

Online news and privacy: Are online news archives affected by a “right to be forgotten”?

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Abstract:

Is there a right to be deleted out of the online records? Today's news are yesterday's news tomorrow and therefore “old”. But news which are not news anymore might, in legal aspects, be treated differently than real new news. Not only after the release of the European Court of Justice (CJEU) judgement on Google Spain, the “right to be forgotten” or the right to be “de-listed” is an issue for online archives.

The judgement expands the existing privacy responsibilities for personal information on search engines. In the mentioned ruling, the court found, that “the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, ...even, as the case may be, when its publication in itself on those pages is lawful.” Anyway, this applies not in every case, but, respective to the ruling, only after pondering the right to access to information and the right to privacy. But this does not make it easier.

(How) can this right to be de-listed affect online-news-archives managed by libraries? In different countries of the EU, judgements on online newspaper archives, already years before the CJEU decision, had shaped principles for balancing privacy of individuals and free speech/freedom of the press in online archives. This talk will discuss if or how the Google judgement on the right to be forgotten” or national court decisions can affect the making available of online news by libraries, especially when they are old “news”.

Keywords: privacy, news archives, data protection, right to be forgotten, EU General Data Protection Regulation

Background

To set the frame for this work, it is necessary to define first of all the subject „news“. We can start with the traditional newspaper: A newspaper is a serial publication, published at least weekly, containing news and other informative articles¹ ... “Most newspapers are now published online as well as in print. The online versions are called online newspapers or news sites.”²

¹ Information from German RDA, 2.13 („Definition newspaper“)

² <https://en.wikipedia.org/wiki/Newspaper>

If we look at the contents, corresponding to this definition, online news have more or less the same contents as printed news. However, there are online newspapers which don't have any printed equivalent. For the legal analysis, I will assume that, with respect to the contents, "newspaper" is the same as "online newspaper". This presumption allows us to devolve jurisdiction on paper news to online news.

How are libraries involved in this?

Libraries and current newspapers: Libraries, via contract with the publisher or aggregator, provide access to current online newspapers or online editions of printed newspapers to their users. The access to the archives is often included. As long as their contract is not terminated, the library does not host the newspaper data. After termination, depending on the agreement, the library might get the possibility to store the archives on its own servers and get the license to make them available to its registered users. Full text search is standard.

Libraries and digitized print newspapers: Several newspapers which never were published online before, are retro-digitized by publishers or libraries and made available on their servers. Understood, personal names or photos of humans are part of the news. Depending on the country, there are different rules how and in which cases personal data can be published in news. Additionally, the re-publishing of the personal names with (old) news, when they are, naturally, no "news" anymore, has been subject to law suits.

Privacy: Legal provisions for news

Publishing personal data in new news, at least in some countries³, is only allowed with consent of the person involved or if a legal exception allows the publication even without consent. For the news press, special laws can allow the publication. In Germany, for example, press codes⁴ refer to some articles of the Data Protection Act⁵. The Code of Conduct of the Press („Pressekodex“) also does. Recital 8 of the Pressekodex directly determines the requisitions for the publication of personal names or photos of humans: The public interest in the information has to outweigh the privacy interest. It determines, that in reports about crimes which were committed long time ago, usually names or photos shall not be (re-)published. In Germany, the publication of *images* of identifiable persons in news, without their consent⁶, additionally, by federal law, are only allowed, if certain exceptions apply: One of them is, that persons of "contemporary history" are shown, § 23 KunstUrhG⁷. This term does not only apply to well known or famous persons like politicians, actors or other celebrities ("absolute" persons of contemporary history), but also on people who are of public interest (only) for a certain point of time. This can justify the publication of images of crime suspects for purposes of investigations⁸, § 24 KunstUrhG. People who posted some hate speech on facebook are not persons of contemporary history⁹ and therefore images of them were not allowed to be published by the news.

³ e.g., in Germany: §§ 5, 9, 38a Federal Data Protection Act (BDSG): https://www.gesetze-im-internet.de/englisch_bdsg/index.html

⁴ E.g., Berlin press code, § 22a

⁵ §§ 5, 9, 38a Federal Data Protection Act: https://www.gesetze-im-internet.de/englisch_bdsg/index.html

⁶ § 22 KunstUrhG: https://www.gesetze-im-internet.de/kunsturhg/_22.html

⁷ § 23 KunstUrhG: https://www.gesetze-im-internet.de/kunsturhg/_23.html

Oberlandesgericht (OLG) Frankfurt (Urt. v. 23.12.2008, Az. 11 U 22/08, 11 U 21/08); § 24 KunstUrhG: https://www.gesetze-im-internet.de/kunsturhg/_24.html

OLG München, Urteil vom v. 17.3.2016 - Az. 29U 368/16: <https://rsw.beck.de/cms/?toc=mmr.root&docid=378515>

Jurisdiction in Germany

Also, the German Constitutional Court basically allows to publish facts about individual and identifiable persons, if they are true¹⁰. Especially in cases where the current public interest to be informed, e.g. about heavy crime, is fundamental, the offender cannot count on his right to privacy¹¹. However, following the German Supreme Court, even publishing true facts can violate personality rights, if the information are spread to the public under a broad effect and if they can exceedingly stigmatize the person and lead to isolation¹².

With respect to personal names of criminals, in 2010 the German Supreme Court judged, that the re-publication is not legal if this person is violated in his personality rights. This can only be judged upon a pondering of these personality rights with the information interest of the public and freedom of speech and press. Both rights are based in in the constitution and human rights conventions¹³. Respective to the judgement, the circumstances of the individual case have to be put in consideration. The re-publication is unlawful only if the interest in protection of the privacy is violated. That is the case, if the protection of the freedom of speech and press is overbalanced by the right to privacy (in the individual case). For cases where even the original publication had violated the privacy rights, the Supreme Court stated its unlawfulness last time in April 2016¹⁴.

Especially in cases where crimes have been committed long ago and the offender has been imprisoned for a long time, his right to resocialize can outweigh the freedom of the press to pull the offender back to the public again and to publicly pillory him¹⁵.

The court declares, that this kind of public pillorying does not exist, if the personal information about the offender in an online archive can only be found by a specific search in a specialized database and the reader can easily observe that he is looking at an old article.

This would mean e contrario, that if a personal name of an offender, connected to his crime, can be found in an online archive which is fully text indexed in widespread search engines, the online archive can violate the personality rights of the (former) offender.

Court of Justice of the European Union (CJEU): The Google Spain Case¹⁶

In its preliminary ruling, the court had to deal with Google's responsibility for the infringement of personal rights of a Spanish citizen, who requested to adopt the measures necessary to withdraw personal data relating to him from Google's index and to prevent access to the data in the future. "The complaint was based on the fact that, when an internet user entered Mr Costeja González's name in the search engine of the Google group ('Google Search'), he would obtain links to two pages of La Vanguardia's newspaper, of 19 January and 9 March 1998 respectively, on which an announcement mentioning Mr Costeja González's name appeared for a real-estate auction connected with attachment proceedings for the recovery of social security debts."¹⁷

¹⁰ Constitutional Court, BVerfG, 10.06.2009 - 1 BvR 1107/09

¹¹ Supreme Court (BGH), Urteil v. 09.02.2010, Az. VI ZR 243/08; <http://tlmd.in/u/1022>

¹² Constitutional Court, BVerfGE 97, 391, 404 f.

¹³ Personality right, Privacy: Art. 1 par 1 and Art.2 par.1 Grundgesetz (Basic Law for the Federal Republic of Germany: http://www.gesetze-im-internet.de/englisch_gg/index.html) and also Art.8 par.1 European Convention of Human Rights, ECHR (https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/Convention_ENG.pdf); Freedom of speech and press: Art.5 par.1 Grundgesetz and Art. 10 ECHR

¹⁴ BGH, Urteil vom 16. Februar 2016 (Az.: VI ZR 367/15); <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&Seite=0&nr=74175&pos=7&anz=619>

¹⁵ Supreme Court (BGH), Urteil v. 09.02.2010, Az. VI ZR 243/08; <http://tlmd.in/u/1022>

¹⁶ Judgement from May 13, 2014, Case C-131/12

¹⁷ CJEU C-131/12, par. 14

The court ruled that Mr. Gonzalez could claim the erasure of the respective data in the result list that follows a search for his name:

CJEU judgement, Par.94: "... that the inclusion in the list of results displayed following a search made on the basis of his name of the links to web pages published lawfully by third parties and containing true information relating to him personally is, at this point in time, incompatible with"...the [EU Data Protection] "directive because that information appears, having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine, the information and links concerned in the list of results must be erased."

With respect to the court, rights to privacy and family life (Articles 7 and 8 of the European Charter of Fundamental Rights on private an family life an protection pf personal data) "override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question" (par. 97 of the judgement).

However, even if the CJEU aimed at Google's search result lists, the online archive or website where the data have been originally published and that had been indexed by Google, is not free of responsibility. The court even indicates that the source can prevent the search engine from indexing, e.g. in robots.txt. There can be joint responsibility: So, the search engine and the website/ online-archive can be liable for the privacy infringement.

Decisions in EU member states following the Google Spain case

In August 2015, the Regional High Court of Hamburg¹⁸, referring to the CJEU judgement, decided that a newspaper archive has to prevent search engine indexation of articles from 2010 and 2011 about a criminal investigation against a communication consultant on having insulted politicians. That criminal procedure had ended without conviction. In the news articles, the consultant appeared under his full name in the archive.

In October 2015, the Spanish Supreme Court¹⁹ had rejected a claim of plaintiffs, who had been arrested for drug trafficking in 1985 and in 2009 found the old news article in the top ranks of search engines after a name-based search. They aimed to have their names deleted of the online archive of the newspaper "El Pais". The court argued, in line with the CJEU, that the newspaper has to assure that the personal names of the plaintiffs "old news" cannot be easily found in big search engines such as Google, Yahoo! and Bing.

The Belgian Cour de cassation²⁰ (Supreme Court), in May 2016, decided that a Belgian newspaper publisher is obliged to delete personal data from its digital newspaper archive concerning a person who was convicted for causing a traffic accident. The court agreed, even

¹⁸ Oberlandesgericht Hamburg, Urteil vom 07.07.2015, 7 U 29/12: <http://www.rechtsprechung-hamburg.de/jportal/portal/page/bsharprod.psml?doc.id=KORE217942015&st=ent&showdoccase=1¶mfromHL=true>

¹⁹Tribunal Supremo, 2015/10/15, sentencia número 545/2015: <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Noticias-Judiciales/El-Supremo-reconoce-el-derecho-al-olvido-digital-de-dos-procesados-implicados-en-un-caso-de-drogas-en-los-ochenta>. Reports: <http://noticias.juridicas.com/actualidad/noticias/10588-primerasentencia-del-ts-sobre-el-derecho-al-olvido-si-los-interesados-lo-solicitan-la-informacion-obsolleta-sobre-personas-sin-relevancia-publica-puede-no-ser-buscable/> ; http://elpais.com/elpais/2015/10/20/inenglish/1445336346_537716.html

²⁰ <http://www.knack.be/nieuws/belgie/cassatie-recht-om-vergeten-te-worden-geldt-ook-voor-krantenarchieven/article-normal-706165.html>

stricter than the decisions mentioned above, that the right to be digitally forgotten is an intrinsic part of the right to be left alone in the seclusion of the private sphere, which is laid down in the Constitution, and that this right can thus justify drawbacks of the right of freedom of speech.

Decisions outside EU²¹

In Colombia, Hong Kong, Japan and Mexico, online journals were ordered to remove information or prevent search engine indexation:

The Colombian Constitutional Court, in 2015, had to decide in a case about an online journal which mentioned the name of a person who had been prosecuted for slave trafficking but wasn't convicted. The court decided that the journal did not have to remove the information, but to update the article and inform, that the person never got convicted. Additionally, the online journal had to prevent technically the finding of the article by name search in a search engine²².

In Hong Kong, the Privacy Commission decided that personal names had to be removed from a web page where court decisions about business cases were collected. There had been possibilities to search for names in the database²³. In November 2015, the Hong Kong Administrative Appeals Board decided that individuals in Hong Kong have the right to have their online personal information deleted, even in a situation where such information had already been published²⁴.

In Japan²⁵ and Mexico²⁶, we can observe jurisdiction similar to the CJEU Google Spain case: Search engines were convicted to remove links to personal information in search results. In the Mexican case, the INAI ruled that the infringement of privacy rights can rectify the claim for removal even if the information had been lawfully published before.

The EU General data Protection Regulation

The principle of the right to forgotten is strengthened in the EU Data Protection Regulation²⁷, which comes into force in 2017. Article 3 and 17 of the proposed regulation determine that EU data protection rules also apply to non-European companies and to search engines. The proposed data protection Regulation fixes that wherever the physical server of a company processing data is located, non-European companies, when offering services to European consumers, must apply European rules.

²¹ <https://derechosdigitales.org/9324/una-panoramica-sobre-la-discusion-en-torno-al-derecho-al-olvido-en-la-region/>; http://www.ifla.org/files/assets/clm/statements/rtbf_background.pdf

²² Corte Constitucional de Colombia, Sentencia T-277/15: <http://www.corteconstitucional.gov.co/relatoria/2015/t-277-15.htm>; <http://iuscomparatum.info/colombia-constitutional-court-rules-on-the-right-to-be-forgotten/>

²³ http://www.hoganlovells.com/files/Uploads/Documents/Newsflash_A_Right_to_be_Forgotten_in_Hong_Kong_HKGLIB01_1452118.pdf

²⁴ <http://www.lexology.com/library/detail.aspx?g=d0104b8c-0e72-4b58-be59-e4adc08dc6f0>

²⁵ <http://www.japantimes.co.jp/news/2014/12/09/national/crime-legal/right-to-be-forgotten-on-the-internet-gains-traction-in-japan/#.Vk3wbHbnu>; <http://www.japantimes.co.jp/news/2015/03/31/national/yahoo-japan-sets-procedure-search-result-removal/#.Vk3wHXbnuU>

(Plaintiff X v. Yahoo Japan Inc. (ワ)第 2893 号 Kyoto district court, 2014.Aug. 7 京都地方裁判所: (ネ)第 2415 号 Osaka high court, 2015.Feb.18 控訴審 大阪高等裁判所第 9 民事部); Plaintiff X v. Google Japan Inc. (ワ)第 2894 号 Kyoto district court, 2014.Sep.17 京都地方裁判所第 6 民事部); Plaintiff X v. Yahoo Japan Inc. (ワ)第 241 号 Kobe district court, 2015.Feb.5 神戸地方裁判所尼崎支部第 2 民事部);

²⁶ National Institute for the Access to Information (INAI), Carlos Sánchez de la Peña v. Google México, S. de R.L., PPD.0094/14

²⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=EN>

To a certain extent, the Regulation gives the data subject the right to control his or her data which are made available by data controllers:

EU General data Protection Regulation

Article 17: Right to erasure ('right to be forgotten')

1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:

(a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;

...

(c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);

(d) the personal data have been unlawfully processed;

(e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;

...

2....

3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:

(a) for exercising the right of freedom of expression and information;

(b) ...

(d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or

(e) ...

Art.17 seems, in par. 3 (a) and (d) to give online archives inside EU a few loop holes, as the right to erasure does not apply when the data processing is necessary for the exercise of the right of freedom of expression and information, for archiving purposes in the public interest, scientific or historical research purposes...

However, this always has to be interpreted in the light of the CJEU decision, pondering the rights of the data subject with the rights and reasons of the controller. So, looking at the judgement, still the (re-) publication of the personal data in search engines can be infringing. The EU data protection regulation, within the drafted margin, allows the member states to provide specifications of this "Right to be forgotten"²⁸.

Recommendations

Libraries within EU and other regions where online archives have been successfully sued for making available old news with incriminating or otherwise burdensome data about an identifiable person, should go on digitizing old newspapers or archiving online news and make them available. The access to these historical records are excellent sources for researchers and facilitate the investigation of everyday life circumstances as well as local and overall incidents and their reception in the press. In none of the cases mentioned, making

²⁸ Recital 156

available for research purposes was the matter of dispute. To prevent financial damages for their institutions, libraries in countries where the re-publication of burdensome personal information is problematic, may be bound to prevent the indexation of the online news by global commercial search engines. However, as search engines are the gates to information today, this conflicts with libraries mission which is to support the optimisation of the recording and representation of information and to provide access to it²⁹. Libraries, therefore, find themselves in a conflict and should back the freedom expression and freedom to access to information, expressed in Art.19 of the United Nations' Universal Declaration of Human Rights, as far as possible. They should even be prepared to take calculable legal risks and to achieve their mission, even if that means to be party of a lawsuit or to enter in discussions with lawmakers³⁰.

²⁹ IFLA Code of Ethics for Librarians and other Information Workers, <http://www.ifla.org/news/ifla-code-of-ethics-for-librarians-and-other-information-workers-full-version>

³⁰ IFLA Statement on the Right to be Forgotten; <http://www.ifla.org/publications/node/10320>