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EU Data Protection

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Views on Impact for Content Publishers of Right to Be Forgotten Ruling

The European Court of Justice's recent right to be forgotten ruling—which held that individuals have the right to compel Google Inc. and other search engines to remove search results linking to websites containing personal information about them (13 PVLR 857, 5/19/14) *—may have an impact well beyond just search engine results, particularly in regard to content publishers.*

Bloomberg BNA Privacy & Security Law Report Senior Legal Editor Donald G. Aplin posed a series of questions to Mark Sableman, a partner specializing in intellectual property, media and information technology law at Thompson Coburn LLP in St. Louis. Before becoming an attorney, Sableman worked as a newspaper journalist. He provided his insights June 12.

BLOOMBERG BNA: The ECJ's right to be forgotten ruling on its face applies to search engine companies, such as Google, and may by extension apply to social media and other companies that have the functionality to index and link materials, but do you think that the actual content to which these services are linking, and therefore the companies that publish content, may also be significantly affected?

Sableman: Yes, in the long run the right to be forgotten is likely to have its greatest effect on original publishers. Individuals who want to erase digital records about themselves will generally want to remove those

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records at the source, not just in the databases of intermediaries like Google and other search engines. In fact, it was unusual—and unexpected by most observers—that in the Google Spain case, an intermediary (Google) was required to remove a record that the original poster (a Spanish newspaper) was allowed to continue posting. The Spanish court had found that the publisher had a free expression right to continue its posting, because its report (about a debt-collection proceeding against the plaintiff) was a fair and accurate report of a prior official proceeding, and hence protected by an official report privilege.

In many of the situations where we can expect future right to be forgotten claims, the underlying publisher won't have the same privilege to assert. A lot of the Internet postings that people find most objectionable are made by private parties, often on message boards, blogs and other private sites, and are unlikely to be privileged like the posting at issue in the Google Spain case. And even media postings aren't always privileged. In the Google Spain case, the publisher essentially litigated and won its official report privilege in the context of a right to be forgotten case. We can expect that in future right to be forgotten cases, publishers won't always succeed on their free expression defenses—or they may find it more prudent to comply with the applicant's takedown demand than to litigate their defenses.

The decision will inevitably affect the thinking of publishers, directly in Europe and indirectly in the rest of the world. In Europe, every Internet posting is now subject to a potential right to be forgotten demand. Of course, the right to be forgotten has limitations. And additionally, freedom of expression rights must be applied in each case, meaning many claims can and will be properly rejected. But publishers will inevitably consider the possibility of takedown demands when they publish. After Google Spain, they likely will think more carefully about the personal privacy interests of what they publish, how they publish it and how long they keep it published. Even if the decision was limited to the obligations of search engines—which it isn't—it puts a new focus on the implications of publishing personal information on the Internet.

BLOOMBERG BNA: How do you think the balancing act between individual data subject privacy and the public interest in seeing the information—the central legal test established by the ECJ for right to be forgotten decisions—may be applied in the context of publishers of information rather than services that link to content?

Sableman: The balance ought to be the same regardless of whether it is made at the publisher level or the search engine level. Again, the unique situation of the Google Spain case—where the search engine but not the publisher was obligated to take down the information—may be giving us an unusual perspective. The interesting thing about the right to be forgotten balancing act is that it seems to occur on two levels.

Initially, in applying EU data protection laws, the data protection agency and courts must strike a privacy/public interest balance. The standard should be the same for all parties and across all levels of publication—original publishers, search engines, social media companies. There are various elements on each side of the balance. Factors considered in favor of the applicant's takedown request include the private nature of the data, whether it is old or out of date, whether it is no longer accurate and whether its publication is no longer necessary or appropriate in light of the purposes of its original publication. Indeed, one of the key factors that prompted the ECJ to demand takedown was that the information was old and out of date. On the publisher-poster side, courts must consider the legitimate interest of Internet users to have access to the information. Unfortunately the ECJ didn't elaborate on this rather vague standard.

From a U.S. perspective, the EU Data Protection Directive (95/46/EC) is structured in a strange way. The directive requires this balancing of personal and public interests, and yet it is also subject to freedom of expression defenses on top of that, which are applied at a member-state level. Member of the European Parliament Jan Philipp Albrecht, the lead negotiator in Parliament for the proposed European Commission data protection regulation (13 PVLR 444, 3/17/14), has pointed out that Article 80 of the proposed regulation would specifically provide that member states must make exceptions to the right to be forgotten whenever it is necessary ''to reconcile the right to the protection of personal data with the rules governing freedom of expression.'' And he says that analysis applies to the Data Protection Directive too.

The best thing that content providers can do is act like true publishers. That is, they can, and should, apply editorial judgment to what they publish.

So it seems like there is a national law freedom of expression defense applied, over and above the balancing of rights inherent in the directive or regulation. (That is actually what occurred in the Google Spain case. Spain's official report privilege, part of its protection for freedom of expression, allowed the original publisher to keep posting the information, even though the ECJ found the private/public interest balance to weigh in favor of privacy.)

There shouldn't be any doubt that freedom of expression defenses should be applied to all defendants, and especially to media publishers. Indeed, the rights of journalists were specifically mentioned in an early draft of Article 80 of the proposed regulation, and Albrecht has stressed that the freedom of expression exemption is meant to cover the media. Followers of future right to

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be forgotten cases will be particularly interested how member states apply the freedom of expression defense.

BLOOMBERG BNA: So what should content providers be doing to anticipate potential right to be forgotten enforcement? In short, are there steps they can take to lower potential liability?

Sableman: It seems odd that this should be controversial, but the best thing that content providers can do is act like true publishers. That is, they can, and should, apply editorial judgment to what they publish. European publishers must now understand that their judgments about what they post and retain about individuals are subject to second-guessing by data protection agencies and courts. In a sense, the same kind of legal scrutiny that publishers always confronted about their original publications now applies to their decisions to maintain information on the Internet.

The ways that publishers have historically defended their original content publication decisions were: (a) to assert legal privileges that protect publications in the public interest (like, for example, the official report privilege); and (b) to make well-considered and defensible editorial decisions. That should also be the formula for continued Internet publication.

This will, however, require a shift in practices. For a long time, the thinking was that once an Internet publisher published something, it could and should stay posted indefinitely, given the low cost of digital storage. The EU right to be forgotten tells European publishers that just as they made careful and informed original publication decisions, they should make careful and informed decisions about continued Internet posting. Their editorial judgment doesn't end with the original posting; it needs to continue to be applied to the continued posting, particularly if time or other events make the original content inaccurate, out of date or no longer publicly significant.

In short, content publishers in Europe are being required, essentially, to not turn off their editorial judgment on the day of publication. And they will be judged as to whether they have made sound judgments about continued publication. If, in future right to be forgotten cases, a European court directs that a publisher take down information (after finding no sufficient freedom of expression interest to override the privacy interest), that decision to some extent will reflect a judgment on the publisher. It will suggest that the publisher acted improperly, at least by the standards of the EU Data Protection Directive (or regulation, if it is enacted).

Google is in a little different position. Its search engine, widely admired and used worldwide, is like a master librarian, indexing the Internet and making it searchable and available to everyone. No one really expected Google to apply editorial judgment every time it compiled search results and presented them to users. So when the ECJ found that the individual plaintiff's privacy rights outweighed the public interest in having his information indexed and presented by the Google search engine, this was no reflection on Google.

Google had performed its search function admirably; the court just viewed the particular information at issue as sufficiently private and out of date that it shouldn't be made so readily available. I assume that at the Googleplex they are shrugging their shoulders and muttering about ''those crazy Europeans,'' but they don't have reason to feel insulted about the decision.

BLOOMBERG BNA: In a recent report on big data (*see related report*), Ontario Privacy and Information Commissioner Ann Cavoukian said in the executive summary that ''Every two days, we create as much new data as we had created between the dawn of civilization and 2003.'' Given that kind data stream, is it realistic to think that, even with the exercise of more editorial discretion, removing data from the Internet—or at least removing links that make it easier to find those data—might be effective?

Sableman: Internet practices often go through several phases. In the first phase, the remarkable new technology seems to be so totally transformative that it turns everything upside down. Remember the cries of the early days, that information would be free, and that because the Internet allowed anyone to respond to false allegations, it would mean the death of libel and disparagement claims? Ultimately price tags were placed on digital information—see iTunes, e-books and a thousand other examples. And traditional laws and torts readily adapted to the digital landscape—consider how libel cases have been asserted even based on 140-character Twitter posts.

The ability of the Internet to remember everything seems at first blush like one of those totally transformational features. But there are signs that we'll find ways to adapt this feature as well to make it more comfortable for people and business.

The EU right to be forgotten is one such adaptation. New technologies that are designed to make information disappear after a certain amount of time, like Snapchat, are another. The scholar Viktor Mayer-Schönberger, in his book, ''Delete: The Virtue of Forgetting in the Digital Age,'' offers a whole variety of possible techniques for dealing with digital information in ways that he thinks is more compatible with human nature and human history. In his view, forgetting is the norm.

For example, he suggests that rather than keeping everything online forever, information publishers may at some point take old information offline and place it in some offline digital archive. That keeps old information available for researchers and those with specific needs, but it avoids the hurtfulness of childhood mistakes—a misdemeanor, or an embarrassing incident written up in a news account—following an individual all over the world for the rest of her life.

Because of convenience and the need for uniform rules, more and more businesses seem to be acknowledging that the European data protection rules are becoming de facto international standards.

Also the right to be forgotten debate is reviving thinking in journalistic circles about the ethics of long-term

posting of personal information. Some college and general publication newspapers in the U.S. have stopped the regular publishing of minor crime information, realizing that the harm of long-term publication may be disproportionate to the public interest. The flurry of anti-mugshot-publication state laws in the U.S., although misguided because such laws clearly violate the First Amendment, has caused some mainstream publications to give further thought to whether they really want to be in the business of publishing mugshots at all, much less forever.

So we don't know where this is going, but there are signs of changing practices, and those of us in the U.S. may even have to give a little grudging acknowledgement to the Europeans jump-starting the discussion.

BLOOMBERG BNA: Should primarily U.S. companies be concerned that the ECJ takes a pretty broad view on the extraterritorial application of the right to be forgotten and what European Commission Vice-President and Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding recently said about the ruling that ''data protection law will apply to non-European companies if they do business on our territory'' (13 PVLR 992, 6/9/14)?

Sableman: Because of convenience and the need for uniform rules, more and more businesses seem to be acknowledging that the European data protection rules are becoming de facto international standards. So to some extent Reding is succeeding in that regard. But it is going too far to suggest that EU rules can be enforced in the U.S.

The SPEECH Act, enacted by Congress and signed by President Obama in 2010, 28 U.S.C. § 4101, specifically prohibits enforcement in U.S. courts of foreign judgments that abridge First Amendment freedoms. For that reason, a U.S. court is highly unlikely to enforce in the U.S. any EU right to be forgotten judgment. Enforcement will be limited to the EU subsidiaries that are clearly subject to EU law and EU courts—for example, Google's Spanish subsidiary, which was the defendant in the Google Spain case.

BLOOMBERG BNA: Do you think the ECJ ruling has any effect on, or lessons for, how information publishers act, under laws such as the Communications Decency Act (CDA), 47 U.S.C. § 230, which provides that interactive computer service providers are immune from any liability for publishing information provided by another information content provider?

Sableman: It has no direct effect, but I think the ECJ judgment sends a message that the era of magical broad-based Internet exemptions for publishers could be endangered if publishers don't demonstrate that they are responsible in the way they handle their digital content.

Google took the position that it had a right to index and reveal everything that was on the Internet, with no limitations. That's similar in some ways to how some U.S. publishers view their privileges under Section 230 of the CDA, and the Digital Millenium Copyright Act (DMCA).

Section 230 permits intermediaries an immunity from any third-party content they post. In light of that freedom, many U.S. publishers (news sites, message boards, consumer review sites, among others) welcomed anonymous commentators because the Internet made it possible. And they often left unedited those commentators' potentially mean, nasty or reckless comments because they were allowed under Section 230. Similarly, in the case of infringing copyrighted material, some U.S. websites regularly accepted such materials, knowing that the DMCA protected them so long as they properly responded to takedown demands from the copyright owners.

These positions, which inherently involve refusals by publishers to make judgments as to the suitability and appropriateness of material that they publish, don't go over well with the public (or in the Google Spain case, with the ECJ), and can lead to backlashes. Internet publishers have long asked for the freedom to regulate themselves. But they are more likely to obtain, and retain, such rights, if they apply reasonable judgment to their Internet publishing decisions. If the right to be forgotten case tells European Internet publishers that they need to apply responsible judgment to the continued posting of personal information, it also tells U.S. publishers that they would be wise to apply responsible judgment even when they avail themselves of the broad protections of Section 230 and the DMCA.

For example, Viacom Inc. fought hard against YouTube a few years ago, challenging the many infringing videos that YouTube hosted in reliance on DMCA protection. YouTube ultimately prevailed, not just because of the DMCA, but also because it implemented many voluntary preventative practices, such as automatic screening for infringing postings. One of the critics of Section 230, Michael Fertig, chief executive officer of online reputation management company Reputation.com, has denounced that law for the anonymous, often scurrilous, third-party material that it permits to be posted, asserting it has created a ''Wild West 2.0.''

You can look at all of this—continued posting of old personal information, hosting of unverified third-party content and hosting of infringing third-party postings—as elements in a ''default publishing'' system. Under this system, content is published because it can be published, not because it has been judged to convey useful or reliable information.

Default publishing seems far removed from the ideals of Walter Lippmann, who urged journalists to create a reliable picture of the world upon which citizens and policy makers could act. It's also increasingly hard to justify. For that reason, publishers of the future—on the Internet just as in print—will be well advised to act more like true publishers, making careful and sound editorial choices about what they publish, from whom and for how long. Those kinds of practices will help them navigate rules like the right to be forgotten, and will also help us all hold onto important protections like Section 230 and the DMCA.

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