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Amending History: Is There a Right to be Forgotten?

BY STEVE THOMAS

Sometimes editing cyberspace sounds like a good idea. In 2011, Cindy Lee Garcia landed a five-second role in "Desert Warrior," an action flick set in ancient Arabia. While appearing "concerned," she delivered two lines: "Is George crazy? Our daughter is but a child." She then collected her \$500 and moved on.

A year later, a trailer for the film appeared on Google's YouTube renamed "Innocence of Muslims," which the Ninth Circuit later described as an "anti-Islam polemic ... [that]

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depicts the Prophet Mohammed as ... a murderer, pedophile, and homosexual." Garcia's two lines had been dubbed over: "Is your Mohammed a child molester?" she appeared to ask, still looking concerned.

An Egyptian cleric issued a fatwa calling upon "Muslim Youth" to "kill" all associated with the film, and a wave of credible death threats rolled over Garcia. She sued Google in federal court and demanded a mandatory injunction requiring Google to remove "Innocence of Muslims" from YouTube and other Google-controlled platforms. The district court denied, but 18 months later, a divided panel of the Ninth Circuit reversed and imposed the mandatory injunction against Google.

That injunction remained in place for more than 12 months before, in May last year, the Ninth Circuit sitting en banc affirmed the district court and lifted the mandatory injunction.

"Ultimately, Garcia would like to have her connection to the film forgotten and stripped from YouTube. Unfortunately for Garcia, such a 'right to be forgotten' ... is not recognized in the United States."

But it is in Europe. Back in the '90s, Mario Costeja González of Spain failed to pay his debts, and in 1998, notices were published in a daily newspaper about the auction of his real estate. Sixteen years later, Google searches of his name still brought up those old notices. Costeja González lodged a complaint with the Spanish Data Protection Agency asserting that his fundamental right of privacy—his "right to be forgotten"—under the European Union's charter and a 1995 Directive of the European Parliament obligated Google to take down the links to those newspaper pages upon his request. On May 13, 2014, the European Court of Justice ruled that he was correct.

The ECJ said all search engines "process" personal data and are "controllers" thereof under Directive 95/46. Applying the language of the opinion to the real world, if Google or any search engine receives a request from a European "data subject" to take down the links to a particular web page discussing that person, the search engine

must determine whether the website's information is "inaccurate, inadequate, irrelevant, or excessive in relation to the purposes of the data processing, ... not kept up to date, or ... kept for longer than is necessary unless [it is] required to be kept for historical, statistical, or scientific purposes."

It does not matter that: (a) the information is true; (b) the publishing website continues to have every legal right to publish the information; and (c) the information causes no prejudice to the requesting data subject. Even for requests made on the "mere wish" of the data subject, "those rights 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." Unless the data subject is a public figure, then maybe the public's rights override.

These case-by-case judgment calls must be made by search engines—companies in the business of making information more accessible. If the data subject disagrees, the search engine likely gets a trip to the courthouse to defend its decision.

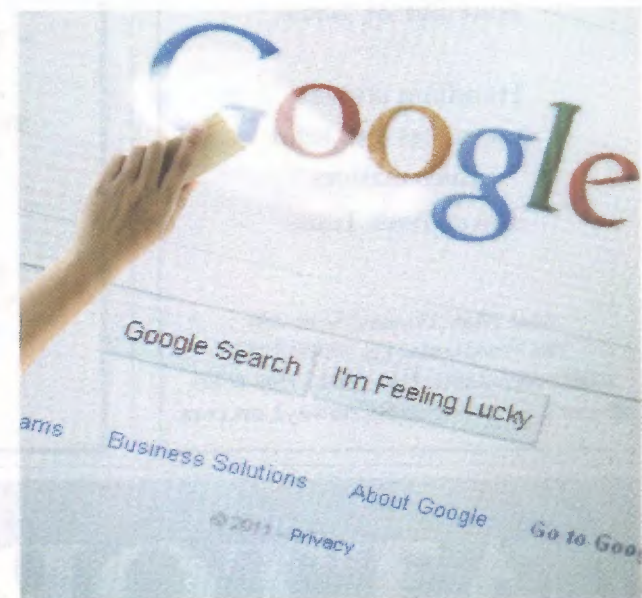
After the ruling, Google established a submission process for removal of search results, and set

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up a European advisory council on the "right to be forgotten" (see google.com/advisorycouncil) to provide advice on principles to apply in individual cases. Within six months after the ECJ's decision, Google received more than 150,000 requests.

According to David Drummond, Google's chief legal officer, the requests included everything from assault victims requesting removal of embarrassing details to "a convicted pedophile who's requesting removal of links to recent news articles about his conviction."

One expert on Google's council—the publisher of a leading Flemish newspaper—said such edit-



ing felt like "amending history."

And like it or not, the right to be forgotten might be coming to America. The EU's new "Global Data Protection Regulation" (GDPR) is expected to be enacted this year and to take effect two years from now. In a Jan. 21, 2016, speech marking Data Privacy Day, FTC Commissioner Julie Brill said that Europe wants to "set a global standard" for privacy, and the GDPR, as its name implies, is part of that effort. Brill said that, under the GDPR, "the right to be forgotten applies to all data controllers," not just search engines, and its scope "does not appear to be limited to European territory." Brill defended the GDPR as having some of its roots in U.S. privacy law, but questioned the "extent to which orders to comply with takedown requests are enforceable outside the EU."

For global Internet-based companies like Google, Facebook, Yahoo and virtually every major news organization, does it matter? The question would not be whether European law can be enforced in Peoria, but whether the "controller" wishes to partition its global network to provide more information in one region than permitted in another—and risk the expensive legal battles that might ensue. The words "chilling effect" come to mind.

The Internet, like the atmosphere, is a global phenomenon. Unfortunately, only time will tell whether Europe is protecting privacy or depleting the information layer.



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