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The Right to Be Forgotten in the United States: Part II

By C. W. Von Bergen, Martin S. Bressler, and Cody Bogard

The General Data Protection Regulation (“GDPR”) is a European Union-wide law on data protection and privacy that applies to European Union citizens and organizations based outside the EU that offer goods or services to European Union residents, monitor their behavior, or process their data. Article 17 of the regulation looks at the right to be forgotten, otherwise known as erasure, delisting, or de-referencing. This and similar legislative initiatives are increasingly inducing some in the United States to implement similar data protection plans; however, such initiatives may conflict with the First Amendment. The first part of this two-part article, which appeared in the July-August 2020 issue of Pratt’s Privacy & Cybersecurity Law Report, discussed the history on the right to be forgotten, the applicability of the GDPR to the issue, and concerns about personal data privacy. This second part of the article discusses privacy initiatives and legislation in the United States, and the right to be forgotten and the First Amendment.

PRIVACY INITIATIVES IN THE UNITED STATES

The California Consumer Privacy Act of 2018

California passed a data privacy law – the California Consumer Privacy Act of 2018 (“CCPA”)49 – that replicates many of the GDPR principles, like rights to access and deletion of personal data. The state law, which now is in effect, is aimed at giving consumers more control over how companies collect and manage their personal information. The CCPA establishes a legal and enforceable right of privacy for every Californian:50

- Requires businesses to make disclosures about the collection of personal information, the categories of personal information collected, the purposes for collecting and selling personal information, and the categories of third parties with which personal information is shared;
- Authorizes consumers to opt-out of having their personal information sold by a business while prohibiting that business from discriminating against the consumer for exercising this right;

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50 Id.
• Authorizes businesses to offer financial incentives for the collection of personal information;

• Prohibits businesses from selling the personal information of consumers under the age of 16 years; and

• Requires data breach notification.

Furthermore, under the CCPA, all companies that serve California residents and have at least $25 million in annual revenue must comply with the law. Also, companies of any size that have personal data on at least 50,000 people or that collect more than half of their revenues from the sale of personal data, also fall under the law. Companies do not have to be based in California or have a physical presence there to fall under the law. They do not even have to be based in the United States. These companies are required to let California consumers view the data they have collected on them, request the deletion of data, and opt-out of having the data sold to third parties. Each violation carries a $7,500 fine on big companies that fail to disclose data collection practices or to receive users’ permission to sell their information.51

OTHER PRIVACY LEGISLATION

California Senate Bill 568 Privacy: Internet minors52 requires “the operator of an Internet website, online service, online application, or mobile application to permit a minor, who is a registered user of the operator’s Internet website, online service, online application, or mobile application, to remove, or to request and obtain removal of, content or information posted on the operator’s Internet website, service, or application by the minor.” As written, the law is about giving a specific group, prone to unwise decisions, the ability to delete information they do not like. In this, it comes very close to the European Union’s proposed right to be forgotten. The most probable side effect of this is that companies will start to make users of their site, service, or application verify that they are 18 years of age or older before the company allows the use of its product. This will have a two-fold effect. Either the adolescents will lie about their age, thus negating the “actual knowledge” requirement of the bill, or they will not use the product.

Other states are similarly adopting data privacy laws, and the varying state law regulations may prove more difficult for industry compliance than one comprehensive federal law. For example, the New York State Assembly53 has come nearest to an American version of a right to be forgotten. The bill, A05323,54 in large part, mimics the

51 Id.
default.fld=&leg.video=&bn=A05323&term=2017&Summary=Y&Actions=Y&Committee%2526nbspVotes=Y&Text=Y.
54 Id.
European Union’s right to erasure. The bill requires search engines, indexers, publishers and any other persons or entities which make available, on or through the Internet or other widely used computer-based network, program or service, information about an individual to remove such information, upon the request of the individual, within 30 days of such request. The Assembly’s government operations committee is currently reviewing the legislation for the second time.

Several U.S. states also have enacted legislation to combat mugshot websites.\textsuperscript{55} Although jail booking mugshots are a staple of news reporting and are generally publicly available, some state legislatures have objected to websites that post mugshots for entertainment or charge the subjects of the mugshots a fee to have them removed. Additionally, a cottage industry of reputation management services has sprung up.\textsuperscript{56} For a fee, these businesses will assist individuals in improving their online profiles by taking measures to drive negative results lower in search-engine lists related to their names. Moreover, the micro-blogging site Twitter\textsuperscript{57} instituted its version of the right to be forgotten for politicians’ deleted tweets. Twitter shut down the account of “politiwoops,” a widespread handle that preserved politicians’ deleted tweets. Twitter’s rationale was that politicians’ free speech rights included the right to delete their messages and not have those tweets still appear on Twitter, under another account.

Relatedly, there seems to be increased attention on issues concerned with ex-offenders. Studies\textsuperscript{58} find that the stigma of an arrest, criminal conviction, or incarceration in prison all act to reduce a person’s earnings in the labor force, which is salient when one considers that unemployment or a low wage amplifies criminal activity generally, and criminal recidivism specifically. Moreover, with the Internet today, people who may have committed a crime a few years ago now find that it is the only thing they are known for and effectively defines their life.

This has resulted in increased calls for criminal justice reform. One such initiative that has gained popularity and becoming somewhat of a national crusade is the so-called ban-the-box (or fair chance) laws that have been adopted by over 100 jurisdictions.\textsuperscript{59}


\textsuperscript{57} Matthew Ingram, Twitter just implemented its own “right to be forgotten” for politicians’ tweets. FORTUNE (Dec. 4, 2019), https://www.fortune.com/2015/08/24/twitter-right-to-be-forgotten/.


\textsuperscript{59} C. W. Von Bergen & Martin S. Bressler, Ban the Box: Protecting Employer Rights While Improving Opportunities for Ex-offender Job Seekers. 42(1) EMPLOYEE RELATIONS LAW JOURNAL, 26-50, (2016).
Governmental entities and officials and advocates have promoted these regulations for ex-offenders (e.g., All of Us or None) and involve removing inquiries about criminal history from preliminary job applications and encouraging employers to consider applicants based on their qualifications first and their conviction history second. It is anticipated that there will be increased calls for limiting information found on the world wide web for ex-offenders.

It appears that many technology company executives are similarly beginning to recognize the benefits of having strict data privacy laws. Tim Cook, Apple’s chief executive officer, recently praised the GDPR and suggested that the U.S. implement a stronger privacy law, explicitly noting that “We at Apple are in full support of a comprehensive federal privacy law in the United States.”\(^{60}\) Mark Zuckerberg, Facebook’s CEO, similarly stated: “I think the GDPR, in general, is going to be a very positive step for the Internet.”\(^{61}\) If these large technology players have the power to incentivize Congress to implement legislation, it appears that the U.S. may be moving toward a comprehensive federal data privacy regulation.

These actions suggest that U.S. citizens should also be able to keep their past histories private under certain conditions. In short, they suggest the right to be forgotten – the idea that one should have the right to privacy of one’s past and have some legal remedy should that past be revealed – exists not only in the EU but may in time also apply in America and may eventually become part of U.S. federal law.

**NOT SO FAST IMPLEMENTING THE RIGHT TO BE FORGOTTEN IN THE UNITED STATES: THE FIRST AMENDMENT**

The right to be forgotten is a legal concept recognized in the European Union and other parts of the world but a concept foreign and contrary to established First Amendment principles in the United States. The push for the right to be forgotten comes from the idea that one’s prior misdeeds or acts of bad judgment should not come up on Google searches or other online search engines forever, and that individuals ought to have the ability to remove negative references. This concept places tension between privacy and free expression.

The decision by the U.S. Court of Appeals for the Second Circuit in *Martin v. Hearst Corporation* is instructive.\(^{62}\) In that decision, Lorraine Martin was arrested along with her two sons on drug charges. News articles appeared online about Martin’s arrest. The state declined to prosecute Martin and she had the arrest removed from her record pursuant to the state’s Criminal Records Erasure Statute. Because her arrest had been expunged,

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\(^{62}\) *Martin v. Hearst*, 777 F.3d 546 (2d Cir. 2015).
Martin asked the news media to remove the articles, which she considered false and defamatory. The news media corporation refused, and Martin sued for defamation. A federal district court rejected Martin's claims. On appeal, the Second Circuit affirmed, reasoning that the erasure law “does not render historically accurate news accounts of an arrest tortious merely because the defendant is later deemed as a matter of legal fiction never to have been arrested.” The court's decisions show that there is no recognized claim for a right to be forgotten and forcing service providers to remove material from the Internet generally would constitute an impermissible form of compelled speech under the First Amendment.

In 1989, the U.S. Supreme Court rendered a decision in the case of *The Florida Star v. BJF* where it stated, “We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order.” This case did indeed concern a newspaper, and that newspaper was publishing police reports, but the holding is still relevant U.S. case law. It is not a stretch to extend its relevance to online publications. This would mean that if the information is truthful, search engines that contained information that revealed past facts about an individual cannot be sued.

The Supreme Court in 1978 rendered an equally compelling holding in the case of *First National Bank of Boston v. Bellotti*, where it interpreted what the First Amendment means regarding the right to be forgotten here in the U.S. before the concept had even been considered. The Court stated, “[T]he First Amendment goes beyond protection of the press and the self-expression . . . of individuals to prohibit government from limiting the stock of information from which members of the public may draw.” Taken at its most literal interpretation possible, and without qualification, this means that any law that would prohibit people from accessing any information possible would be in direct violation of one of America's most fundamental rights – free speech.

In the United States, a right to de-reference publicly available information on data protection grounds would be unconstitutional: the First Amendment to the U.S. Constitution guarantees the right of people to publish information on matters of public

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63 Id.
65 Id.
67 The First Amendment: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
68 *Florida Star, supra n. 64.*
interest that they acquire legally, even in the face of significant interests relating to the private life of those involved.\textsuperscript{69} This reasoning extends to those situations where there is a significant governmental interest in maintaining the confidentiality of the information in question,\textsuperscript{70} where the information concerns judicial procedures,\textsuperscript{71} and even where the publisher of the information knows that her or his source obtained the information illegally.\textsuperscript{72} The First Amendment also guarantees the right to receive information, including by means of a search engine.\textsuperscript{73}

**SUMMARY AND CONCLUSION**

Data privacy has increasingly become a hot-button issue for Americans, especially after recent developments in the EU which recently created the right to be forgotten. Now enshrined in EU law, the right enables citizens and residents of the bloc to demand that a search engine or website delete or unlink personal information they deem obsolete or excessively intrusive, even if true, and even in the absence of a finding of prejudice. Google and other search engines must delink offending webpages from a search of an individual’s name, even if the underlying article or webpage is lawful and remains online. It, in effect, provides a right of curation – enabling individuals to manage their own reputation online, and to avoid having an embarrassing news article, or an arrest on a charge that was later dropped, follow them around throughout their life.

However, the right to be forgotten, which is a centerpiece of the European Union’s Internet privacy laws, was recently limited by The European Court of Justice, Europe’s highest court, which ruled that the right to be forgotten cannot be enforced beyond the European Union.\textsuperscript{74} The ruling to limit the geographical reach of the right to be forgotten is considered a victory for Google against a French effort to force the company and other search engines to take down links globally.

Nevertheless, the right to be forgotten puts data privacy advocates and free speech advocates in direct conflict with each other. Free speech advocates indicate that the right to be forgotten, in the wrong hands, could allow dictators to rewrite history, and prevent the public record from being complete. Privacy advocates, on the other hand, declare that the right to be forgotten is vital for protecting people from things like revenge porn, or having their names attached to stories about, for example, having been charged with crimes that they were ultimately never convicted of.

\textsuperscript{73} Langdon v. Google, 474 F. Supp. 2d 622 (D. Del. 2007).
\textsuperscript{74} Court of Justice of the European Union, Judgment in Case C-507/17, Google LLC, successor in law to Google Inc. v. Commission nationale de l’informatique et des libertés (September 24, 2019).
While the supporters of free speech seem today to hold the upper hand in the U.S., the door is not completely closed to the importation into America of the notion that certain truths may not be set forth by certain entities. California and New York have introduced legislation that would create a version of the EU right to be forgotten law. Such initiatives will face an uphill battle due to the overwhelming influence of the First Amendment. Indeed, U.S. courts have consistently held that the First Amendment’s protections for expression, petition, and assembly necessarily also protect the rights of individuals to gather information to fuel those expressions, petitions, and assemblies. Although there seems little doubt that the courts would hold any such legislation to be unconstitutional, the fact that it has even been introduced illustrates the appeal of limitations on the dissemination of older information, however accurate the data may be.

Even though American lawmakers seem to talk more than act about regulating tech-related topics, their European counterparts have been much more active in protecting employee rights. A few years ago, several European countries implemented the right to disconnect – the right of workers to not respond to employers’ calls, texts, or emails after official work hours – to decrease work-related stress and achieve an enhanced work-life balance. More recently, the EU has implemented the GDPR to help safeguard its citizens’ privacy. One element of this regulation and the topic of this paper involves the right to be forgotten – a rule that gives EU nationals the ability to demand electronic data about them to be deleted or removed from search engines.

Despite its passage, the right to be forgotten is not without its detractors. For instance, the Index on Censorship denounced Google Spain as “akin to marching into a library and forcing it to pulp books.” The European Union Committee of the British House of Lords responded to Google Spain by concluding (in bold-faced type) that “the ‘right to be forgotten’ . . . must go. It is misguided in principle and unworkable in practice.”

Jimmy Wales, the co-founder of Wikipedia, condemned the right to be forgotten as “deeply immoral” because “[h]istory is a human right.” Critics of EU data privacy laws claim that requests for information removal could quickly lead to over-censorship through search engine de-linking and Byrum questions how transparent communication

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75 Index on Censorship, Index Blasts EU Court Ruling on “Right to be Forgotten,” INDEX (Nov. 29, 2019), https://www.indexoncensorship.org/2014/05/index-blasts-eu-court-ruling-right-forgotten/.


“could occur in an ecosystem that allows for arbitrary information removal and the creation of memory holes.”

American legal scholar Jeffrey Rosen has observed that Google Spain and the GDPR portend a “titanic clash” with American free speech principles. The appeal of erasing certain facts is understandable. But the danger of allowing governmental suppression of truth is real. Nevertheless, the concept of the right to be forgotten appears to be making some inroads in America.
