

Top German court rules on multiple right to be forgotten disputes

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(Credit: Credit: iStock/AdrianHancu)

Germany's top constitutional court has issued judgments in two separate right to be forgotten cases – in one case finding in favour of Google and in the other against magazine Der Spiegel.

Despite reaching different conclusions, the published decisions in both cases said the court had to consider the balance between the right to “informational self-determination” and other fundamental rights.

In a 6 November ruling, published last Thursday, the German Federal Constitutional Court ruled against German magazine Der Spiegel, finding a man who was convicted of a double murder in 1981 has the right to erasure.

In the second ruling, also published on Thursday, the businesswoman plaintiff was not granted the right to erasure. She had asked Google to remove a link to a transcript of a broadcast in which she is accused of unfairly treating a former employee.

The judgment against Der Spiegel overturns an earlier ruling by the Federal Court of Justice and will force the magazine – which published articles on the man’s conviction – to take technical measures to ensure Google searches for the man’s name do not return results leading to the magazine articles.

Der Spiegel covered the man’s conviction at the time and subsequently uploaded the articles to their online archive in 2009. The man, released in 2002, later sued to prevent the magazine from disseminating any information on the case containing his name.

The constitutional court said that right to be forgotten decisions regarding online versions of archived articles must balance conflicting fundamental rights and must consider the length of time since the article’s publication.

The ruling does not mean that media organisations need to proactively review their archives to find “problematic” articles, Sebastian Seelmann-Eggebert, a partner at Latham & Watkins in Hamburg told GDR.

“However, when confronted with a complaint about an archived article, they need to assess the complaint’s legitimacy in the specific circumstances of each case, including the complainant’s right over time to fade from public attention,” Seelmann-Eggebert said.

If the complaint is legitimate, the organisation must “explore any means” available to delist the article from a search for that person’s name but can otherwise keep it available, Seelmann-Eggebert said. In this case, that means the article should not be listed when searching for the name of the murderer, but can be listed for other related search terms such as the author’s name, he said. The court ruled differently in the businesswoman’s case against Google, finding that a lower court’s decision not to force Google to delist results about her was not a violation of her information rights.

Lokke Moerel, senior counsel at Morrison & Foerster in Berlin, told GDR the court ruled that publication by a search engine does not fall within media privilege – unlike Der Spiegel – and that Google therefore cannot rely on the principle of freedom of expression.

“The court balanced the plaintiff’s right to privacy with Google’s right to conduct business, and not freedom of expression,” Moerel said.

Additionally, if the search engine had been prevented from linking to the transcript, this would also affect the freedom of expression of the publisher as well as the right of the public to receive such information, Moerel said. In its judgment, the court also said that not enough time had passed since publication, and the plaintiff herself had agreed to be interviewed for the article.

Moerel said the ruling appears to contradict the European Court of Justice’s earlier judgments on the right to be forgotten in the landmark Google Spain and Google global delisting cases.

“The [constitutional court] contradicts the Google Spain decision in which the ECJ held that privacy rights should in principle take precedence over the information interests of internet users. Exceptional circumstances, which would justify the linking, did not exist in that case.”

In contrast, the German constitutional court does not assume that privacy rights take precedence, but emphasises the equal status of other fundamental rights, Moerel said.

Moerel said the case marks the first time the German constitutional court has declared itself competent to decide on violations of European fundamental rights. Until now the court had only considered itself competent to rule on violations of the German constitution, she said.

Der Spiegel did not return a request for comment.