

# Keeping public data public: The right to remember

David M. Webb  
Publisher, Webb-site.com

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# The International Covenant on Civil and Political Rights (ICCPR)

- Article 17.1: No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- A19.2: Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- A19.3: The exercise of the rights in 19.2 carries special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public) or of public health or morals.

# HK Bill of Rights Ordinance (BoR)

- Enacted 1991
- A14 BoR=A17 ICCPR; A16 BoR=A19 ICCPR
- The BoR binds only the Government, public authorities and their agents
- Basic Law (BL) A27: HK residents shall have freedom of speech, of the press and of publication...
- BL A39: The provisions of the ICCPR...as applied to HK shall remain in force and shall be implemented through the laws of the HKSAR.

# What is the public domain?

- In the copyright context, it is creative work that can be used freely – like Mozart’s compositions;
- That’s not our context. There is no copyright in facts. By “public domain information” we mean information that has been published, or more narrowly, information that has been legally published (we’ll worry about data leaks separately)
- The publication is not necessarily free of charge (e.g. a purchase of a magazine or a document from the Land Registry) but is available to the general public
- Once legally published, the original source may vanish, but the information is still in the public domain – some people know it and can repeat it (freedom of speech)
- Publication follows the arrow of time – it is irreversible, even if one might wish it was not

# Privacy laws

- A good purpose – to prevent your private information becoming public. Bank records, medical records, school test results, correspondence, phone calls...
- This reflects ICCPR intent
- But in our view, the right to privacy should not extend to information that is legally in the public domain
  - It is impractical to tell everyone to “forget” information and not to repeat it, and free speech protects this
  - It would create Orwellian “memory holes”
  - It would create a two-tier society in which those who know the information hold an advantage over those who don’t and an obligation not to tell them
  - Privacy laws exist to keep private data private, not to make public data private

# Google v Spain

- Mario Consteja Gonzalez failed to pay taxes. His property was foreclosed. This was announced by notice in a newspaper, *La Vanguardia*. He later repaid the debt.
- He asked the Spanish data protection agency to order the newspaper to redact its archive, and Google to stop linking to the notice.
- The DPA ruled that the newspaper notice should stay and is protected by freedom of speech, but that Google should remove its link. Google appealed, and the case was referred to the European Court of Justice.
- The ECJ ruled against Google, 13-May-2014
- And incidentally, Mr Gonzalez and his past tax problems are now famous – this is known as the “Streisand Effect”

# From *La Vanguardia*, 1998

■ Les dues meitats indivises d'un habitatge al carrer Montseny, 8, propietat de MARIO COSTEJA GONZÁLEZ i ALICIA VARGAS COTS, respectivament. Superfície: 90 m<sup>2</sup>. Càrregues: 8,5 milions de ptes. Tipus de subhasta: 2 milions de ptes. cadascuna de les meitats.

■ Las dues meitats indivises d'un habitatge al carrer Montseny, 8, de Cervelló, propietat de MARIO COSTEJA GONZÁLEZ i ALICIA VARGAS COTS, respectivament. Superfície: 90 m<sup>2</sup>. Càrregues: 8,5 milions de ptes. No es consideraran ofertes inferiors a 650.000 ptes. per cada una de les meitats.

# Barbara Streisand's home



Copyright (C) 2002 Kenneth & Gabrielle Adelman, California Coastal Records Project, [www.californiacoastline.org](http://www.californiacoastline.org)

This photograph was made famous when singer Barbra Streisand sought to have its publication suppressed, on grounds of privacy. The "Streisand Effect" is a term that evolved from the controversy, referring to the unintentional consequence of increasing public awareness of something through seeking to suppress information.

# Consequences of Google v Spain

- Google (and other search engines) know what we don't know (the known unknowns)
- Google now decides what users (in the EU, at least) should be able to find; it must consider whether information is still “relevant and not excessive” for the purposes for which Google “processed” it
- Whether links should be removed may depend on the (unspecified) time elapsed and “the role played by the data subject in public life”
- Google and other search engines, as gatekeepers of information, become more powerful. Knowledge is power and influence.
- If you build your own search engine, you can be powerful too. The NSA can. Your government can. Think of the political leverage.

# Distorting history

- Before you run for public office or try to be an artist and take a “role in public life”, write to Google and get them to remove your drunk driving conviction, bankruptcy, the report about your infidelity and divorce battle, or that report on your fake doctorate
- How old is too old to show?
- Relevant to whom? If no longer relevant to anyone, then why does it matter if it stays available?
- What about search functions on web sites? Should the Daily Mail censor its own search results? How expensive would that be, and would it be cheaper to just remove or truncate the archive from public view?
- How hard would historical research be if online archives were closed to the public?
- “Those who cannot remember the past are condemned to repeat it” – George Santayana, 1905

# But outside EU...

- So far, Google.com does not censor results, only Google.co.uk and other sites in the EU. As long as Google.com remains available within the EU, the ruling is somewhat pointless
- A further ruling might be needed to clarify that and erect the Great Firewall of Europe, “protecting” EU users from knowing what others know
- Sites which are big enough, like *Wikipedia*, and outside the EU, might still have the information searchable on their site.
- HK’s Privacy Commissioner for Personal Data (PCPD) has called for Google to provide a “borderless service”, removing information wherever you are

# Meanwhile in HK...



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• 公司/個人新聞  
• 案件審裁庭消息  
• 法庭判決結果

The advertisement is on a red background. It features a central graphic of a clenched fist pointing upwards. Text is arranged around and below this graphic, including the app's name, website, availability on app stores, and a list of features.

# Did PCPD Do No Evil?

- “Do No Evil” was a smartphone app which gathered public domain material, including court writs and judgments, bankruptcy notices and company directorships, and made it more accessible, bringing “due diligence” to the mass market;
- DNE won a Silver “Best Lifestyle (Green, Healthy & Creative Living) Award” in the HK ICT Awards 2013. The awards are “Steered by the Office of the Government Chief Information Officer”. The judging panel included the Deputy Head of the Government’s Efficiency Unit
- In 2013, PCPD ordered the publisher behind DNE to shut it down, claiming it was illegal
- Anyone, with sufficient effort, could have compiled the same information themselves; DNE’s “crime” was making it easy
- Unfortunately, the publisher did not appeal the PCPD’s decision
- Who is doing the evil here?

# User-friendliness – good or bad?

- The judging panel in the HKICT Awards: “DNE integrates an extensive database with a highly user-friendly search engine, allowing users to easily conduct legal background search of companies or targeted persons in an instant and economical way.”
- PCPD: “the name search function and user-friendliness of the App allows its subscribers to access information of any particular individual indiscriminately.”

# Singapore v HK

- The Singapore Personal Data Protection Act, effective 2-Jul-2014, defines “publicly available” personal data, and allows collection, use and disclosure of such data without consent of the subject. This is an *explicit* public domain exemption.
- The status in HK remains grey and untested in court. An earlier PCPD did propose an explicit public domain exemption, but the Government did not take it forward. We think there is an *implicit* exemption; the current PCPD clearly disagrees and is opposed to an explicit one.
- If there is no implicit exemption, then anyone who “collects” public domain personal data, by reading, hearing or seeing it in the media, and records it, is a “data user”, as are the media who “collect” if from public sources.
- That clearly was not the legislative intent, so there must be an implicit exemption.
- The Administrative Appeals Board in AAB 36/2007 upheld a PCPD decision not to investigate a complaint against Ming Pao, which published personal data from a court writ. The AAB said “The original purpose at the time of collection refers to the purpose of the data collector, not the purpose of the data subject.” The purpose of the newspaper when it collected the data was publication, so it was free to publish.
- It logically follows that if a person collecting public data has any purpose, then she is free to pursue that purpose, unless otherwise illegal.

# Webb-site v PCPD

- Since 1998, Webb-site has reported thousands of judgments, rulings, regulatory sanctions, convictions and prosecutions
- In 2000/2001, 3 judgments in a matrimonial case were handed down following open hearings in CA/CFA, named basis, published on judiciary website
- Webb-site published brief reports of the judgments with names of the parties, court and date of judgment, linking to the judgments
- In 2010/12, the online judgments were redacted on request of a party, Luciana Wong Wai Lan, who is also a member of several statutory bodies covered by Webb-site Who's Who
- We declined to redact our archive. She complained to the PCPD, which in Aug-2014 issued an Enforcement Notice ordering us to redact
- We appealed to the AAB, heard on 13-Jul-2015
- On 27-Oct-2015, the AAB rejected our appeal

# The AAB Decision

- The AAB, referring to AAB 36/2007, ruled that it was not our purpose in collecting the data that matters (i.e. reporting and publication), but the judiciary's purpose in collecting it from the parties and publishing it
- AAB: "We do not believe the Appellant's purpose of using the Complainant's personal data (i.e. reporting and publication for general use) can be said to be consistent with the Judiciary's purposes of publishing the judgments (i.e. to enable their judgments to be utilised as "legal precedents on points of law, practice and procedure of the courts and of public interests")."
- Therefore, AAB says that our reports used the data for a "new purpose" and breached Data Protection Principle 3
- This clearly undermines freedom of the media to report judgments and archive those reports – you may be in breach of DPP3 on a daily basis
- If that was the intent, then why are judgments available to the media and not just to lawyers under some duty of confidentiality?
- We now possess public domain information that we can no longer tell you.

# Basic Law, Bill of Rights

- A restriction on a Basic Law right to protect other rights must be constitutionally “necessary”. That is, it must be “no more than is necessary to accomplish the legitimate purpose in question” (*HKSAR v Leung Kwok Hung*, FACC 1/2015).
- But the PDPO only applies within HK. Publishers outside HK could collect the same online data. This places HK publishers at a severe disadvantage without “accomplishing” the objective of “un-publishing” the public data.
- To get closer to accomplishment, a “Great Firewall of HK” could stop online data collection by overseas publishers and/or stop access from HK to overseas publications, if we also order ISPs to block all VPNs, and ban people who travel outside HK from bringing the data back (except in their heads).
- If we don’t adopt mainland-style controls, then applying the PDPO to the public domain clearly fails the constitutional necessity test
- AAB ruled that the PCPD should carry out a “balancing exercise” – putting PCPD in the position of a media censor – but this ignores the point that overseas publishers are beyond its reach

# Implications if this stands

- HK media may face action for reporting public domain data if PCPD decides it is not in the public interest. He decides what the public need to know.
- Other DPPs apply – including not keeping information longer than is necessary. E.g. an archived report of a conviction or bankruptcy, after the conviction is old or the bankruptcy is over.
- Can the HK media afford to run take-down departments to handle such requests, or will they just close, or shorten their publicly available archives?
- HK e-book publishers may be forced to redact after time has passed
- Public registries (Land, Companies) may continue with paywalls and be redacted over time – remember the battle over HKIDs, currently in ceasefire mode
- Innovation in public data applications such as DNE will be stifled. Compare that with the UK Companies Registry, where all digitized documents are now free online.

**Advanced Search & Archive**

**Find**

with all search terms:

with the exact phrase:

with at least one of the words:

without the words:

**Date Range**

Year to search : 2013 (Only 1 year at a time)

Start Date: -- April

End Date : 1995 May

1996

1997

1998

1999

2000

2001

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2011

2012

2013

SUBMIT RESET

**Archive**

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S	M	2013	V	T
28	29	1	2	3
5	6	8	9	10
12	13	15	16	17
19	20	22	23	24
26	27	29	30	31
		1	2	3

Jan 2013 Go

Archives are already being shrunk. Why?

18-May-2013

18-year archive:

(source: archive.org)

Archives are already being shrunk. Why?

30-May-2013  
3-year archive:  
(source: archive.org)

Hong Kong's biggest circulation English daily  
**The Standard** 英文虎報

Thursday, May 30, 2013

### Advanced Search & Archive

**Find**

- with all search terms:
- with the exact phrase:
- with at least one of the words:
- without the words:

**Date Range**

Year to search : 2013 (Only 1 year at a time)

Start Date: 2013 April

End Date : 2012 May

SUBMIT RESET

**Archive**

<	May 2013						>
S	M	T	W	T	F	S	
28	29	30	1	2	3	4	
5	6	7	8	9	10	11	
12	13	14	15	16	17	18	
19	20	21	22	23	24	25	
26	27	28	29	30	31	1	

Jan 2013 Go

# About Webb-site

- Founded in 1998. Not-for-profit, partly funded by speaker fees, but mostly funded by me. The site and related activity takes about half my time.
- The other half, I research and invest in HK small-caps, currently holding >5% of 15 listed companies
- Corporate horror stories end up in *Webb-site Reports* (time permitting), while under-valued well-governed companies go into my portfolio, and hopefully not *vice versa*
- Over 20,000 subscribers to a free newsletter, opt-in/out
- Opinion polling
- Hall of Shame for jailed directors, CCB watch, SFC watch, ICAC watch
- Site also covers economic governance, advocating transparency, accountability, civil liberties, tax reform, land lease reform, minimal intervention and economically-rational policy-making
- *Webb-site Who's Who* covers all HK-listed directors, auditors, advisers since 1990; legislators, district councils, statutory/advisory bodies, CE election committee, relationships between them
- Frequent news flow from courts, tribunals, ICAC, HKICPA, SEHK, SFC and others, often with commentaries
- *Webb-site Total Returns* series – since 1994, all HK stocks including delisted
- Tracking all SFC-licensees, and all HK-registered companies (over 1 million live)
- CCASS Analysis System for stock movements
- Directors' share dealings since 2003

# Thank you!

