Is the emergence of a US 'right to be forgotten' likely?

In May 2014, the European Court of Justice ('ECJ') ruled that in certain instances, individuals have the right to request that search engines remove links to webpages "that are published by third parties and contain information relating to a person from the list of results displayed following a search made on the basis of that person's name" (the 'Decision'). Michelle W. Cohen, Member at Ifrah PLLC, shares her thoughts on whether we will see the emergence of a right to be forgotten ('RTBF') in the US.

The content at issue must be "inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed and in the light of the time that has elapsed."[1] At the present time, Google has applied the Decision to requests from individuals in the EU, although some courts have ordered Google to remove certain content from its global search results. The question is will we see a RTBF in the US? While the US favours an open, uncensored internet, this emerging right has taken shape in a few contexts.

The ECJ based its Decision on the 1995 EU Directive on privacy[2]. Under this, the Court concluded that search engines such as Google have obligations to protect personal privacy in certain situations: "The Court observes in this regard that, inasmuch as the activity of a search engine is additional to that of publishers of websites and is liable to affect significantly the fundamental rights to privacy and to the protection of personal data, the operator of the search engine must ensure, within the framework of its responsibilities, powers and capabilities, that its activity complies with the directive's requirements."[3] The underlying websites do not have to remove the content, but search engines must delete the links to the webpages, provided the request meets the "inadequate, irrelevant or excessive" standard.

Various regulators have urged Google to remove links globally, since one can search another Google site, such as Google.com, and find the links, even if, say, Google's German site has removed those links. CNIL, the French privacy authority, announced in June 2015 that it was providing Google with a "Formal Notice of 15 days to make the delistings apply globally, or Google would face sanctions," stating, "the CNIL considers that in order to be effective, delisting must be carried out on all extensions of the search engine and that the service provided by Google search constitutes a single processing."[4] In other words, the CNIL believes that links across Google's search engine, including Google.com, should be removed when the links meet the standard under the Decision. The agency does not believe Google should limit removal to the site accessed by, say, a French citizen, such as Google.fr.

On 30 July, Google's Global Privacy Counsel published a blog stating that Google will not apply the Decision to all of Google's search engines. Google's representative stated that the Decision is not a worldwide decision and that Google fears "chilling effects on the web."[5] Google will continue to apply the Decision to EU users' valid requests. However, Google disagrees with CNIL's assertion of global authority, arguing that one country should not be allowed to censor search results in another. According to Google's representative, "there are innumerable examples around the world where content that is declared illegal under the laws of one country, would be deemed legal in others: Thailand criminalizes some speech that is critical of its King [for e.g.]."[6] Google requests that CNIL remove its 'Formal Notice.'[7]

Nevertheless, Google does accept removal requests for links to certain 'sensitive' content across Google's search engines, including in the US. Content falling in this category includes child sexual abuse imagery and content in response to valid legal requests such as copyright notifications under the Digital Millennium Copyright Act. Sensitive personal information that Google may remove upon request includes: national identification numbers (such as social security numbers), bank account and credit card numbers, and images of signatures[8]. Recently, Google announced and implemented a RTBF to links of 'revenge porn' across Google search engines. Revenge porn includes "nude or sexually explicit images that were uploaded or shared without your consent."[9] Microsoft followed suit in late July, stating it would remove links to photos and videos from search results in Bing, and remove access to the content itself when shared on OneDrive or Xbox Live, when a victim notifies Microsoft[10].

A US right to be forgotten?

Americans favour a free and open internet, treasuring the First Amendment rights, and the rights of a free press. As the internet developed, courts and the US Congress had to address whether and how to preserve this freedom. A delicate balance ensued. Certain actions remain within the ability of courts or governmental authorities to censor, such as child

pornography and copyright infringement. Other types of content, such as defamatory statements, are actionable in private litigation. However, in the US, the law and the public generally favour an uncensored internet.

In response to potential civil liability faced by websites such as AOL for content posted by third parties and a desire for an unencumbered internet, in 1996, Congress passed Section 230 of the Communications Decency Act. Under Section 230, providers of an 'interactive computer service' are largely immune from liability resulting from content posted by another third party[11]. Thus, many different online intermediaries such as Google, Facebook, review sites, and bloggers that allow third parties to post content may invoke Section 230 in response to civil liability claims. Section 230 has been invoked successfully to avoid liability and to allow online providers to host content, free of concern of civil liability and without the requirement to censor (except in the case of criminal matters and in certain IP matters).

Thus, online service providers would not favour a new RTBF requirement in the US. And, Americans generally want a free internet, even if it may contain embarrassing or sensitive information. However, more recently, there has been some movement toward a RTBF, at least as to certain content. In July, the Consumer Watchdog ('CW') group filed a complaint with the Federal Trade Commission ('FTC') against Google, asserting that Google's failure to apply the RTBF in the US is an unfair practice under Section 5 of the FTC Act, since according to the group, Google states it protects consumers' privacy[12]. One example provided by CW is that of 18-year-old Nikki Catsouras, who perished in a car accident. Graphic crime scene photographs are easily accessed via a Google search of Ms. Catsouras' name. Her family understandably wants links to these photos removed[13]. The Association of National Advertisers ('ANA') has already urged the FTC to reject CW's complaint. The ANA contends that applying the RTBF to US businesses would lead to a slippery slope of an array of European privacy laws being applied in the US, and would violate the First Amendment. While a general federal RTBF would conflict with the First Amendment, at least one state has enacted a RTBF in certain limited contexts. In 2013, California passed SB 568, 'Privacy Rights for California Minors in the Digital World.' Under the law, operators of websites or apps 'directed to minors' with 'actual knowledge' that a minor is using the site/app must permit minors who are registered users of their service 'to remove or, if the operator prefers, to request and obtain removal of, content or information posted on the operator's Internet Web site, online service, online application, or mobile application by the user.'

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Website operators are required to provide notice to minors of this service and provide clear instructions on use. There are some exceptions to this obligation, including where the content or information was stored on or posted by a third party (including republication)[14]. Interestingly, this law actually requires removal of the content. California's law does not cover adults, minors in other states, or content posted (or republished) by other parties.

Conclusion

If the RTBF is to extend to the US, it will likely be in limited situations like California's law. While many states are enacting laws to criminalise 'revenge porn,' these laws generally do not require content removal.

The RTBF is unlikely to take hold in the US. Instead, legislators and regulators will focus on the need to protect special groups (such as children) and special types of information (such as financial information). In a twist, it is the online service providers, such as Google and Microsoft, who may actually develop this area through their voluntary policies allowing removal requests in certain areas such as the recent revenge porn delisting policies.

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1. See http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf
2. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).
3. The Decision. See footnote 1.
4. http://www.cnil.fr/english/news-and-events/news/article/cnil-orders-google-to-apply-delisting-on-all-domain-names-of-the-search-engine/
5. http://googlepolicyeurope.blogspot.com/2015/07/implementing-european-not-global-right.html
6. Ibid.
7. Ibid.
8. See https://support.google.com/websearch/answer/2744324
9. Ibid. See also http://googlepublicpolicy.blogspot.com/2015/06/revenge-porn-and-search.html
10. http://blogs.microsoft.com/on-the-issues/2015/07/22/revenge-porn-putting-victims-back-in-control/
11. 47 U.S.C. § 230(c)(1).
12. http://thehill.com/policy/technology/249907-advertisers-us-right-to-be-forgotten-would-be-legally-baseless
13. http://www.consumerwatchdog.org/newsrelease/google's-failure-offer-'right-be-forgotten'-united-states-unfair-and-deceptive-consumer-
14. http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB568