



Human Rights Council

Are we losing grasp of our personal data? The right to be forgotten in the digital era

Introduction

Collecting, processing and evaluating large amounts of personal data has been a remarkably fast growing industry in the last few years. People tend to share more and more personal information about themselves online, often without considering the possible harm this may cause. Once the information is shared, it becomes very hard to delete it, possibly violating one of the basic human rights - right to privacy. The right to be forgotten (further on abbreviated as RTBF) is a way of protecting this right. Already implemented in European Union and legal systems of several UN members, the RTBF should be introduced to the UN.

The Legal Side

The view on the Right to Privacy may change drastically in the upcoming years, especially when it comes to online information. We all should be able to decide on what we want to share with the society, what we allow others to judge us on. Part of The Universal Declaration of Human Rights, the Right to Protect Oneself Against Public Scrutiny is an element of many legal traditions and therefore enforceable by an individual. Depending on the legal system, it may however be very complicated or impossible to enforce this right without the knowledge of the person who invades the privacy of said individual. This issue can arise when trying to resolve privacy violation on the internet, where the possession of information can be very abstract.

Outside of the internet, the person who possesses the information is in full control of it and therefore responsible for it. To have full control of it, the owner must be capable of completely erasing the information or making it permanently unavailable. An example would be an employee of a company who has access to strategy of his/her employer. It is up to the employee only whether to violate the law and share the information for their personal benefit and when they do so, there is no doubt who is responsible for spreading the information.

Let's have a look at another example - a person sharing their photo to a social network. By taking the photo, they become the owner of it. However, by sharing it, the possession of the photo becomes much more complicated and the power of the author over it diminishes. Other users can spread it, making it much more popular than the author meant it to be. It can be altered, misused or collected. The collecting, or harvesting, of data is one of the main reasons for implementing RTBF.

Big Data

The issue becomes more interesting when a data collecting 3rd party is introduced. It may be argued that the spreading of unwanted information on social media may be restricted by communicating with the specific company, which is partially responsible for the data flowing through their system, but with big data services, the responsibility becomes distorted. Services such as Google specialize in collecting information from the internet in order to make it available in

a matter of seconds to anyone interested. The links can often be searched for even after they are physically deleted, further complicating the complete power over their deleting.

This has been an issue for Mario Costeja González. His story, as described by Wikipedia: *"In 1998 the Spanish newspaper La Vanguardia published two announcements in its printed edition regarding the forced sale of properties arising from social security debts. The announcements were published on the order of the Spanish Ministry of Labour and Social Affairs and their purpose was to attract as many bidders as possible. A version of the edition was later made available on the web."*

One of the properties described in the newspaper announcements belonged to Mario Costeja González, who was named in the announcements. In November 2009, Costeja contacted the newspaper to complain that when his name was entered in the Google search engine it led to the announcements. He asked that the data relating to him be removed, arguing that the forced sale had been concluded years before and was no longer relevant. The newspaper replied that erasing his data was not appropriate since the publication had been on the order of the Spanish Ministry of Labour and Social Affairs."

The court ruled in favour of Mr. González, setting a precedent that the search engine is responsible for the erasure of their data that may violate someone's Right to Privacy, if the data linked is *"inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed"*. There are several points to think about. One of them is the appeal of Google, which among other arguments stated, that they did not change the information a bit. The point was that the search engine only makes it much more convenient for its user to find the desired information, but the information alone is not altered, hosted or owned in any other way by Google, who therefore possesses no power over it.

Advocate General of the European Court of Justice, Nilo Jääskinen, has raised several points in favour of Google. One of them was, that the process of deciding whether to use the RTBF is very sensitive and therefore often requires individual approach and evaluation to make sure that the individual case indeed is a breach of privacy. This would create an enormous burden on the company, since the decision making would require a lot of balancing between the human rights and, the Advocate General ultimately argued, should not be handled by private corporations and should be instead viewed as a problem for the judicial system. He was not alone, as more criticism regarded the responsibility for proving that the request complies with the rules, which, as the European Court of Justice ruled, is up to the company responsible for the search engine.

This raises the question, whether the search engine is the one to be made responsible. Shouldn't it be the website that published the content? The court decided that indeed the search engine can be held responsible, since the activity *"...quite clearly involves data processing..."* and *"The operator of a search engine is the 'controller' in respect of the data processing carried out by it since it is the operator that determines the purposes and means of that processing."* These decisions have however been also argued with by representatives of several governments of EU and thus should be further investigated.

Other Policies

Laws concerning the internet are still in many cases in their infancy. The Right to Be Forgotten may however be inspired by several other policies, which are concerned by similar issues. One of them is the movement focusing on revenge pornography, which is defined by Wikipedia as *"sexually explicit portrayal of one or more people distributed without their consent via any medium"*. The movement has seen several successes in recent years, with governments across the globe adopting laws to counterattack this phenomenon and actually punishing perpetrators with prison sentences. Along with the governments, several companies, including the two largest search engines Google and Bing, adopted policies that enable victims to file a complaint and have the links disabled, preventing the harmful material from being viewed. The movement's effort to create leverage on the sites themselves, which offer the video to public, has yet to see success.

Sociological Point of View

The memories of humans fade with time, enabling us to eventually forgive others. One of the cornerstones of religions and a standard part of the underlying rules of society, forgiveness can be limited online, since the internet does not forget. This may severely interfere especially with lives of people punished by the society for breaking the law. One of the principles of criminal law is forgiveness of society after the sentence is served, forming with other principles the fundamentals of theory of imprisonment.

If a person breaks the law, they are to serve their sentence and then are given a second chance. The second chance is an opportunity to fully integrate back to the society and this is not possible if the information about the released person is available to anyone with internet connection. This has been marked as a possible threat to the motivation of former inmates to become law-abiding citizens, since their stigma would make it impossible to integrate into society and would further increase their chance to relapse.

The Streisand Effect

Named after American singer Barbra Streisand, this effect shows how counter-productive and ineffective can the effort to delete certain information from internet be. After a photo of her mansion taken without her consent has been posted to a public image sharing website, the artist sued the website and the photographer for violation of her privacy. The lawsuit led to a drastic increase in the popularity of the photo, showing just how much ineffective it may be to resolve these conflicts on a case-to-case basis in court, seeing as the lawsuits are public and may attract more undesired attention.

This has been the case with Mr. González also, as he became famous for his ground-breaking lawsuit. The question then arises, how to prevent this from happening? Should the accuser somehow remain anonymous, making his personal information unavailable to public? Different approach would be to try and avoid the lawsuit altogether and either form an institution or establish policies. Both of these approaches are however very sensitive, seeing as giving a censoring power to an institution may be very hard to control. The policy approach has been adopted by the European Union, stating that the websites hosting the data are to delete it upon request, if the data is not up to date anymore, untrue or outright harmful. The formulation is again vague and would benefit from reviewing.

Spreading of Altered Information

So far we have only discussed the spreading of unaltered information. Early in the year 2015, the Russian executive body responsible for overseeing the media, Roskomnadzor, has given itself the power to censor any memes in reaction to the lawsuit filed by the Russian singer Valeri Syutkin in reaction to an extremely popular picture of himself including untasteful lyrics from another artist. Mr. Syutkin claimed that this connection is ruining his career and is putting him into bad light. The ruling of the Roskomnadzor, which takes care of the protection of human subjects and their data online as well as censoring the internet for Russian citizens, was extended to any pictures depicting public figures in bad light, giving the Roskomnadzor power to delete them even without request.

This surely goes a long way towards protecting public figures against damaging their image online, but is clearly a strong tool in hands of a possibly undemocratic regime. Especially when Roskomnadzor can force the sites based in Russia to erase the unfitting information, rather than just making the links unavailable. Overall, the approach of Roskomnadzor towards Freedom of Speech on internet has been rather questionable and the extensive banning goes to show how much power can a censoring institution possess if uncontrolled by a body interested in Freedom of Speech of the citizens. This example shows that untruthful or manipulated information can also very much violate basic human rights and might be considered in the topic of the RTBF.

In the previous paragraph, the location of where the website is based has been mentioned, which is one of the underlying issues of combatting illegal or harmful websites. The international laws are still being put together, often leaving individuals/companies powerless when trying to take down a website. It is sometimes the case, that while the website based in country A violates the laws of country B and causes damage to company or individual based in country B, the company or individual have no way of stopping the website. In case of the more direct approach to the RTBF of taking down the sites hosting the harmful information, an international policy would be required to counteract this issue for it to have any effect.

Criticism of the Right to Be Forgotten

The Right to Be Forgotten has been met with criticism because of the potential danger that it might become a tool for suppressing Freedom of Speech. The ruling of the European Court of Justice shows that the European Union takes the Right to Privacy seriously. It has been emphasized in the closing speech, that the conditions for when the RTBF applies have to be carefully examined on a case-to-case basis.

Especially in a country so concerned about the Freedom of Speech, such as the United States of America, this raises many fears. Nevertheless, the state of California has recently adopted a law providing the Right to Be Forgotten for minors, focusing mainly on, but not limited to, the social media. This law allows only registered under age users to ask the website to erase their personal information, but is still a great step. The conditions of when the law does not apply are as follows and might serve as an inspiration:

- Federal or state law requires the business to retain the information;
- The information was stored or posted by a third party;
- The online service anonymizes the content or information;
- The Minor does not follow the appropriate instructions to remove or request the removal of the Minor's information; or
- The Minor has received compensation or other consideration for providing content.

On social media, where the information is shared by users, the erasure of e. g. a picture may be more complicated in terms of suppressing the Right to Freedom of Speech and Expression. Let us examine the case of person A uploading a picture of themselves and person B sharing it on their own profile. If person A decides they want the picture taken down, should the social media website have the power to censor the picture on the profile of person B? Again, the ruling as to how far one can go to save the privacy of one person on the expense of another person's Freedom of Expression is a sensitive issue.

Conclusion

The internet is ever growing, ever expanding and the policies defending human rights online should be growing with it. The Right to Be Forgotten is in this sense an important instrument and a step in the right direction, if introduced with great care.

Sources for further reading:

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