



## Juxtaposing Right to be Forgotten and Copyright Law

Ankita Aseri<sup>†</sup>

National Law University, Jodhpur, Rajasthan - 342 304, India

*Received: 10 July 2019; accepted: 24 March 2020*

Privacy plays a pivotal role in the life of the people. Internet governs every aspect of a person's life. It is significant to see what information is available on the Internet about an individual as that sculpts the digital image of that individual. At any point in time, "we have wished to erase some part of information related to us on the Internet. It may not have been foreseen when the Internet was invented but it is now a right conferred to the European Union citizens. Right to be forgotten has been codified and given judicial recognition. The right places a substantial burden on the data controller to assess whether a takedown request should be accepted or not. Usually, the pictures used in revenge porn are selfies and the victim owns a copyright in the image. In this research paper, the researcher has made an attempt to analyze the interface between Copyright law and the right to be forgotten. Further, the researcher has analyzed the implications of the use of the right to be forgotten and copyright law to combat revenge porn. The research paper will also include the judicial precedents to provide more clarity on the current position along with principles of legal philosophy.

**Keywords:** Copyright Laws, European Union, Digital Millennium Copyright Act, GDPR Regulations, Internet archives, Data protection

*It is said that the Internet never forgets. But from time to time, this assertion is challenged.*

The Internet is a platform which never forgets the information uploaded on it. At times, people wish to erase information about them from the Internet. It is a remedy that is sought by revenge porn victims. The European Courts have recognized the right to be forgotten. It is also called the right to erasure. It allows the data subject to get information removed from the Internet on certain specified grounds. Article 17 of the GDPR Regulation<sup>1</sup> and Article 17 of the DSM Directive<sup>2</sup> (Directive on Copyright in the Digital Single Market) holds the online content sharing service providers and the data controllers liable if they fail to regard the right to be forgotten. The Digital Millennium Copyright Act holds the intermediary liable if they fail to remove the copyright-infringing material.<sup>3</sup>

The right to be forgotten is significant in a situation where an explicit picture is leaked on the Internet without the consent of the individual. Copyright law is beneficial in situations where the victim is the owner of the photo or video. In situations where the photo is not clicked by the victim then the victim will have to rely on notice and takedown provisions.

A lot of celebrity's private pictures were leaked by a hacker and the challenge faced by them was to prove that they are the owner of the pictures.<sup>4</sup> Unauthorized distribution of pictures or videos is rampant on the Internet. A challenging situation will arise when the work has entered the public domain and the individual wants to exercise the right to be forgotten. The right to be forgotten has far-reaching implications on both privacy law as well as copyright law.

### Right to be Forgotten

The right to be forgotten stems from the French law which recognizes *le droit à l'oubli* or right of oblivion which enables a convicted criminal who has been rehabilitated to oppose the publication of his conviction.<sup>5</sup> The right to be forgotten was given a judicial recognition in the case of *Google Spain SL v Agencia Española de Protección de Datos & Mario Costeja González*.<sup>6</sup> A lawsuit was filed against Google for removal of information and the Court recognized the right to be forgotten which enabled the data subject to demand the erasure of the data which is no longer relevant. The decision was based on the fundamental right to privacy of an individual as opposed to the economic interest of the company or public interest in access to information. Later, the right was codified under Article 17 of the General Data Protection Regulation 2016/679 which provides that a

<sup>†</sup>Email: ankitaaseri09@gmail.com

person has a right to remove information which is excessive, irrelevant or where the subject has withdrawn consent.<sup>1</sup> The scope of the Regulation is restricted to the protection of natural persons in relation to the processing of personal data.<sup>7</sup> The major limitation with the right to erasure is that it is limited to information published online.

In order to exercise the right to be forgotten, the individual must inform the data controller regarding the data that is listed without the consent of the individual. After the request of removal of personal data, the data controller or the search engine is required to take action. The right to be forgotten places a substantial burden on the data controllers to assess whether a takedown request based on this right should be accepted or not. Post the judicial recognition of the right to be forgotten, a suit was filed by Google against CNIL where Google contended that the right to be forgotten must not be enforced globally and should be limited to the territory of European Union.<sup>8</sup> The Advocate General of the European Court of Justice gave a ruling that right to be forgotten must be limited to the European Union.<sup>9</sup> The Court ruled in favour of Google and held that the right to be forgotten is not an absolute right and the data controller is responsible to delist the content from the European versions of the websites. The content is still available to the people outside the European Union. However, the infringing copyrighted material is removed globally under the Digital Millennium Copyright Act.<sup>10</sup>

The United States, on the other hand, does not recognize the right to be forgotten. The U.S. Court of Appeals for the Ninth Circuit in the case of *Garcia v Google* stated that the right to be forgotten is not recognized in the United States.<sup>11</sup> In this case, an actress performed a five seconds cameo for a movie. Without her knowledge, the director used her lines in another film which was broadcasted over YouTube and due to which Garcia received death threats. The Court dismissed her lawsuit stating that the United States does not recognize a right to be forgotten. The United States confers more weight to the publication of information than personal liberty due to the First Amendment.<sup>12</sup> Right to be forgotten is perceived as a threat to freedom of speech. However, the New York State Assembly has passed the Bill A05323 which is an attempt to provide for the right to be forgotten.<sup>13</sup> California passed the California Minor

Eraser Law that allows residents below the age of 18 to request for the removal of any information posted on the server.<sup>14</sup> A contrasting approach has been adopted by both the countries towards conferring weight to privacy and freedom of speech.

### **Interface between Copyright Law and Right to be Forgotten**

There are certain issues that arise due to the intermingling of the right to be forgotten and copyright law. The researcher will focus on the conflicts that will arise after the right to be forgotten is enforced.

#### **Internet Archives**

In the case of *Davydiuk v Internet Archive Canada*, a lawsuit was filed for the removal of pornographic films that were posted on the Internet.<sup>15</sup> The plaintiff was successful in the deletion of the film from the website but the Internet Archive's 'Wayback Machine' had retained copies of the film. The Court described 'Wayback Machine' as a collection of websites accessible through the websites 'archive.org and web.archive.org'.<sup>15</sup> These Internet crawlers store copies and preserve them as they existed. Even if an individual has exercised his/ her right to be forgotten, the data can be still accessible through Internet archives. It can also violate the copyright in the data stored by the Internet crawlers.

Article 17(3)(d) of the GDPR Regulations provide for an exception to the right to erasure.<sup>16</sup> It provides that archiving is permissible if it is in the public interest, or scientific and historical research purposes or statistical purposes. This exception safeguards certain type of archiving. However, the right to erasure would still be applicable on web crawlers if they fail to prove that the archiving was for the purposes of public interest or scientific and historical research purposes or for statistical purposes. This is an important exception carved out to facilitate innovation and further research.

#### **Public Domain Works**

Another challenging situation arises when the work that the victim seeks to remove has entered the public domain. For instance, the picture was clicked by another person and published in a book. If the book enters the public domain, the victim will not have a remedy against it as the right to be forgotten is restricted to online publications and copyright law

does not give protection on the works which have entered the public domain. The limitation on the monopoly of the rights on the work permits other authors or artist to use works in the public domain to create their own works. According to Jason Mazzone, authors take the benefit of copyright laws by asserting exclusive rights over the material that is in the public domain thereby limiting access.<sup>17</sup> Mazzone defines this phenomenon as ‘copyfraud’ as the ineffective enforcement allows owners of expired copyrights to prevent the use of public domain name work thereby restricting cultural commons which further stifles creativity and impose costs on the consumers.<sup>18</sup> This will be significant in the case of online publication where due to the hefty penalty for non-compliance of the Regulation leads to ineffective enforcement by the data controller. Mazzone claims that application of fair use is diminishing as the doctrine is applied in an inconsistent way, leading to uncertainty as to what would require the permission for the use which leads to an overreach of copyright laws.<sup>19</sup>

The GDPR Regulations fails to provide a distinction between work or information in the public domain and private data of an individual which is under copyright protection. There must be different rules to govern both the data. As the United States does not recognize the right to be forgotten, a work which has entered the public domain cannot be removed in the United States. However, in the European Union, individuals can rely on the GDPR Regulations to seek the removal of the data that has entered the public domain. The GDPR Regulations is conferring a perpetual right to an author to exercise control on a public domain. This will have an adverse impact on the fair use of the work and can stifle further innovation and creativity.

#### **Revenge Porn**

Various models and actresses have filed lawsuits on the removal of the explicit images published without their consent. However, the favourable rulings were largely based on the right of publicity, data protection, privacy, reputation and copyright. Celebrities are often photographed by media without their consent; the photographer owns the photo unless it is work for hire. A lot of celebrities have been the victim of nude picture leaks by hackers.<sup>4</sup> One needs to establish ownership over such pictures for them to be covered under the domain of copyright law. The

controversy lies in the establishment of ownership in such images. Copyright law protects any original work of authorship fixed in a tangible medium of expression, including photographs. In the case of revenge porn, the pictures are mostly selfies clicked by the victim. The victim, therefore, has copyright protection in the selfie. In other cases, the film or pictures could be filmed with the consent of both the parties. In that case, Danielle Keats Citron and Mary Anne Franks advocate that both the parties would have joint ownership in the pictures or film.<sup>20</sup> In the decision of *Mitchell Brothers Film Group v Cinema Adult Theater*, the Court explained that “the protection of all writings, without regard to their content, is a constitutionally permissible means of promoting science and the useful arts”.<sup>21</sup> The Courts have ruled that there can be copyright on sexually explicit work.<sup>22</sup>

The reproduction and display of revenge porn victim’s copyrighted images without their permission constitutes copyright infringement. The author of the work retains the right to decide whether the work must be published or not. The attacker uploads the victim’s copyrighted images on the website. It is a well-settled principle that uploading amounts to copying.<sup>23</sup> The Regional Court of Koblenz in Germany dealt with an issue involving two lovers who consented to film themselves naked and after the relationship was over the girl demanded that the boy should delete all the lewd material and the Court held in favour of the girl.<sup>24</sup> As Danielle Keats Citron & Mary Anne Franks advocates that in such cases both the parties are joint authors which means that they enjoy equal right over the work. Right to be forgotten fails to address the issue of joint data subjects who are part of a photograph or video and one of them want to takedown the material, the Regulation is unclear as to whose rights will be honoured.

The remedy that lies with the victim is to use the takedown provision under the Digital Millennium Copyright Act to delist the websites that publish their images from search engines. The victim can also approach the website to seek the removal of their images. The burden of curtailing the distribution of non-consensual explicit images and videos lies on the search engines and the Internet service providers. Tech companies like Google and Twitter have banned the posting of intimate images without the consent of the subject’s consent and agreed to honour the request to remove such images. In some countries like England and Wales, revenge porn is declared to be

illegal. § 230 of the Communication Decency Act protect interactive service providers from liability for user-generated content.<sup>25</sup> This immunity is not applicable if the interactive service providers host both original and user-generated content. § 230 has carved an exception for copyright infringement which can hold websites liable for reproducing copyrighted images.<sup>25</sup> Some victims have used copyright law to demand the removal of revenge porn on which § 230 do not apply.<sup>26</sup> As the U.S. does not recognize the right to be forgotten, the victim will have to prove ownership over the images or video to seek the removal of the images.

### Conclusion

The right to be forgotten has a far-reaching impact on access to knowledge and innovation. The right is restricted to online publications. It cannot be used against print publication. Internet is the catalyst to exercise of the right to be forgotten. The interface between the right to be forgotten and copyright law uncover issues that were not foreseen at the time this right was recognized. Majority of the cases where the right to be forgotten is exercised is in the case of revenge porn. The issues emerge with respect to the ownership of such work. A remedy will lie under Copyright law only if the work is owned by the victim. Recourse lies with the right to be forgotten if the country recognizes it. There can be a situation where the work is erased from the website but copies are retained by the web crawlers. In such a case if it satisfies the requirements under the GDPR Regulations then the archives will be liable to be erased.

A public domain work can be forgotten if the GDPR Regulations are applicable but it is not possible in the United States. The right also places considerable responsibility on online content sharing service providers by imposing hefty penalties on them if they fail to comply with the right to be forgotten. The fear of penalties forces the online content sharing service providers to blindly accept all the right to be forgotten requests that they receive. The penalties act as a deterrent for the online content sharing service providers to assess every case with the requirements of the regulation and to determine if they fall under the restrictions on the removal of data. This can have serious implications on the knowledge that the public would be able to receive and it would defeat the public interest and further innovation and creativity which are the foundation of Copyright law.

### References

- 1 Article 17 of the General Data Protection Regulation 2016/679.
- 2 Article 17 of the Copyright in the Digital Single Market Directive.
- 3 17 U.S.C. § 512 of Digital Millennium Copyright Act, 1998.
- 4 Dan Kedmey, *Hackers Leak Explicit Photos of More Than 100 Celebrities*, TIME (1 September 2014), <http://time.com/3246562/hackers-jennifer-lawrence-cloud-data/>.
- 5 Rosen J, The right to be forgotten, *Stanford Law Review*, (Online) 64 (2012 88; Bolton R L III, The right to be forgotten: Forced amnesia in a technological age, *The John Marshall Journal of Information Technology & Privacy Law*, 31 (2014) 133.
- 6 *Google Spain SL v Agencia Española de Protección de Datos & Mario Costeja González*, Case C-131/12.
- 7 Recital 1 of the General Data Protection Regulation 2016/679.
- 8 *Google Inc. v Commission nationale de l'informatique et des libertés (CNIL)*, Case C-507/17.
- 9 Advocate General Szpunar's opinion on *Google v CNIL*, Press Release No. 2/19, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-01/cp190002en.pdf>.
- 10 Powles J, Right to be forgotten: Swiss cheese internet, or database of ruin?, *The Guardian* (1 August 2015), <https://www.theguardian.com/technology/2015/aug/01/right-to-be-forgotten-google-swiss-cheese-internet-database-of-ruin>.
- 11 *Garcia v Google, Inc.*, 786 F.3d 733 (9th Cir. 2015).
- 12 U.S. rejected the claim of two murderers Wolfgang Werlé and Manfred Lauber to remove the news of conviction of murder of an actor due to the First Amendment; John Schwartz, Two German Killers Demanding Anonymity Sue Wikipedia's Parent, N.Y. Times, (12 November 2009) <https://www.nytimes.com/2009/11/13/us/13wiki.html>.
- 13 Bill No., A05323, The New York State Assembly, 2017, [https://nyassembly.gov/leg/?default\\_fld=&leg\\_video=&bn=A05323&term=2017&Summary=Y&Actions=Y&Committee%2526nbspVotes=Y&Text=Y](https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A05323&term=2017&Summary=Y&Actions=Y&Committee%2526nbspVotes=Y&Text=Y).
- 14 SB-568, California, [http://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB568](http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB568).
- 15 *Davydiuk v Internet Archive Canada*, 2014 FC 944 (CanLII).
- 16 Article 17(3)(d) of the General Data Protection Regulation 2016/679.
- 17 Mazzone J, Copyfraud and Other Abuses of Intellectual Property Law, 2011.
- 18 Shoor E A, Narrowing the right to be forgotten: Why the European Union needs to amend the proposed data protection regulation, *Brooklyn Journal of International Law*, 39 (2014) 487.
- 19 The Fair Use Doctrine in the U.S. does not require permission from the copyright owner for use, so long as the use falls within the ambit of the doctrine.
- 20 Citron D K & Franks M A, Criminalizing revenge porn, *Wake Forest Law Review*, 49 (2014) 345.
- 21 *Mitchell Brothers Film Group v Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979).
- 22 *Jartech, Inc. v Clancy*, 666 F.2d 403 (9th Cir. 1982).

- 23 *Sega Enterprises Ltd. v Maphia*, 857 F. Supp. 679 (N.D. Cal. 1994).
- 24 Heather Saul, German Court rules ex-lovers must delete explicit photos of partners after a break-up, *Independent* (22 May 2014), [https://www.independent.co.uk/news/world/](https://www.independent.co.uk/news/world/europe/german-court-rules-ex-lovers-must-delete-explicit-photos-of-partners-after-a-break-up-9419009.html)
- 25 § 230 of Communication Decency Act, 1996.
- 26 Cooper P W, The right to be virtually clothed, *Washington Law Review*, 91 (2016) 817.