Views on Right to Be Forgotten, Big Data and Global Sourcing

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by Brooke L. Daniels

Brooke L. Daniels
Global Sourcing
+1.202.663.8618
brooke.daniels@pillsburylaw.com

Brooke Daniels is counsel in Pillsbury's Global Sourcing practice and is located in the Washington, DC office. She focuses on complex global sourcing transactions and software licensing on behalf of Fortune 500 international corporate clients, including transactions for operating and infrastructure, telecommunication, offshore application development and maintenance and business process services.

In a landmark ruling, the European Court of Justice—the European Union's top court—held that data subjects in the EU have the right to compel Google Inc. and other Internet search engines to remove search results linking to websites containing personal information about them.

Bloomberg BNA Privacy & Security Law Report Senior Legal Editor Donald G. Aplin posed a series of questions to Brooke L. Daniels, counsel at Pillsbury Winthrop Shaw Pittman LLP, in Washington, about the effect of the ruling on search engines in a world of big data analytics and the possible repercussions for companies engaged in global sourcing activities. Daniels works in the firm's Global Sourcing Practice.

Do you believe that the European Court of Justice's May right to be forgotten ruling presents an unfair implementation burden on Google and other search engines in terms of the resources they must expend to respond to data subject removal demands?

The analysis of the decision is still in its nascent stage, but data related to the impact of the decision, as reported by Google itself, have started to become available. Over the past few months, there has been an opportunity to see the scale of the impact of the right to be forgotten.

Since the decision, Google has responded to upwards of 91,000 requests from individuals to remove links from its European search results. There is an undeniable cost to Google in responding to these requests. First, Google must dedicate personnel to receiving and responding to requests, which means either re-allocating resources or hiring new ones. Second, in addition to the cost of personnel resources, Google has to maintain and bear of the cost of tools needed to track the information and remove it from its search results.

So I suppose whether or not this is an unfair burden is a matter of perspective, but it is undeniably onerous.

Is the balancing test set by the ECJ ruling between individual privacy rights and the right of the public to see information a reasonable one for search engines to implement, and are you hopeful that the Article 29 Working Party will—after if finishes its consultation with the affected search engine companies (144 PRA, 7/28/14)—be able to craft guidance on how to address that balancing test?

While the ECJ recognizes a compelling individual interest and one that is not entirely unique (for example, prior events causing poor credit scores in the U.S. are eventually expunged over time), the standard set by the ECJ is a subjective one that is open to interpretation by the search engine.

The ECJ held that individuals have the right to require search engines to remove personal information about them if the information is "inaccurate, inadequate, irrelevant or excessive." Such a standard means that (1) since the standard for removal is subjective (e.g., how does one determine whether the information is "inaccurate, inadequate, irrelevant or excessive?"), Google itself has to be the arbiter of the requests, and (2) Google is responsible for reporting on its own compliance with this ruling.

Given the subjective nature of the ECJ's ruling, any institution will have a challenge in providing guidance to the private sector and monitoring compliance.

In a world where big data analytics that are able to capture and compare disparate pieces of data increasingly make the anonymization of data less effective, is a right to be forgotten even possible regardless of what search engines may do to de-link information?

The question of whether data can ever truly be erased or anonymized is one that has been plaguing big data analytics almost since its inception. Certain entities like the Federal Trade Commission have been very vocal in expressing concerns about the ability to "re-identify" data with individuals even after such data has gone through the de-identification process used by data collectors.

Even if the requested information is removed, what happens if the same information can be inferred through the analysis of big data? Where does Google's responsibility to scrub the information end? There don't seem to be clear answers to these questions.

The version of the proposed EU data protection regulation approved by the European Parliament in March (49 PRA, 3/13/14) includes the right to be forgotten principle recast as a right to erasure. If that principle remains in a final version of the regulation to replace the EU Data Protection Directive (95/46/EC), do you think it will eliminate the possibility that the EU will find any other country without the principle to have adequate privacy protections or otherwise undercut international privacy harmonization efforts?

Issues like the right to be forgotten (or its evolutionary kin, the right to erasure) highlight the difficulties that are facing countries in creating a global privacy framework.

A May report released by the White House, which was focused on the future of big data, recommended that the "United States should lead international conversations on Big Data that reaffirms the Administration's commitment to interoperable global privacy frameworks" (85 PRA, 5/2/14).

How will the right to be forgotten factor into establishing a global privacy framework? Neither Congress nor the U.S. courts have shown much of an appetite for adopting a stance similar to the ECJ, so there is little chance that the right to be forgotten will be established in the U.S.

The fact that the EU has adopted a much more protectionist stance on individual data while the U.S. appears unwilling to walk down the same path serves to highlight some of the difficulties that we face in establishing a global privacy framework. That fact combined with the increasing global footprint of companies with operations and consumers located in multiple countries will continue to cause friction and ambiguity with respect to compliance.

The U.K. government has said it opposes the right to be forgotten principle (132 PRA, 7/10/14), and a House of Lords subcommittee issued a report, which called the principle "unworkable" (147 PRA, 7/31/14). Do you think the U.K. view represents something that has a chance of emerging as a consensus view in the EU or of perhaps moderating the proposed data protection regulation?

The U.K. subcommittee report certainly left no doubt on its views of the right to be forgotten principle. Calling the principle unworkable and recommending that the U.K. government fight to ensure that the EU data protection regulation does not include any type of right to be forgotten principle makes it clear that not everyone is ready to embrace the amplification of individual rights with respect to data.

As the impact of the ECJ's ruling begins to ripple through Google's operations, a clearer picture of the implications of the ECJ's ruling begins to appear.

The EU's justice commissioner recently said that the impact of the decision is distorted, but as more creditable and vocal opponents emerge the EU may have to consider moderating the breadth of the right to be forgotten (160 PRA, 8/19/14).

Since your practice includes a strong focus on global sourcing and information technology work, I'm interested in how you think the right to be forgotten court ruling or the proposed regulation's right to erasure may impact how multinationals approach their international sourcing and IT efforts?

Fortunately, for infrastructure outsourcing service providers the right to forgotten should not have an enormous impact.

Although a client's data are often accessed by service providers, most infrastructure outsourcing service providers do not function as a "search engine" or provide other types customer facing service. The answer might be slightly different for certain types of business process outsourcing (BPO) service providers. For example, a database marketing outsourcing provider typically uses a client's customer records in order to enrich those records with data obtained from other sources and to conduct marketing exercises on behalf of the client. Is it possible that an individual might seek to have that data removed from the customer records? Yes, it is possible, although it seems a stretch that such data would be categorized in a manner that would meet the ECJ's standard for removal.

However, as I mentioned earlier, the standard is a subjective one, and even if an individual's request patently falls out of the ECJ's guidelines, the client will still need to respond to the individual and implement a process with the service provider in order to remove such data. That also means that the cost of removing data, including the technical tools and the resources, will need to be factored into the charges for such services.

Pillsbury Winthrop Shaw Pittman LLP