

Information Technology

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The Fight for the Right...to be Forgotten Online

A recent decision of the European Court of Justice overrides the interests of internet users in protecting the privacy rights of individuals whose personal information is retrievable online.

Background

On May 5, 2010, Mr. Costeja Gonzalez filed a complaint with the Spanish Data Protection Agency (SDPA) against La Vanguardia Ediciones SL (“**Vanguardgua**”), a Spanish daily newspaper publisher, and Google Spain and Google Inc. Mr. Gonzalez complained that when internet users searched his name, they retrieved links to two Vanguardgua announcements from 1998 regarding a real-estate auction connected to recovery of social security debts owed by Mr. Gonzalez.

Mr. Gonzalez requested that: (i) Vanguardgua remove or alter the relevant pages on their website so that his personal information would not be publicly available, and (ii) Google cease to include his personal data in search results. Mr. Gonzalez argued that the articles were no longer relevant because the situation had been fully resolved.

On July 30, 2010, the SDPA rejected his claim against Vanguardgua finding that Vanguardgua had legally published the articles in 1998. However, the SDPA upheld Mr. Gonzalez’s claim that his personal data no longer be included in Google search results. The decision was based on the SDPA’s authority to require search engine operators to remove or exclude data that compromises the fundamental right to data protection and the dignity of persons. The SDPA considered that the obligation on search engine operators was separate from any obligation of the initial publisher. Thus, the

requirement to remove or exclude data could be imposed on search engine operators even when the information legally remained on a website.

Following an appeal by Google to the National High Court of Spain, the question of what obligations are owed by search engine operators to protect personal data of persons who do not want their personal information to be located, indexed and made available to internet users, was referred to the European Court of Justice (ECJ) – the highest court in the European Union in matters of European Union law.

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The ECJ decided that a person may make a request for information removal directly to the search engine operator. The search engine operator must assess the merits of the request and accept or deny the request. If the search engine operator denies a request, the requesting party can bring the matter before a supervisory or judicial authority for determination.

The ECJ analyzed the need to access data for legitimate interests in the face of a person’s right to privacy – a European Charter protected fundamental right and freedom. In its analysis, the ECJ stated that a fair balance should be sought in determining the legitimate interests of an internet user and a person’s fundamental rights. As a general rule, the ECJ specified that the interests of the person whose data is in question will override the interests of an internet user. However, the determination ultimately depends on: (i) the nature of the information in question, (ii) how personal or sensitive it is to a person’s private life, and (iii) the interests of the public in having the information, in particular, the person’s role in public life. It may therefore be more difficult for politicians to have personal information relevant to their profession removed from search results.

Goodmans^{LLP} Update

The Right to be Forgotten in Canada

While Canadians' rights to privacy are not enshrined in our Charter, as is the situation in Europe, we enjoy some protections under our federal and provincial privacy laws.

As concerns mount that the right to be forgotten will open the door to large-scale self-censorship in Europe, pitting freedom of speech advocates against the defenders of privacy, the status quo in Canada may not last long. Google is currently building an infrastructure that will allow internet users to request the removal of personal information relating to them from search results. A test case in Canada is likely on the horizon.

Please contact any member of our Information Technology Group for further information.