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'Right to be forgotten' is redrawing Internet content rules

Pre-Internet, the distribution of embarrassing photos, crude comments and even criminal records resided largely in the realm of bathroom walls and handbills. Bathroom walls could be washed, files lost, and photos destroyed.

With the rise of digital communications, a simple Internet search can disclose a wide array of accurate (and inaccurate) information about virtually anyone. It isn't only the rich and famous, such as Jennifer Lawrence, who have to worry about the public disclosure of private photos.

To the contrary, anyone who used Snapchat now faces the dismaying reality that a service expressly founded on the ability to avoid any trace of shared data has been hacked. Worse, the hackers are already disclosing the data of average citizens.

Into this privacy void, a personal "right to be forgotten" is a powerful game changer. This right clearly raises concerns over the balance between personal privacy and censorship. It also threatens to alter the carefully constructed balance between content owners' and service providers' rights under copyright law.

A large swath of Web material today comprises user postings, celebrity gossip and tabloid-style news sites. In the United States, the Digital Millennium Copyright Act affords most service providers, including Web hosts and search engines, a safe harbor against copyright liability. 17 U.S.C. Section 512. Service providers can host, search and link to sites that contain a wide variety of personal information with no realistic threat of liability if the dissemination of such materials is unauthorized. The creation of a right to be forgotten seriously undermines any comfort these safe harbors provide.

The strongest support for a right to be forgotten arises in the European Union. The EU has always provided stronger privacy protection for personal data than the United States. Since 1995, the EU Data Privacy Directive (Directive 95/46/EC) has imposed stringent obligations governing the collection, retention and use of "any information relating to an identified or identifiable natural person."

In 2012, as part of its comprehensive reform to strengthen online privacy rights, the European Commission issued a draft regulation specifically creating a right to be forgotten. (COM (2012), Article 17. This right grants individuals "the right to obtain ... the erasure of personal data relating to them and the abstention from further dissemination of such data."

Before this controversial proposal could be adopted, the European Court of Justice, roughly equivalent to the U.S. Supreme Court, held in May that a right to be forgotten already existed and could be violated by results obtained using an Internet search engine.

In *Google Inc. v. Costeja* (Case C-131/12), the CJEU held that Google's search linking to a Spanish newspaper detailing a forced sale of Costeja's assets in 1998 in connection with social security debts violated his privacy rights. The court found the information to be "inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes" for which it was listed by Google. Google was ordered to remove the links to the page from future search results.

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To comply with this new right to be forgotten, Google has created a request form to do so. As of this month, Google has processed more than 150,000 requests from EU residents and has removed more than 170,000 links. Individuals can seek removal if the linked information is "irrelevant, outdated or otherwise objectionable."

Google reserves the right to decline to remove "certain information about financial scams, professional malpractice, criminal convictions or public conduct of government officials" if the public interest outweighs such removal. It has yet to disclose what factors it considers in reaching such decisions.

In October, a Japanese court similarly ordered Google to remove links to articles about an unproven allegation of criminal activity.

Even in California, a modified right to be forgotten for teenagers is due to take effect in January (California SB 568). Under this state provision, minors have the right to demand removal of basically any content they have posted.

Although present debates about the scope of a right to be forgotten have focused on privacy issues, there is little doubt that this right also poses serious challenges to free speech and information access. In the United States, it also could undermine present balances between content control and service provider liability under copyright law.

For authors (journalists, bloggers and so forth) the right to remove works from public view introduces the equivalent of the moral right of "withdrawal from publication" to U.S. law. At least under international law, such withdrawal is premised on the need to demonstrate some harm to an author's reputation. Yet neither *Costeja* nor California's SB 568 requires any such proof. To the contrary, even accurate information can be removed.

For service providers, new obligations to remove content based on end-user demands for privacy would not be covered by a DMCA safe harbor, whose focus is on content provider demands. The DMCA's elimination of any obligation to monitor user content (section 512(m)) would be similarly unavailable.

Where copyright and privacy law conflict, internationally, copyright does not appear to receive any extra weight in the balance. Thus, in a case involving a demand for end-user identity disclosure, *Promusicae v. Telefonica de Espana* (Case C275/06), the CJEU held that member states were not required "to lay down, in order to ensure effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings."

Instead of waiting for the right to be forgotten to become fully enshrined in international law, Web hosts and other service providers can take positive steps now to reduce potential liability.

For those who decide, as a business matter, to allow users' removal demands, Google's form provides a workable first step. For those who prefer a wait-and-see approach, terms of service and privacy statements should still be reworked to include privacy issues among the bases for content removal and access denial. Indemnifications should be similarly expanded to expressly include privacy laws.

The right to be forgotten has a strong emotional appeal for a public that feels its personal space rapidly diminishing. We need to begin a serious debate about the contours of any such right on both a domestic and international level. If not, the rules of the game may change without us. The stakes are too high for both sides to allow that to happen.

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