Exploring Privacy over the next 25 years: The Right to be Forgotten

An early iteration of the Nethui theme for this year's was "The Next 25 Years of the Internet". Admirably ambitious, but a prospect I approached with the trepidation of the guy who has only ever succeeded in predicting the immediate past. As Arthur C Clark warned "any prediction that is believable is simply not bold *enough".*

So instead I'm going to pick a single topic and think out loud on that; the so-called right to be forgotten on the internet.

It seems to me that there is a degree of dissonance in the views held by this community, about privacy. I am of course making a significant assumption there, but let me test it. I think you will share the characteristics of many of the online communities in which I participate. If I ask you whether the NSA, GCSB, SIS or Department of Internal Affairs should monitor your emails, check in on your Skype calls and track your browsing history you will respond with a chorus of "no's". Why? Because privacy.

I'll get a similar (if slightly less resounding) response if I ask if it is OK for Google and Facebook to monitor your movements across the web, and to manipulate what you see as a result. Why? Privacy. It is a little bit creepy to have someone aggregating that data and making assumptions about you on the basis of it.

If I ask should people be able to opt out of being indexed by search engines, we see a flip. Why? Because information wants to be free, because it is in the public domain, because freedom of expression. Because open and uncapturable internet.

If I am completely honest with you, my starting point has so far been somewhere close to that latter position. However I take to heart the wise words of Tim Minchin, who in his inspiring graduation speech to the University of Western Australia quoted Clint Eastwood from the 1988 film the Dead Pool. Hard boiled cop Dirty Harry Callahan says "opinions are like arseholes – everyone has got one". Minchin pointed out that the significant difference however is that you should constantly, and thoroughly, and I'll add, even in public, examine your opinions.

Over the next few minutes I'm going to share some of the fruits of my self examination, and invite you to do the same.

Now as you might recall, on May 13 of this year the European Court of Justice ruled that Google in Spain should break links to an old newspaper story about a debt of a plaintiff,

Mr Gonzalez, because he'd paid the debt. The decision was based on European privacy law, and the principle behind it has been called 'the right to be forgotten'.

I'm actually not a big fan of the term.

The decision was based on the Spanish legal requirement on the relevance of personal data; the right to be forgotten that has been under debate as part of the review of Europe's 1995 Directive isn't yet a part of EU law, though plans are afoot to make it so.

Also, a right to be forgotten means different things to different people. It can mean data portability, so that if you decide to leave (say) Facebook, you should be able to take your links and content with you, and have that deleted. Do we feel more comfortable with that formulation?

It could mean a right to anonymity, or to its cousin obscurity.

And It can mean the removal of content from public search.

In his typically prescient way Australia's most famous jurist Sir Michael Kirby even proposed a right not to be indexed back in 1999.

The right to have people forget you.

But let's take the phrase at face value for the moment. If we end up with this right, then who would it apply to? Well, everyone. If it's a right then it doesn't make sense if it only applies to a few people.

But that's too passive. A right doesn't mean much if you can't enforce it; so, unless you can convince them you're so boring you fade from their memory the moment you stop talking to them, what it actually means is

The right to <u>make</u> people forget you

But again, we're not talking about people with their fallible memories, are we? It's the information systems, information machines that people have created, that are doing the heavy lifting, so:

The right to make <u>machines</u> forget you

Since the Spanish court case, Google in Europe have been receiving more than 10,000 requests a day that it forget about some kind of personal information, that it break links to information that is no longer relevant.

Why would you want the right to make machines forget you?

Privacy is all about helping people keep control over their own information in the face of technological innovations that lessen that control. And if every aspect of your life is being tracked by machines that never forget then more and more of your information is heading out of your control at every moment.

Back in the 1970s, US courts recognised the concept of practical obscurity, where information that might have been available had drifted out of availability. But information storage prices and volumes are constantly dropping. Assuming that within 25 years you're able to store the current internet on something the size of a pen, what is the structural incentive for the people operating these machines to throw anything away? If we're never going to run out of space then practical obscurity doesn't work as a concept.

Security expert Bruce Schneier said, with reference to the internet-enabled world: "we are embarking on a great experiment of never forgetting."

Eventually, nearly every aspect of our lives will be logged and searchable. Will we lose some of our ability to change as we grow, because we'll be locked closer and closer to who we have been in the past? Some might say we're already there with Facebook.

The conversation which has begun in Europe and which is gathering momentum around the world is a response to this increasingly ubiquitous hoarding and storing of personal information.

But it's complicated because if you can make a machine forget about you, you can make it a lot harder for people to talk about you, which can be very attractive for the bad people of this world. The information you'd like to remove about yourself is sometimes the *exact* information that other people want to keep hold of and be able to access.

Is this talk an affront to free speech?

Surely free speech isn't something we should give up without taking a very careful look at what the future might hold.

The Right to Be Forgotten – looking to the future

Harvard law professor Lawrence Lessig attempted to give us a tool to look into that future in his early 1990s book "Code (and other laws of cyberspace)".

Professor Lessig suggested there were four ways that people were regulated, four forces acting on the individual.

Market, mores, law, architecture

The example he used to explain these four terms was the bicycle. Imagine a meeting of serious people who want to accomplish the important goal of protecting bicycles.

After an hour or two they settle on those four options: market, mores, law, and architecture.

1: They could subidise bikes and make them cheap – this would make it not worth the thieves while to steal them. This is targeting the **market**, how buying and selling things reflects human behaviours.

2: They could try and change public opinion and make bike theft unacceptable by mounting a big advertising campaign with a catchy slogan - maybe go to Facebook and post "steal bikes, lose likes". This is hitting the **mores**, the way people think as a group, social acceptance.

3: They could introduce a statutory mandatory life sentence for bike theft. This is the **law** part of the story – a formal and codified set of rules for society, mediated through designated bodies like courts and Parliament.

4: They can attach padlocks to every wall, making it as easy as possible to lock your bike up. This is using **architecture**, the structure of the world, to accomplish your goal.

But also remember that each of these affects the other – the law has to deal with the world as it is, the existing market forces, the way people think. The market is similarly constrained by mores, architecture and laws. And so on.

The big thing that Lessig realised, is that **in an electronic world, architecture is fluid.**

It's made of code so it can be re-written silently and seamlessly.

When you want to protect something with architecture in the real world, you do it with bricks and mortar; it's obvious, and clunky.

When Google, say, wants to change the way it stores its email or to how it ties together its users, it changes its code. Code is mutable.

They can change the landscape of how are data is stored and used as, and how, and when they want to.

So let's break it down and apply these four views to the Right to be Forgotten – but don't forget when we use that term, we are incorporating the right to have information deleted, and the right to force a search engine to not link to other sites hosting information.

I could look at each of these four and discuss how the other three would affect an attempt to address an emerging issue solely by one of them, but I haven't got time, so I'll just focus on some of the interactions and tensions between them

Market

The economics of the web are odd, aren't they? A company makes Yo, an app that sends a verbal equivalent of a little eyebrow waggle, and it's worth millions of dollars.[1] Other companies make billions of dollars from providing elaborate, and expensive, services for free and selling advertising that, people have convincingly argued, might not even work.[2] There is a crazy free-for-all competition in the app space, and something close to a monopoly in the search space. Odd.

But in some ways, the market is king of the web right now because it has the clearest goal.

The mores are still fluid because the internet is comparatively new; we are still deciding how we deal with always-on connectedness as a society.

The architecture is also fluid because technology is changing the way we talk to each other, from one day to the next.

And the law is fluid because it's playing catch up; which I personally don't think is a bad thing, because hasty law-making creates problems.

By comparison with the other three, the market has a very clear goal: it wants to make a lot of money.

You know what they say…

   "If you're not paying for the product, you are the product."

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[1] http://www.businessinsider.com.au/the-inside-story-of-yo-there-isnt-actually-1-million-in-the-bank-2014-6

[2] http://www.theatlantic.com/business/archive/2014/06/a-dangerous-question-does-internet-advertising-work-at-all/372704/

Because the clear market incentive of all these information tools and services is to find a way to extract money out of information; out of *your* information, for as long and as hard as the other three forces will let the market get away with it.

So how does a right to be forgotten square with that market incentive?

How is the Market likely to support or hinder the right to be forgotten on the Internet?

Out of the four forces, the Market is the most deliberately responsive to the tension from the other three; it's all about trying to find the best and most profitable solution, to solve the equation of architecture, law and mores in a way that maximises its profit. So the market is well placed to provide its own solutions to the tensions of the other three forces.

Market and Mores

The strongest tension is probably from the Mores. Companies operating in the Market need to respond to the Mores, because if they don't they go out of business. Competition demands responsiveness.

The recent alarm over Facebook's mood alteration research is a good indicator of how quickly public opinion can react to a perceived misuse of user information.

And the never-ending fountain of revelations from WikiLeaks and Edward Snowden about how information is being collected and used in ways which the users may not have anticipated. There's a possibility this will just lead to apathy rather than more concern, which is something I'll look at in a moment, but in the short to medium term the change in an input is just the sort of thing that the Market is well-placed to respond to.

We're already seeing services like Snapchat make a virtue of how much information they don't collect, how it is not available for search, self destructs after a limited time, and therefore does not need to be "forgotten". If people can price their privacy in a way that makes sense, then the market will respond.

But also, don't underestimate the capacity of those with the greatest to lose in the unregulated marketplace to attempt to influence the mores to better support their business model. "Privacy is over" declared Zuckerberg in January 2010. And do you think Google might be doing a wee bit of astro-turfing in its response to the ECJ decision? They had 10,000 take-down requests within the first day of offering their form. Odd how quickly it became known in the media that a paedophile and a former bankrupt

were amongst them? In the last week, they've notified influential journalists and bloggers that they've broken links to former stories. I'm not a conspiracy theorist, I'm just saying …

Market and Law

Market entities need to be legally compliant otherwise they get in trouble. There's a long history of the law stepping in when one player becomes monopolistic and in those cases, the law usually wins.

However, there are lots of loopholes to discover along the way, as we have seen in the copyright area, where the market has been fighting the law for a couple of decades.

As the regulator in New Zealand, I have some options to address market issues, but hasty law is often bad law.

Market and Architecture

Architecture is in this context the least restrictive of the three forces because as Professor Lessig pointed out, code is architecture. So market entities that are working with code get to create their own architecture. And even when market entities try to lock down their code, it doesn't last long; jailbreak apps are an architectural innovation, responding to a lack of individual control.

Existing systems generally treat disruptive change as a threat that needs to be fought against.

Even when they started as a scrappy disruptive underdog, once the scrappy underdog becomes the leader of the pack, it loses its sympathy for the next scrappy underdogs.

So it seems possible that if the idea of the right to be forgotten takes root then we may see a vigorous corporate defence of their right to have machines never ever forget about you by use of their architectural control of code as we've seen in the area of digital rights management.

However, I think, on balance, I'm optimistic about the market's role in this.

I'm not convinced by the idea of a concrete right to be forgotten, but the inherent dynamism in always needing to justify your value proposition means that even if we don't end up with that right exactly, there is scope for the Market to address the desires and fears that it represents. Maybe not 'if you build it they will come'; more 'if you don't build it, they won't come - so get building'.

Mores

It's been a busy couple of years in privacy. WikiLeaks, the Edward Snowden revelations about the NSA, and a range of well-publicised data breaches have made privacy a household word.

People are becoming more aware and concerned.

But there is also the chance that everyone will assume everything is known about them and give up, the 'privacy is dead: get over it' approach

There's no lack of concern at the growing power of big companies, Facebook, Google, Amazon, the rest. You could argue we are seeing the rise of multinational information aristocracies. But importantly there is no intermediary between us and them. We all use these services and we give our information to them of our own free will.

We're voting with our index fingers, one click at a time, and to quote Vaughn Davis: "You ticked the f***ing box, people!!"

But all those index fingers can add up to a real difference. There's always the potential for a great wave of consumer action. You saw it with the web blackout directed against SOPA and PIPA, the US anti-piracy acts and our own activism against the 3 Strikes/Skynet law. You might see it around net neutrality. There's even a chance that the right to be forgotten will capture the public imagination.

A key issue is people mostly don't value their personal information very highly. On one hand, it makes sense because each individual data point is not much use to anyone. But if you flip it around, the multinational information aristocracies are nothing without the information of their users.

And another possibility is that we'll all stop caring as much about whether someone might have smoked a spliff, recorded an embarrassing video or said some risqué things in a chatroom. The social expectations about acceptable behaviour can change fast; look at smoking and drunk driving, both of which were much more mainstream behaviours just a couple of decades ago.

As Giles Fraser, a South London priest and Guardian columnist, put it in a thoughtful opinion piece after the ECJ decision came out:

> (I predict) the internet generation is going to end up being a lot better at what we used to be comfortable calling forgiveness. For if we are going to find it more and

more difficult to forget, then we are surely going to find it more and more important to forgive.

This change is happening right now, and will continue to happen. But even if we *end up* in a more open, mature and forgiving world, where no-one cares about their permanent record because everything is awesome, is it enough for us rely on *right now*.

So let's examine the ways in which social expectations, the mores, might change in response to the challenge of a possible right to be forgotten. Apathy, or perhaps acceptance is a better way of putting it, is one response, panic (or: concern?) is another.

The law might say you always had this right, it's nothing new. Agencies need to make sure the information they're using to make decisions about you is accurate, up-to-date, relevant and not misleading; and that's exactly the grounds on which the European court made its decision about Mr Gonzales.

The market via advertising is pretty great at telling you things are okay as they are and suggesting things could be better if you just bought this one new gadget, but it also might lead you to rely on those new gadgets. We've got Snapchat, if there are any problems with that, just wait for an appropriate gadget to fix it.

One of the points of the law is that it isn't static. It changes in response to events, to accomplish goals, and to remedy market failures.

Law

The right to be forgotten as seen in the decision about the Spanish gentleman I mentioned at the beginning comes from existing law about relevance. A broader right to be forgotten is before the European Parliament. It recognises, to quote: 'the desire of an individual to 'determine the development of his life in an autonomous way, without being perpetually or periodically stigmatized as a consequence of a specific action performed in the past.'

The NZ Privacy Act actually already allows people to correct their personal information. You can do it right now – call up someone who's holding information about you that's wrong, or out of date, or inaccurate, or irrelevant, and tell them to correct it.

Agencies holding information have to either make the correction, or, if they don't want to for whatever reason, they have to attach a statement setting out why you disagree with that information.

Could a New Zealand citizen assert a right to have links removed from a Google search on their name? The New Zealand law differs in some key respects from the Europeans', but we have a similar obligation to keep information relevant.

What is the onus if a New Zealand person asserts a right of correction (a term which is defined as including deletion) under information privacy principle 7?

Does the "purpose" element of the non-retention principle (principle 9) absolve search engines of the obligation to proactively purge old content? Should I issue a code of practice which spells out the respective rights of search engines and individuals?

These are all questions which I'm obliged to leave hanging, because of my role as a regulator and decider upon complaints under the Act.

The Law Commission finished its four-year long review of the Privacy Act in 2008 and, although they didn't suggest there should be a right to be forgotten, they did propose a right to anonymity or pseudonymity in its report.

Following on from the Law Commission review is going to be a new Privacy Act, over the next year or two.

Ending up with a right to be forgotten along the lines of the EU directive is one possibility, though admittedly a distant one, if there's a good enough argument for it, if it becomes important enough to people, to the mores.

Architecture

Architecture is not just the web – it includes human architecture. We are human beings with fallible memory and limited storage space. We need memory because the world at any instant does not provide us with enough information to make the best decision about what to do next.

And as humans, we've supplemented our fallible memory with ever better prostheses, like books, libraries and computers. In the process, we've sanctified that notion of memory. The destruction of the Library of Alexandria is a historical crime that still has the power to make antiquarians shudder, because losing all that knowledge seems criminal

However, while memory is anything in the past, if you make it fast enough the past becomes the present. A record of where you were five minutes ago is a record of where you are right now.

If you let people control what was said about them, then you are also giving them control of what will be said about them.

There's a famous story of Barbra Streisand and her cliff-top estate – she sued to remove a photograph, and in the process made it vastly more famous. So there's a self-correcting aspect to the process of online censorship. 'The web treats censorship as damage and routes around it', as the saying goes. There's an architectural protection, supported by the mores of free speech.

Conclusion and questions

Technical predictions are a quick route to embarrassment, but it's safe to say that computers will keep getting better, and they will keep getting better at a faster and faster rate. Over time, retention will become more frictionless, and storage capacity and Moore's Law follow the logarithmic curve relentlessly upward. We are either going to find some way to reintroduce friction and loss into the system or get used to living in a golden cage of information tweeting happily at our own reflection.

So some questions for you:

What do you think of a world where we have the right to more explicitly control how our information is stored and referenced, to make machines forget about us, would look like?

Is there a real demand for it, and is that demand strong enough to pull the architecture and the market with it?

And if we're going to tweak the market, the mores, the law or the architecture to bring about that right, which version do we want to follow - a right to anonymity, a right not to be indexed or a right to obscurity?

Or should we merely forgive, rather than forget?