

12-8-2014

Privacy Doesn't Exist in a Vacuum

Dawinder S. Sidhu

University of New Mexico - Main Campus

Follow this and additional works at: http://digitalrepository.unm.edu/law_facultyscholarship

Recommended Citation

Dawinder S. Sidhu, *Privacy Doesn't Exist in a Vacuum*, U.S. News & World Report (2014).

Available at: http://digitalrepository.unm.edu/law_facultyscholarship/264

This Article is brought to you for free and open access by the School of Law at UNM Digital Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UNM Digital Repository. For more information, please contact disc@unm.edu.



**SCHOOL
OF LAW**

**SMALL SCHOOL.
BIG VALUE.**

<http://www.usnews.com/debate-club/should-there-be-a-right-to-be-forgotten-on-the-internet/privacy-doesnt-exist-in-a-vacuum>

Privacy Doesn't Exist in a Vacuum

By Dawinder Sidhu

U.S. News & World Report

Dec. 8, 2014, at 12:45 PM

The "right to be forgotten," adopted in the European Union, enables individuals to remove online content about them from EU-based search engines, such as Google.co.uk. An EU privacy panel has proposed that this right should be expanded to all search engines, including those based in the United States. As the right is in tension with American privacy and free speech principles, the prospective application of the right to U.S.-based search engines raises serious concerns.

In 1890, Samuel Warren and Louis Brandeis, seeking to ensure that privacy kept pace with emerging technologies, offered the theoretical ingredients for a distinctively American "right to privacy." Warren and Brandeis argued that each individual has the right to determine "to what extent his thoughts, sentiments, and emotions shall be communicated to others." They acknowledged, however, that this right was "lost" once the individual had publicly shared or "published" such information.

While this right holds that an individual's privacy interests in information fades if the individual places the information in the public sphere, the right to be forgotten posits that an individual retains privacy interests in public information even if the individual himself carried the information across the private-public divide. This is the case even if the information in question is factually accurate. As such, the scope of such a cognizable privacy interest far exceeds, and contradicts, the American understanding of individual privacy.

Even if there was a normative basis to enlarge individual privacy in the United States to a degree commensurate with its European counterpart, privacy does not operate in a vacuum. Privacy rights must exist along with other, potentially competing rights, the most relevant of which for our purposes are free speech rights. Robust free speech protections, enshrined in the First Amendment, help explain why individual privacy rights cannot be as expansive as those contemplated by the right to be forgotten.

The vision of a marketplace of ideas illustrates why our society places a premium on free speech. As part of our DNA, we believe that, in the marketplace of ideas, the value or truth of information will spring forth from the open consideration of competing opinions, viewpoints, and perspectives. The availability and discussion of that information, when relevant to policy and policymakers, can enrich and enhance our capacity for self-governance.

The "right to be forgotten," adopted in the European Union, enables individuals to remove online content about them from EU-based search engines, such as Google.co.uk. An EU privacy panel has proposed that this right should be expanded to all search engines, including those based in the United States. As the right is in tension with American privacy and free speech principles, the prospective application of the right to U.S.-based search engines raises serious concerns.

In 1890, Samuel Warren and Louis Brandeis, seeking to ensure that privacy kept pace with emerging technologies, offered the theoretical ingredients for a distinctively American "right to privacy." Warren and Brandeis argued that each individual has the right to determine "to what extent his thoughts, sentiments, and emotions shall be communicated to others." They acknowledged, however, that this right was "lost" once the individual had publicly shared or "published" such information.

While this right holds that an individual's privacy interests in information fades if the individual places the information in the public sphere, the right to be forgotten posits that an individual retains privacy interests in public information even if the individual himself carried the information across the private-public divide. This is the case even if the information in question is factually accurate. As such, the scope of such a cognizable privacy interest far exceeds, and contradicts, the American understanding of individual privacy.

Even if there was a normative basis to enlarge individual privacy in the United States to a degree commensurate with its European counterpart, privacy does not operate in a vacuum. Privacy rights must exist along with other, potentially competing rights, the most relevant of which for our purposes are free speech rights. Robust free speech protections, enshrined in the First Amendment, help explain why individual privacy rights cannot be as expansive as those contemplated by the right to be forgotten.

The vision of a marketplace of ideas illustrates why our society places a premium on free speech. As part of our DNA, we believe that, in the marketplace of ideas, the value or truth of information will spring forth from the open consideration of competing opinions, viewpoints, and perspectives. The availability and discussion of that information, when relevant to policy and policymakers, can enrich and enhance our capacity for self-governance.

Dawinder S. Sidhu is a professor at the University of New Mexico School of Law.

Copyright © 2016 U.S. News & World Report L.P.