

The right to remember: keeping public data public

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at

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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
- 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

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
- And incidentally, Mr Gonzalez and his past tax problems are now famous – this is known as the “Streisand Effect”

Barbara Streisand's home



Copyright (C) 2002 Kenneth & Gabrielle Adelman, California Coastal Records Project, 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 artiste and take a “role in public life”, write to Google and get them to remove your drunk driving conviction, 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

Archives are
already being
shrunk.

18-May-2013
18-year archive:
(source: archive.org)

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

SUBMIT

RESET

Archive

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

Jan 2013 Go

Archives are
already being
shrunk.

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

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

2011
2010

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

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

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 came into effect on 2-Jul-2014, It 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. DNE would be allowed in Singapore.
- The status in HK remains grey and untested in court. The previous 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 decision of the (previous) PCPD not to investigate a complaint against a newspaper 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 [the newspaper], 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.

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 13 listed companies
- Corporate horror stories end up in *Webb-site Reports* (time permitting)
- Under-valued well-governed companies go into my portfolio
- 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

Thank you!

