[BE] Court of Cassation extends the right to be forgotten to online newspaper archives

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On 29 April 2016, the Court of Cassation rejected the appeal against a judgment of the Court of Appeal of Liège (25 September 2014) which found that a doctor could request the anonymisation of an article in the online archive of a newspaper. The article concerned a fatal car accident which the doctor had caused 20 years ago while inebriated (for a Dutch case on online news archives, see IRIS 2015-6/27).

The Court of Cassation confirmed the reasoning that the "digital" right to be forgotten (le droit à l'oubli numérique) is an intrinsic component of the right to privacy. In its assessment of the legality criterion of Article 10, paragraph 2 of the European Convention on Human Rights (ECHR), it finds that the interference with freedom of expression, that the right to be forgotten may justify, is based not on doctrine and jurisprudence, but on Article 8 of the ECHR, Article 17 of the International Covenant on Civil and Political Rights (ICCPR) and Article 22 of the Belgian Constitution. The reference by the Court of Appeal to the Google Spain judgment of the Court of Justice of the European Union (C-131/12) (see IRIS 2014-6/3) supports the scope that it bestows on this right to be forgotten.

Furthermore, according to the Court of Cassation, although Article 10 ECHR and Article 19 ICCPR ensure that the written press may put digital archives online and guarantees that the public may access these archives, these rights are not absolute. In certain circumstances, within the strict limits of these articles, these rights should yield to other equally respectable rights. The right to respect for private life contains the "droit à l'oubli" or right to be forgotten, allowing a person who has been found guilty of a crime or an offence to oppose in certain circumstances that his judicial past is recalled to the public on the occasion of a new divulging of facts, and may justify an interference with the right to freedom of expression. The digital archiving of an old press article that, at the moment when the facts occurred, legally rendered an account of the past that is now covered by the right to be forgotten, can be the subject of such interference. This may consist of altering the archived text in order to prevent or redress a violation of the right to be forgotten.

The Court of Cassation considered that the Court of Appeal judgment was right in stating that the online archiving of the article in question constituted a new

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divulging of the judicial past of the defendant, which may breach his right to be forgotten. By putting the article online, the applicant has enabled the article to be "prominently available" through the search engine of its website, which can be consulted for free. Moreover, this availability is enhanced considerably by search engines such as Google.

In addition, it was confirmed that the defendant fulfils the conditions to benefit from the right to be forgotten. Maintaining the non-anonymised article online, many years after the incident about which the article was written, the Court agrees, may cause the defendant harm disproportionate to the advantages gained from the strict respect of the applicant newspaper's freedom of expression. The Court found that the conditions of Article 10 paragraph 2 ECHR, with respect to legality, legitimacy and proportionality, are fulfilled. Hence, the Court of Appeal judgment legally justified its conclusion that, by refusing to anonymise the article in question, the applicant has made a mistake. The order to replace the first and last name of the defendant with an "X" in the version of the article on the website, and to pay him EUR 1 as moral damage, is thus confirmed.

Interestingly, the Court of Cassation emphasised that the Court of Appeal does not base the digital right to be forgotten on the European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Nor, it stated, was it based on the Belgian Act of 8 December 1992 on the protection of privacy in relation to the processing of personal data.

Cour de cassation, C.15.0052.F, 29 avril 2016

http://www.droit-technologie.org/upload/actuality/doc/1795-1.pdf

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