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The Resilient Internet

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Abstract

Many commentators laud European privacy law as a vital protection in the Internet age. They hail the "right to be forgotten" as necessary to individual privacy. Conversely, commentators on the other side champion free expression and highlight the censorship threat implicit within the right to be forgotten.

But few have discussed the practicalities. The right to be forgotten, as applied, is not working. As soon as European law strips content from Google searches, for example, that content is added back into the cyber commons through alternative avenues. The controversy, in other words, may be theoretical only, since implementation of the "right to be forgotten" falters against Internet resilience.

This paper suggests that European policymakers failed to confirm their privacy law to the Internet's architecture. They failed to account for the borderless flow of information, leaving the ongoing controversy over free expression and censorship moot.

Keywords: Resilient; Internet; Google; Socio-political; Privacy law; European policy makers

Internet's Architecture

Mario Costeja Gonzales, a Spanish lawyer, could not pay his debts [1]. His home was repossessed and a local newspaper, *La Vanguardia*, published a 36-word notice of the debt. But the short notice, published only once in 1998, followed Costeja every year thereafter. Google searches under Costeja's name consistently retrieved the 36-word notice of his old debt – even fifteen years after the original 1998 publication. Costeja sued, asking a Spanish court to delete the record of the debt.

Costeja claimed a "right to be forgotten" – that the old debt was no longer relevant and that both Google and *La Vanguardia* must forever erase the 36-word notice and all reference to it [2]. The court held that Google must delete any link connecting Costeja to his old debt [3].

The ruling was immediately controversial. It set a broad precedent, conferring on European residents a new legal right to force erasure of previously published personal information [1]. The right requires that Google and similar data "controllers" delete information deemed "inadequate, irrelevant or no longer relevant."

But the court provided little guidance in determining when personal information is subject to mandatory erasure due to "irrelevance" or "inadequacy." Where do media rights, self-expression, and free speech factor into the court's standard? What if a European politician demands that Google delete all links to past indiscretions? What notification, if any, must Google give to websites and others that *their* links have been erased, or "cast into oblivion" as one reporter said when his blog was delisted from Google searches? [4].

Without answers to these questions, Google complied by creating a data erasure request form [5]. Within one day of the form's publication, Europeans submitted 12,000 requests to delete information, growing to 41,000 requests in four days [6]. One source posits that approximately 33% related to accusations of fraud, 20% to other serious crimes, and a further 12% to child pornography [7].

As of April 2016, Google had fielded over 423,000 requests to deactivate more than 1,477,000 URLs and had deleted over 42% of those, approximately 535,000 links [8]. Microsoft and Yahoo have also begun processing requests as a result of the court's ruling and have already deleted thousands of links [9].

Commentators from diverse socio-political backgrounds but particularly from the United States decry the right to be forgotten as antithetical to free expression and as distorting the benefits attending unfiltered access to information. Professor Michael Rustad fears "the right to be forgotten will lead to censorship of the Internet because data subjects can force search engines or websites to erase personal data, which may rewrite history [10]."

Wikipedia's founder, Jimmy Wales, labeled Europe's approach "completely insane," arguing that "in the case of truthful, non-defamatory information obtained legally, I think there is no possibility of any defensible 'right' to censor what other people are saying. You do not have the right to use the law to prevent Wikipedia editors from writing truthful information, nor do you have a right to prevent Google from publishing truthful information [6]." Stanford scholar, Jennifer Granick, says this "marks the beginning of the end of the global Internet, where everyone has access to the same information, and the beginning of an Internet where there are national networks, where decisions by governments dictate which information people get access to [11]."

But will these predictions come true? Is European privacy law a legitimate threat to international free speech?

Start with "patient zero," the first person granted anonymity under the right to be forgotten. Mario Costeja sought to erase any report of his 1998 debt, and yet in a single day in 2014, 840 articles in the world's largest media outlets were published in reference to his case, including in countries where his name would otherwise never have been heard [12]. Today, a Google search under Costeja's name generates thousands of articles, linking him to the right to be forgotten, and ultimately to his

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1998 debt. Costeja's attempt to suppress information only amplified it.

But perhaps Costeja's case is unique. Costeja was the first to exercise the right and consequently the most controversial. Maybe subsequent petitioners seeking data erasure succeeded in withdrawing their personal information from the public eye. A close look, however, indicates that these less polemical erasure requests face similar barriers, revealing the difficulty inherent in digital data erasure.

For example, the website "Hidden from Google," launched by American web developer Afaq Tariq, archives deleted links along with the relevant search term and the source that revealed the missing information [13]. Links to information involving a financial scandal, a shoplifter and a sexual predator have disappeared from Google search results only to reappear on the "Hidden from Google" webpage [13]. Media outlets have followed suit. The British Broadcasting Corporation now republishes the links to its stories that have been deleted from Google searches [14].

Tariq's webpage and the BBC's publication presage the failure of the right to be forgotten and highlight the Internet's resilience. As soon as European law strips content from Google searches, that content is added back into the cyber commons through alternative avenues.

The best-case scenario for proponents of the right to be forgotten is that "deleted" content becomes slightly more difficult to find. Google currently monopolizes the search engine market and has been likened to the card catalogue of the Internet library [15]. But if it continues to delete links to content in compliance with European privacy law, that status may very well falter. The more content Google scrubs, the less attractive its service, opening a market for smaller, perhaps regional search engines that do not have assets or market-share in Europe and are therefore not subject to European law.

Conclusion

In the long term, European privacy law will not realize its goal of ensuring the privacy of EU citizens who seek to remove their previously published personal information from public access. It may, however, dilute Google's primacy as search engine juggernaut – (a perhaps unsurprising secondary effect, given the European Commission's ongoing efforts to destabilize Google's dominance in Europe). Europe's failure to effectuate privacy goals is due, in large part, to the borderless flow of information over the Internet. Until Europe conforms its policy-making to the Internet's architecture, ongoing regulatory efforts will promote, if anything, unintended anti-trust consequences rather than privacy objectives.

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