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This European 'right' should be forgotten

ANNE FLAHVIN THE AUSTRALIAN JULY 11, 2014 12:00AM

THE European Court of Justice has created a monster that has journalists in Britain and other European countries up in arms as their stories become effectively invisible.

In May, the court created a legally enforceable “right to be forgotten”. It held that European citizens had a “fundamental right” to demand that search engines such as Google remove links to web pages that contain information about them that is “inadequate, irrelevant, or no longer relevant”, regardless of whether it is true, and regardless of whether it has caused them any actual prejudice.

The only exception is where there is a “preponderant” public interest in having access to the information.

Not surprisingly, Google has been flooded with requests — more than 70,000 in June — from individuals who would like some aspect of their past to be “forgotten”.

To put that in perspective, it compares with 12,763 complaints received by the British Press Complaints Commission over an entire year.

The full consequences of the ECJ decision have become apparent over the past few weeks as newspapers have been notified by Google that the search engine has removed links to their stories at the request of individuals seeking to rely on this new right.

Journalists at *The Guardian* and the BBC have expressed outrage at what they say is censorship of their journalism.

The nature of some of this “disappeared” content illustrates just how problematic the right to be forgotten is.

So far, it includes a 2010 *Guardian* story relating to Dougie McDonald, a soccer referee who was found to have lied about a penalty call. No one has suggested that the story is untrue, and it has not been removed from *The Guardian*'s online archive.

But at the request of the publicity-shy referee, it was made effectively invisible to anyone conducting a search using McDonald's name on any EU Google site.

Guardian journalist James Ball complained that the paper's journalism can now “only be found until someone asks for it to be hidden”. As a former journalist, I can relate to his outrage.

The irony of all of this is that as newspapers go public with the fact that their stories have been effectively “disappeared”, the whole embarrassing business that the aggrieved individual sought to hide from public view becomes newsworthy again, many years after its original publication. Hardly an effective reputation management tool.

The newspapers whose content has been hidden from view in Europe have no right of appeal. Nor does Google: the ECJ decision is final, and binding on all EU countries.

It's difficult to imagine that the ECJ judges didn't anticipate the monster they would create with their right to be forgotten. They have imposed a legal obligation on search engines to undertake, in a fairly perfunctory fashion and at scale, what is essentially a highly nuanced inquiry that a court would struggle with.

How should a search engine determine when a story has become sufficiently out of date to trigger a right to be forgotten? What factors should it apply when deciding whether the public interest outweighs an individual's “right” to have the record wiped clean?

And what will happen if fresh newsworthy events occur after a search engine has deleted links at the request of an individual?

The person who asked for those links to be removed is hardly going to notify the search engine that the stories have once again become a matter of public interest and should be rendered visible to ensure that interested members of the public can once again have access to the full, uncensored record.

The ECJ judges who created the new right provided no guidance as to how this important balancing process ought to be undertaken, other than to stress that it would take a “preponderant public interest” to override the right to be forgotten. There is none of the sophisticated free speech jurisprudence that is a feature of decisions handed down by the European Court of Human Rights when it is asked to hear cases where free speech and privacy are in conflict.

Nor is there any apparent consideration of the technical and bureaucratic dimensions to imposing this kind of obligation on search engines.

With the best will in the world, how can a search engine apply the kind of nuance that will be imperative if free speech is not to come a poor second to the desire of politicians, sportspeople and pedophiles to have their history wiped from public view?

It remains to be seen how this will continue to play out in Europe. The experience so far, though, should give very serious pause for thought for anyone who thinks a right to be forgotten is a good idea.

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