to be forgotten' seems to presuppose a contractual relationship. It can/should only be applied in situations where the individual has consented to the processing of personal data. The concept is not suitable to cope with privacy issues where personal data is (legally) obtained without the individual's consent. Additionally, it is important to remember the right only provides an ex-post solution to privacy issues.

One of the most repeated arguments against a 'right to be forgotten' is that it would constitute a concealed form of censorship. By allowing people to remove their personal data at will, important information might become inaccessible, incomplete and/or misrepresentative of reality. There might be a great public interest in the remembrance of information. One never knows what information might become useful in the future. Culture is memory. More specifically, the implementation of a fully-fledged 'right to be forgotten' might conflict with other fundamental rights such as freedom of expression and access to information. Which right should prevail when and who should make this decision . Finally, defamation and privacy laws around the globe are already massively abused to censor legitimate speech. The introduction of a 'right to be forgotten', arguably, adds yet another censoring opportunity.

How should the right deal with ubiquitous and opaque cross - platform data transfers? One could request 'personal data' to be deleted on one site, but meanwhile the information might have been copied and/or 'anonymised' already. All these potential third-party uses (and/or 'secondary uses') are practically untraceable and do not necessarily take into account deletion of the primary material. Moreover, the right also raises some technical implementation issues. In short, besides traditional jurisdictional issues, the actual implementation of an effective 'right to be forgotten' brings along many practical difficulties as well.

The Internet is evolving from a practically entirely 'free' network to a primarily commercial environment. In this new setting, personal data has become the major currency. The greediness for this currency and the limitless data collection capacities of modern technology, have caused a major power shift between data users and data subjects. On the Internet, the latter are virtually powerless against the first. Even if an individual knows that his or her data is being collected / used, there is often not much

that can be done in order to prevent this. Notice and takedown procedures might take content out of public sight, but do not normally result in removal from the data user's servers. Public outcry and a lot of media coverage have not led to much improvement yet. And the claim that competition is only 'one click away' has no value in this context. The free market argument depends on transparency and does not take into account network externalities and lock -in issues . Further, the few true efforts that are made by market players, necessarily lack in credibility as their business model generally depends on the collection and use of personal data. Finally, consumers are showing a paradoxical demand for more data collection, which illustrates that they do not necessarily want more 'privacy' (oh, what a vague concept) , but especially want more 'control'. Concluding, it has become clear over the last few years that it is impossible to rely on the market alone to give back control to individuals. Code and especially the law will be necessary to assure a healthy and balanced market.

One of the most interesting ideas on how to implement the 'right to be forgotten' is that of an 'expiry date'. It has the considerable advantage that an individual does not have to worry any longer after personal data is shared. But the practicability of this theoretical principle is far from evident. Personal data could , for example, be 'tagged' with an expiry date (adding so-called metadata). This system relies on the willingness of data users to respect it and should probably be accompanied by a corresponding law forcing data users to comply. Alternatively a more profound technical protection could be inserted in the data, similar to DRM protection for intellectual property. In both cases, individuals should have a legal recourse against circumvention of these expiry dates. Although interesting research is being done on the latter, the first voluntary system seems most technically feasible at this point in time. Nonetheless , the idea that an individual will have to give an expiry date each time personal data is being collected seems unrealistic. Besides, it risks becoming a merely proforma requirement that no one truly pays attention to, as is already the case in the current consent regime. Additionally, nothing would prevent someone from copying and /or decrypting the data for as long as it is available. A 'privacy agent', monitoring all personal data transfers and allowing people to manage their expiry preferences over time according to different types of data, controllers and contexts, could contribute to a more effective 'user choice'. Obviously, such centralised data-managing software raises many other privacy questions.

As a safeguard against censorship and unwanted erasure of data, the 'right to be forgotten' should be limited by a 'public interest' exception. This exception would cover, but is not limited to, the free speech issues in article 9. To decide on its applicability, one could rely on a 'substantial relevance' standard (with regard to the personal data) and a proportionality test (with regard to the request for deletion). Undoubtedly, an Article 29 Working Party opinion on the 'public interest exception', especially with regard to its compatibility with art.7(e) of the DP Directive, would bring more clarity and lead to cross-border efficiency. But ultimately, it will be national judges and data protection authorities that decide on the exact scope of the

exception. The burden of proof , as EU Commissioner VIVIANE REDING hinted already, should be on the data controller. Finally, it should also be emphasised that the exception only applies to actual personal data, which might be separated from other content it is part of.

In the form proposed by the European Union, the right to be forgotten cannot easily render a substantial contribution to an improvement of data protection. The concept is probably too vague to be successful. History has shown that human rights need to be embedded in strategies, and such strategies have to be actually used. Consequently, a clearer picture of the actual objective of a new fundament right is necessary. The proclamation of a right to be forgotten as such does not suffice. It recalls the myth of Pandora's box: Impelled by her natural curiosity, Pandora opened the box and all the evils contained in it escaped. Moreover, a concretization of the right to be forgotten might be achieved by more specific codes of conduct, such as the French "Code of Good Practice on the Right to Be Forgotten on Social Networks and Search Engines," encompassing practical commitments that could become the starting point for a future international memorandum of agreement.

The right to be forgotten must be complemented with legal instruments to guide individuals and entities on how to apply data protection principles on the basis of the acknowledgement of right holders 'autonomy. Together with such guidelines, accountability mechanisms need to be introduced and audit procedures should be established. Possible means could be privacy marks or seals from a self-regulatory regime, which would then be monitored by established data controllers according to accountability procedures applied by the program or scheme organization. Such an "evaluation" also corresponds to the democratic theory that holds governing bodies accountable in responding to the public's interest. This would enable technical measures to be introduced much faster than legal instruments, and the technical measures would have a global scope of application that is not limited by geography. Returning to Pandora's situation, by the time she managed to close the lid, nearly the entire contents had escaped. Only one last thing lay at the bottom, and that was hope.