



# THE "RIGHT TO BE FORGOTTEN": ASSERTING CONTROL OVER OUR DIGITAL IDENTITY OR RE-WRITING HISTORY?

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**The “right to be forgotten”: Asserting control over our digital identity or re-writing history?**

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2015, p. 19 IRPPS Working paper 83/2015

The dramatic expansion of Internet over the past twenty years has presented society with fresh dilemmas regarding the balance of non-absolute fundamental rights, specifically the conflict between the right to freedom of expression on the one hand, and the right to privacy and data protection on the other. In this context, this paper analyses the case of Google Spain, concerning a Spanish citizen’s request to have personal information de-listed from Internet search engines. Following a description of the case, the implications as well as the controversies surrounding the CJEU’s ruling on the “right to be forgotten” will be explored. The paper concludes that despite the many grey areas left by the CJEU’s decision, the case has ignited an important discussion regarding individuals’ relationship with the Internet, which has moved beyond the legal arena and permeated civil society.

*Keywords:* “Right to be forgotten”, Right to privacy, Freedom of expression, Data Protection Directive (95/46/EC).

CNR-IRPPS

**Il “diritto all’oblio”: affermare il controllo sulla nostra identità digitale o riscrivere la storia?**

Alice Pease<sup>(\*)</sup>

2015, p. 19 IRPPS Working paper 83/2015

La drammatica espansione di Internet negli ultimi venti anni ha presentato alla società nuovi dilemmi per quanto riguarda l’equilibrio dei diritti fondamentali non assoluti, in particolare il conflitto tra il diritto alla libertà di espressione da un lato, e il diritto alla privacy e alla protezione dei dati dall’altro. In tale contesto, l’articolo analizza il caso di Google Spagna, riguardante la richiesta di un cittadino spagnolo, al motore di ricerca, di sopprimere dei link rimandanti ad alcune informazioni personali. A seguito di una descrizione del caso, saranno esplorate le implicazioni e le polemiche che circondano la sentenza della CGUE sul “diritto all’oblio”. L’articolo conclude che, nonostante le molte incertezze emerse dalla decisione della CGUE, il caso ha riaperto un dibattito importante per quanto riguarda il rapporto degli individui con Internet, una discussione che non è stata limitata all’arena legale ma che ha permeato la società civile in generale.

*Parole chiave:* “Diritto all’oblio”, Diritto alla privacy, Libertà di espressione, Direttiva sulla Protezione dei Dati (95/46/EC).

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## 1. Introduction\*

Typing one's name into Google, however little famous we may consider ourselves to be, can wield a whole host of results, from personal Facebook and Twitter pages to other more obscure memories which we may have buried in the past. In this day and age, most of us have a digital identity made up of fragments of past and present accounts, comments, posts and photos. It is an identity which persists over time and in the nebulous age of Internet, it is difficult to see exactly how these snippets of our lives are pieced together for the whole world to view. Our digital identity is, consciously or unconsciously, at the mercy of online publishers and digital data processors who dig up the archives of our past.

It was Mr Costeja González's dissatisfaction with his digital identity which led him to make a complaint before the Spanish Data Protection Agency<sup>1</sup> regarding two advertisements, dating back to 1998. He objected to the fact that every time his name was typed into Google two notices for the auction of his house to cover his social security debts appeared. These notices had been published on the website of a Spanish newspaper, *La Vanguardia*, more than a decade before and yet they still appeared in the front line of a Google search of his name, causing him considerable professional obstacles. With his debts settled long ago, Mr Costeja González felt that events relating to his personal financial history were "now entirely irrelevant" and the linking of such notices to his name infringed directly on his privacy rights.

Mr Costeja González therefore made two requests to the Spanish Data Protection Authority. Firstly, for the notice to be taken down from its original website, and secondly, that Google Spain and Google Inc. be required to remove a link to personal data relating to him. The first complaint he lodged was rejected on the grounds that it had been advertised lawfully and for legitimate purposes, whilst the second was upheld. Google Spain and Google Inc. appealed the decision to Spain's National High Court, the *Audiencia Nacional*, who referred to the Court of Justice of the European Union (CJEU) for a preliminary ruling.

At the heart of the case, the Google ruling<sup>2</sup> questions the boundary between the right to privacy and freedom of information in the digital age. Both sets of rights are enshrined in the European Union's primary law, in the Charter of Fundamental Rights, as well as in the Council of Europe's European Convention of Human Rights (ECHR). But neither of these rights is absolute, and a delicate equilibrium needs to be achieved between access to information and transparency on the one hand, and privacy on the other. This tension between two clashing principles is by no means new; it has existed for centuries and has been shaped by historical, cultural and social factors. But the evolution of technology at a breakneck speed over the last 20

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### \* Acknowledgements

*I would like to thank Professor Daniele Archibugi for his guidance on the case study as well as my colleagues at the Consiglio Nazionale delle Ricerche for their valuable feedback.*

<sup>1</sup> The Spanish Data Protection Agency is the public law authority which was set up to oversee compliance with the legal provisions on the protection of personal data.

<sup>2</sup> *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (Case C-131/12, 13 May 2014).

years has reignited discussion about the exact relationship between these two sets of fundamental rights.

In this day and age, few would deny that search tools have become indispensable, making information posted on the Internet instantaneously accessible to everyone to view freely. Search engines have facilitated the art of remembering although it is a memory that is selective and not wholly representative of an individual's past (Mayer-Schönberger 2009). The power that search operators have in unearthing information has presented society with fresh dilemmas regarding the obligations of data operators. Do search engines have the right, through a string of algorithms, to dig up potentially sensitive and unconnected issues relating to our lives? Should search engines act as neutral databases of information, as a traditional library would, without filtering potentially embarrassing or irrelevant information? Or do we have the right to demand that certain facts about us no longer appear in search engines?

On 13 May 2014, the CJEU handed down a judgement which firmly established the "right to be forgotten" and the idea that personal data should not be stored in databases indefinitely. The term "right to be forgotten" was coined relatively recently by scholar Viktor Mayer-Schönberger (2009) but it has its intellectual roots in French law, and the *droit à l'oubli*, traditionally applied to an individual who has served a criminal sentence and no longer wishes his name to be linked to previous criminal activities (Rosen 2012). It can be implemented in several forms; by passing of legislation which requires that data be deleted after a certain time lapse, or the right to have websites remove personal data. The CJEU ruling favoured this second approach and found that all individuals had the right to ask Google to remove links to information that was "inadequate, irrelevant or no longer relevant, or excessive"<sup>3</sup>. Previously, removal requests were limited to a much narrower list of items, such as information judged illegal by court, pirated content, personal information or child sexual abuse imagery. The ruling has thus expanded the power of the individual to control personal information online.

The ruling has proved to be a divisive one. It has attracted strong criticism not only by search engine businesses but also by freedom of expression advocates who see the new obligations imposed on Google and other search engines as a dangerous precedent to containing in a discriminate fashion Internet's best attribute, that is the free circulation of information. There is also strong criticism at the new role which the CJEU has forced search engines to take up; in essence, by deciding whether or not information should be delisted, search engines have become fundamental rights' arbitrators, far from their natural role as profit-making corporations. Criticism is also focused on the fact that the ruling left many grey areas unanswered concerning the "right to be forgotten". The Court failed to specify questions such as the geographic scope of delisting and how to balance fundamental rights or which Internet companies should fall under the scope of the data protection directive.

Others, on the other hand, have welcomed the ruling as an opportunity for citizens to exercise greater control over personal data by challenging the notion that information published on the web should stay there indefinitely. It is seen as expanding individual rights against the economic rights of private corporations who make personal data available for the world to see. Those particularly relieved at the CJEU judgement might include, for example, victims of abuse

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<sup>3</sup> Case C-131/12, paragraph 94.

or people wrongly connected to a crime who can now request to be dissociated with certain links to their name.

This paper will begin by discussing the current EU legislation on data protection and detail the Google case. The paper will then move on to analysing the debate surrounding the “right to be forgotten”, between those who see the CJEU ruling as an opportunity to assert a greater degree control over his or her digital identity, and those who decry the ruling as a dangerous precedent to rewrite history.

## **2. Privacy and data protection in European legislation**

The idea of the “right to be forgotten” is strictly related to the value of privacy, a concept that has caused a headache amongst a wide number of legal and philosophy scholars alike. It is next to impossible to find a consensus on the exact meaning of privacy given that it encompasses a wide range of ideas, of varying degrees of interconnectedness, which change over time and across societies and cultures. A wealth of issues enter into the privacy debate including, among others, identity, the right to physical space, the right to make individual decisions on questions such as abortion and contraception, the right to control the flow of personal information, surveillance and media intrusion.

In light of the difficulties of defining the term, traditionally scholars have opted to strip the concept down to find the bare common denominator between its different expressions. For example, Samuel Warren and Louis Brandeis made an early attempt to define privacy as the right “to be let alone” (1890). But recently some scholars have moved away from this approach believing that such definitions are either too narrow or too broad and do not adequately reflect the complexities of the issues at hand. David Solove, for example, has opted for a plurastic understanding of privacy, seeing it as a “set of family resemblances” that are not necessarily reducible to a single characteristic (2007).

This may not provide a clear-cut answer on how to define privacy, but the idea of privacy with porous boundaries allows for a more engaging and rigorous analysis of the issues at hand. The spread of technology has complicated, rather than simplified, the long-standing debate on privacy. Public and private spheres have never been mutually exclusive, but the information age has blurred the line between the two yet further. As Solove points out, the individual and society do not necessarily sit on opposite sides of the fence, rather “privacy issues involve balancing society interests on both sides of the scale”. (2007).

Europe has a long history of privacy regulations concerned with identity, integrity and media freedoms. The ever-growing importance of Internet in the lives of European citizens has led to the emergence of a new privacy right, that of data protection. It is an issue dealt with widely by the European Union and the Council of Europe in general treaties, as well as in more specific directives and regulations.

The right to privacy was originally enshrined in Article 8 of the European Convention of Human Rights (ECHR), which establishes the right to respect for private and family life. But an increasingly technologized society made evident the need for a more specific convention with

an exclusive focus on data protection. Convention 108<sup>4</sup>, adopted in 1981, responded to this need by becoming the first legally binding instrument concerning data protection. It sets out minimum standards to protect individuals against unlawful collecting and processing of data as well as the regulation of the transnational flow of personal data. Enshrined in the convention is the right to privacy and the right to know what information is being collected on individuals (as well as to have it corrected if necessary). Ratified by all EU members, it has provided a common data protection framework for subsequent EU regulations regarding data protection. On 1 July 2004, the Additional Protocol<sup>5</sup> came into force, strengthening the original convention in two areas; firstly, by requiring that Member States set up national supervisory authorities to ensure compliance with data protection legislation, and secondly, by improving the guarantees for transborder data flows.

Under EU primary law, data protection acquired the status of a separate fundamental right under Article 8 of the Charter of Fundamental Rights as of 2009. It is related to, but distinct from, the respect for private and family life (Article 7). The principal EU instrument of secondary law concerning data protection, and the one central to this case, is the Data Protection Directive (95/46/EC). It was introduced in 1995 as it became clear that the four “freedoms” (goods, services, capitals and people) required the harmonization of EU data protection standards across different European countries<sup>6</sup>. The directive proposes an integrated approach to data protection across Europe, establishing a series of rights and duties, although Member States have the responsibility to implement these independently at a national level. The 1995 Data Protection Directive ensures that individuals have strong rights over the processing and controlling of data concerning them, including the right to access data and the right to object. The “controller” of the data must ensure that information is collected for “specific, explicit and legitimate purposes”<sup>7</sup>, and must make every effort to ensure that the data is accurate, and rectify or erase it if it is not<sup>8</sup>. The Data Protection Directive provides a number of exceptions in cases of public interest, so that the same level of data protection does not automatically apply in instances of journalistic or artistic or literary expression.

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<sup>4</sup> Convention for the protection of individuals with regard to the Automatic Processing of Personal Data regarding supervisory authorities and trans border flows, 21 January 1981, ETS No. 108, available <http://conventions.coe.int/Treaty/en/Treaties/Html/181.htm>.

<sup>5</sup> Additional Protocol to the Convention for the protection of individuals with regard to the Automatic Processing of Personal Data regarding supervisory authorities and trans border flows (opened for signature 8 November 2001, entered into force 1 July 2004), ETS No. 181, available <http://conventions.coe.int/Treaty/EN/Treaties/HTML/181.htm>.

<sup>6</sup> For more detail on the evolution and the current state of Data Protection laws in Europe, see European Agency for Fundamental Rights, *Handbook on European data protection law*. Luxembourg: Publications Office of the European Union, 2014. Available [http://www.echr.coe.int/Documents/Handbook\\_data\\_protection\\_ENG.pdf](http://www.echr.coe.int/Documents/Handbook_data_protection_ENG.pdf).

<sup>7</sup> Directive 95/46/EC of the European Parliament and of the Council 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, article 6 (1) (b).

<sup>8</sup> *Ibid.*, Article 6 (1) (d).

Table 1. Fundamental Rights enshrined in European Treaties.

Right to Privacy, Right to Data Protection and Freedom of Expression		
	European Union	Council of Europe
Right to Privacy	Article 7 Charter	Article 8 ECHR
Right to Data Protection	Article 8 Charter	Convention 108 Additional Protocol
Freedom of Expression	Article 11 Charter	Article 10 ECHR

Source: Author's own elaboration.

As recent CJEU rulings have stated, “the right to data protection is not ... an absolute right but must be considered in relation to its function in society”<sup>9</sup>, and should be measured using the principle of proportionality<sup>10</sup>. Freedom of expression in particular often comes into conflict with the right to data protection, given its nature as another fundamental right which, in contrast to the prohibition of torture or slavery say, is not absolute and instead has to be “viewed in relation to its social purpose”<sup>11</sup>.

The rapid technological developments of the last two decades led the European Commission to propose, in January 2012, a new General Data Protection Regulation (GDPR). Whereas currently each member state enforces the rules and obligations of the directive individually, the proposed General Data Protection Regulation, the final approval of which may come in late 2015<sup>12</sup>, would create a single law applicable to all Member States. The reform has two central aims; to enhance the level of data protection for individuals and to improve business opportunities by facilitating the flow of data in the digital single market. As part of the reform, the proposed GDPR includes an explicit “right to be forgotten” and provides the conditions for the right to be exercised. The proposal highlights one particular group who will benefit; “the right is in particular relevant, when the data subject has given their-consent as child, when not being fully aware of the risks involved by the processing, and later wants to remove such personal data especially on the Internet”<sup>13</sup>. But the proposed regulation is also more specific about the limitations to the “right to be forgotten”; when the retention of the data is in the interest of the public, in the area of public health, or for historical, statistical and scientific

<sup>9</sup> Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen, 9 November 2010, paragraph 48.

<sup>10</sup> For a more extensive discussion regarding the non-absolute nature of the right to data protection see Jeanne Mifsud Bonnici (2014), “Exploring the non-absolute nature of the right to data protection”, *International Review of Law, Computers & Technology*, vol. 28, no. 2 (2014), pp. 131-143.

<sup>11</sup> Case C-112/00 Schmidberger, 12 June 2003, paragraph 80.

<sup>12</sup> On 15 June 2015, the European Council approved the General Data Protection Regulation. The European Commission, European Parliament and European Council now needs to agree on the final text of the regulation. It is likely that a final version will be completed by December 2015.

<sup>13</sup> Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council, (COD) 9565/15, 11 June 2015, available <http://data.consilium.europa.eu/doc/document/ST-9565-2015-INIT/en/pdf>.



purposes, or if it used for the establishment, exercise or defence of legal claims, then it will be considered lawful.

### **3. Case description and ruling**

So how may European citizens use the existing legislation in practice to safeguard their data protection rights? In the case of a perceived violation, an individual should first address the issue with the controller of the data. If the controller fails to provide an adequate response, the data protection subject may then bring his case before the national court or the national supervision authority. In this specific case, Mr. Costeja González, first went to Google Inc. and Google Spain and the newspaper La Vanguardia to request the removal of the notices. On having his request denied, he decided to take his complaint to the Spanish Data Protection Agency, who after considering the case, ruled that Google was obliged to de-link the information from his name, but that La Vanguardia was under no obligation to take down the original notices relating to Mr. Costeja González's debts from their website.

Google Inc. and Google Spain then appealed the decision to the Spanish High Court who referred three questions to the CJEU on the interpretation of the European data protection directive. Firstly, the CJEU was asked to determine whether Google could be considered, through its search engine activities, a "processor" or "controller" of data. Google argued that as a mere intermediary between the reader and the publisher, it had nothing to do with the regulation of content, and therefore was not liable to the obligations of the "controller" under the directive. The second question regarded the territorial scope of the application and whether search engines like Google who were established outside of the EU but had subsidiaries in Member States were under the obligations imposed by the directive. Google upheld that the company's data processing service was fully conducted outside the European Union and therefore search engine activities did not fall within the territorial scope of the Directive. The last question related directly to the "right to be forgotten". The Court asked whether, under the EU Data Protection Directive, an individual has the right to request that his or her personal data be removed when his or her name is typed into search engine even when the information is lawfully published by a third party.

In its judgment, the CJEU clearly upheld the right to privacy ruling that "in the light of the potential seriousness of the impact of this processing on the fundamental rights to privacy and data protection, the rights of the subject data subject prevail, as a general rule, over the economic interest of the search engine and that of internet users to have access to the personal information through the search engine"<sup>14</sup>. The Court found that Google could be requested to remove search results linked to a person's name as long as the person's privacy interests outweighed the interests of the general public.

For this conclusion to be reached, the ruling recognized that Google's activities clearly fell under the definition of "processing of personal data" through its activities of collection, storage, organization and disclosure of personal data and that it could be considered a "controller" since it "determines the purposes and means" of processing<sup>15</sup>. The CJEU also rejected Google's

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<sup>14</sup> Case C-131/12, paragraph 81.

<sup>15</sup> Ibid. at paragraph 33.

claims that the search engine activities' did not fall under the scope of EU data protection laws. The ruling considered that Google's national subsidiaries constitute establishments of the company in the EU since their commercial and advertising activities carried out in Member States are "inextricably linked"<sup>16</sup> to the processing of personal data.

With regards to the "right to be forgotten", the Court found that Google had a major impact on the data privacy rights of individuals as search engines enable any Internet user to obtain information which would have otherwise been very difficult, or next to impossible, to find<sup>17</sup>. The Court went on to assert the "right to be forgotten", as a matter of principle, through the de-linking of information on the basis of a person's name. But it reiterated that it was not an absolute right, rather that a "fair balance" between the interest of Internet users to access information and the data subject's fundamental rights to privacy and data protection needs to be struck<sup>18</sup>. The nature or the sensitivity of the processed data as well as the interest of the general public to have access to the information should be taken in consideration in a case-by-case assessment<sup>19</sup>.

Finally, the Court held that the activities of search engines have to be distinguished from those carried out by publishers of websites. The Court found that the displaying of a link in a search engine is likely to have a greater impact on privacy than was the information only to appear on the original website. Therefore, Google may be required to de-link since it made access to personal information "appreciably easier"<sup>20</sup>, whereas the original publisher is not under the same obligations.

Significantly, the ruling went against the opinion of Advocate General Jääskinen delivered in June 2013. According to his view, the establishment of the "right to be forgotten" in the European Union would leave the bulk of the decision on fundamental rights down to the search engine, which essentially would curtail the right of expression of the original publisher of the content<sup>21</sup>. This "would amount to the censoring of his published content by a private party"<sup>22</sup>. As will be discussed shortly, this argument has been taken up by many critics of the "right to be forgotten".

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<sup>16</sup> Ibid. at paragraph 56.

<sup>17</sup> Ibid. at paragraph 80.

<sup>18</sup> Ibid. at paragraph 81.

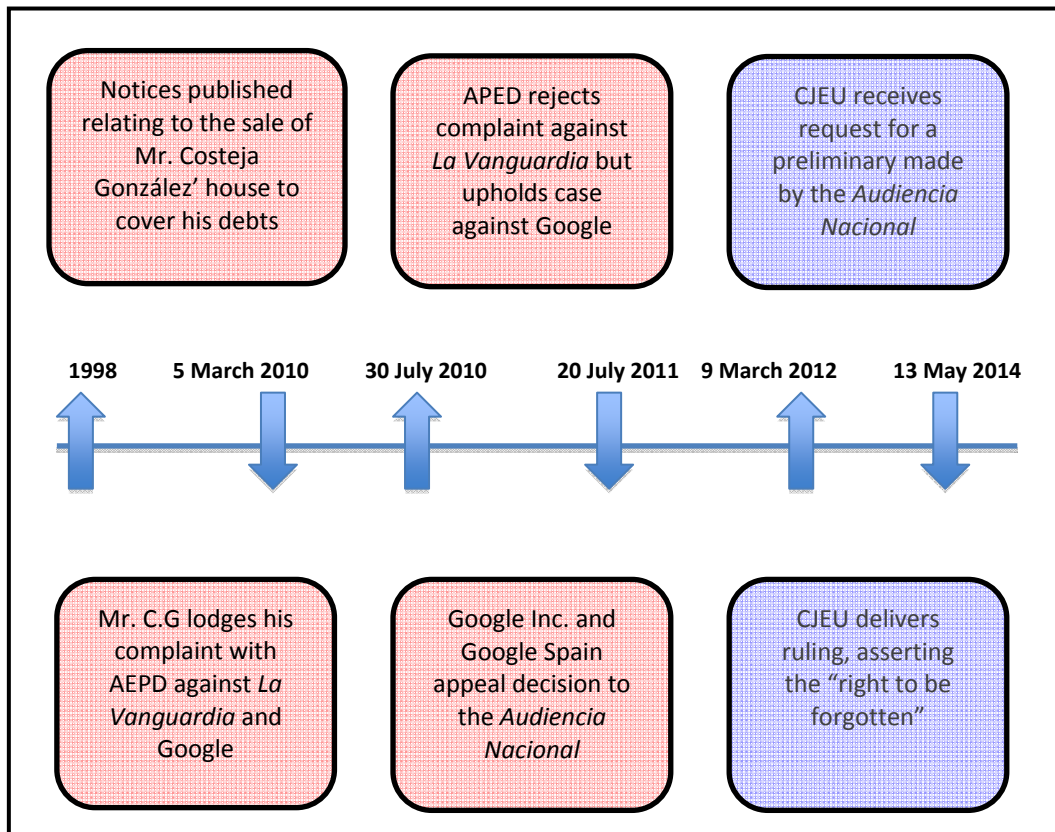
<sup>19</sup> Ibid. at paragraphs 97-98.

<sup>20</sup> Ibid. at paragraph 85.

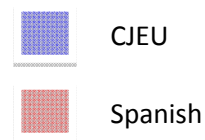
<sup>21</sup> Opinion of Advocate General Jääskinen, delivered on 25 June 2013, in case C-131/12 *Google Spain vs. Agencia Española de Protección de Datos*, paragraph 133, available <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1436178848049&uri=CELEX:62012CC0131>.

<sup>22</sup> Ibid., paragraph 134.

Table 2. Timeline of the Google Spain case.



Source: Author's own elaboration.



#### 4. Impact of the ruling

In practical terms, the Google case led the company, and several others like Bing, to launch a new de-listing request system. An online form has been made available to individuals of the 28 EU Member States where Internet users can request the removal of a link to certain information they consider "inadequate, irrelevant or no longer relevant". Google has appointed a team of legal experts to assess the validity of each individual case, depending on criteria such as age of the material and the interest of the public to access the content. If the request is approved, then Google sends a notice to the Webmaster of a site informing that the article will be de-linked to a person's name in Google. The information remains online and may still be found through a search engine based on a different query. For example, a document entitled "Alexander Dalkirk questioned over burglary at 94 Canvas Road" may be removed as a result under "Alexander Dalkirk" but would still appear under a search for "burglary at 94 Canvas Road". Contrarily to what the name suggests, therefore, an article is not "forgotten", it is just made a little more difficult to find.

So far, Google has had over 280,000 requests to remove information, of which around 59% have been rejected<sup>23</sup>. Google removes most links from Facebook, followed by profilengine.com, YouTube and groups.google.com. Some decisions have been straightforward, such as links to the fact that someone was infected with HIV a decade ago, whilst others are thornier in nature. The table below illustrates just some of the many contentious decisions which Google has been forced to make regarding de-listing.

*Table 3. Examples of de-listing requests received by Google since the CJEU ruling.*

De-listing requests received by Google	
Approved requests	Rejected requests
A victim of physical assault asked for results describing the assault to be removed for queries against her name.	Elected politician who requested removal of links to news articles about a political scandal he was associated with.
Links to “revenge porn” - nude pictures put online by an ex-boyfriend.	Multiple requests from a single individual who asked to remove 20 links to recent articles about his arrest for financial crimes committed in a professional capacity.
An individual asked to remove a link to an article covering a contest in which he participated as a minor.	Request to remove a 2013 link to a report of an acquittal in a criminal case on the ground that it was very recent.
A request by someone incidentally mentioned in a story, a news report, but not the actual subject of the reporting.	Request by a doctor objecting to patient reviews.
An article in a local paper about a teenager who years ago injured a passenger while driving drunk.	A public official asked to remove a link to a student organization’s petition demanding his removal.
The name on the membership list of a far-right party for someone who no longer holds those views.	Reports of a violent crime committed by someone later acquitted because of a mental disability.

*Source: Adapted from J. Powles (2015), “Results May Vary”.*

Various newspapers have denounced the seemingly arbitrary de-listing process of search engines<sup>24</sup>. But like the expansion of rights in any new domain, it is a process which requires a certain degree of trial and error, with Google’s chief legal officer, David Drummond, calling it a “work in progress”<sup>25</sup>. Despite the uncertainties presented by the decision, Google has adjusted

<sup>23</sup> For updated statistics, see “European privacy requests for search removals”, *Google* (updated 6 July 2015), available at <http://www.google.com/transparencyreport/removals/europeprivacy/?hl=en-US>.

<sup>24</sup> See for example James Ball, “EU’s “right to be forgotten”: Guardian articles have been hidden by Google”, *The Guardian*, 2 July 2015 available <http://www.theguardian.com/commentisfree/2014/jul/02/eu-right-to-be-forgotten-guardian-google>, Mathew Sparkes “Google removes more links under “right to be forgotten””, *The Telegraph*, 15 August 2014, available <http://www.telegraph.co.uk/technology/google/11038155/Google-removes-more-links-under-right-to-be-forgotten.html>.

<sup>25</sup> Quoted in James Ball, “Google admits to errors over Guardian “right to be forgotten” link deletions”, *The Guardian*, 10 July 2014, available <http://www.theguardian.com/technology/2014/jul/10/google-admits-errors-guardian-right-to-be-forgotten-deletions>.

to the Court's ruling by appointing an Advisory Group made up of academics, legal professionals and technology experts who have assessed how to overcome some of the practical difficulties resulting from the Court's decision. Seven public consultations were organized in cities across Europe and in the recently published final report by the Advisory Group, guidelines were offered on how to best evaluate the de-listing requests and on how best to manage key procedural elements<sup>26</sup>.

## 5. The “right to be forgotten” debate

The Google case has reinvigorated debate all across Europe and beyond about how the Internet should be regulated. Should we have the right to demand that links be taken down from search engines or does this qualify as censorship? Should laws regarding data protection be applicable to search engines based outside Europe who have part of their operators on the continent? And is it right that massive profit making corporations make key decisions about how to balance fundamental rights? The case highlights a conflict between two sets of social values, freedom of information and right to privacy. Societies value these competing rights in different ways; in the United States freedom of expression, enshrined in the First Amendment, trumps the right to privacy whereas Europe gives greater significance to privacy. Determining the correct balance of these rights stretches far beyond the legal sphere; the correct equilibrium has to be found in a country or a continent's historical, cultural and social roots.

The reaction of Google and other Internet companies was, unsurprisingly, one of disappointment but many other advocates of freedom of expression and media outlets have been similarly concerned with the potential impact of the case. The founder of Wikipedia, Jimmy Wales, decried the ruling, claiming that “History is a human right and one of the worse things that a person can do is attempt to force to silence another”<sup>27</sup> Similarly, Big Brother Watch, a UK based freedom of expression campaign group, said that the EU was “establishing a model that leads to greater surveillance and a risk of censorship”<sup>28</sup>. Criticism of the Google case has focused both on the legal shortcomings of the CJEU ruling, such as the failure to fairly balance rights and to define the territorial scope of the ruling which complicates the implementation of such the right, and on the consequences that the decision will have on customers and on Internet companies.

Legal criticism has focused around the lack of clarity of the CJEU ruling with regard to the “right to be forgotten”, which creates many uncertainties when enforcing the ruling. The Court's overly broad definition of “data controllers” and secondly over the court's balancing test, which seems to prioritize – and not “balance” – the right to privacy over other fundamental rights (Frantziou 2014). No clear guidelines were given on how to best achieve a fair consideration of

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<sup>26</sup> “The Advisory Council to Google on the “right to be forgotten””, 6 February 2015, available <https://drive.google.com/file/d/0B1UgZshetMd4cEI3SjlvV0hNbDA/view>.

<sup>27</sup> Quoted Sophie Curtis and Alice Philipson, “Wikipedia founder: EU's “right to be forgotten” is ‘deeply immoral’”, The Telegraph, 6 August 2014, <http://www.telegraph.co.uk/technology/wikipedia/11015901/EU-ruling-on-link-removal-deeply-immoral-says-Wikipedia-founder.html>.

<sup>28</sup> “The CJEU ruling does not provide “the “right to be forgotten””, Big Brother Watch, 14 May 2014, available <http://www.bigbrotherwatch.org.uk/2014/05/CJEU-ruling-provide-right-forgotten>.

the two rights, which creates the risk of marginalizing freedom of expression and information in the future. Similarly, the British House of Lords, in a report reviewing the CJEU's decision, criticised the sweeping definition and argued that a much more stringent interpretation of "controller" should have been given<sup>29</sup>.

Beyond legal criticism, the criticisms focus on the potential negative impact of the CJEU ruling for customers and businesses alike. Critics fear that the CJEU's ruling will lead to "silent encroachment"<sup>30</sup>. The ability for individuals to request delisting might lead to an airbrushing of information which is of interest to the public, for example facts inconvenient facts relating to public officials. Since anyone is entitled to request information to be de-linked, fears of auto-censorship and the re-writing of history are rife. Parallels have been drawn to the "memory hole" in George Orwell's 1984, a vacuum through which the Ministry of Truth is able to eliminate uncomfortable facts about government activities<sup>31</sup>. Could this be a first step by the European Union in legitimizing a twenty-first century "memory hole"?

The ruling is also unclear about the obligations of search engines and intermediaries other than Google. What exactly constitutes a "search engine"? Google currently controls almost 90% of the market place for search operators but the ruling is sufficiently broad that it could affect other smaller companies, sometimes with a more specialized search focus, who have fewer resources to deal with the "right to be forgotten". Similarly, the ruling asserts that the "right to be forgotten" may be limited "according to the role played by the data subject in public life"<sup>32</sup>, but again this boundary between a public and private figure is difficult to ascertain.

The difficulties associated with the implementation of the "right to be forgotten" have also been highlighted, from dealing with the avalanche of potential requests to determining a coherent stance with rest of the world on the "right to be forgotten". With the Court's decision, the role of search engines has been substantially redefined to become adjudicators of fundamental rights. Google has ceased to be a mere "intermediary" immune from data protection obligations, and instead has to play an active role in ensuring that individuals can have some control over their digital identity. Although search engines will act under the supervision of national data protection authorities, in practice the company usually has the last say about whether the information should be de-linked to a person's name or not, without public accountability or scrutiny. Evaluating the rights of privacy and freedom of information is no easy task by any standards and requiring a for-profit company to undertake the evaluation of legal and ethical values is in many ways problematic. A private corporation operates under a different cost-cutting logic which might endanger fundamental rights assessment, exacerbated by the fact that the ruling failed to provide clear guidelines about how to balance these rights.

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<sup>29</sup> The House of Lords, European Committee, *EU Data Protection law: a 'right to be forgotten'?* London: Authority of the House of Lords, 2014. Available <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldecom/40/4002.htm>.

<sup>30</sup> See "On being forgotten", *The Economist*, 17 May 2014, <http://www.economist.com/news/leaders/21602219-right-be-forgotten-sounds-attractive-it-creates-more-problems-it-solves-being>.

<sup>31</sup> Brendan O'Neill, "There's a whiff of Orwell's Ministry of Truth to the EU-backed 'right to be forgotten'", *The Telegraph*, 14 May 2014, available <http://blogs.telegraph.co.uk/news/brendanoneill2/100271366/theres-a-whiff-of-orwells-ministry-of-truth-to-the-eu-backed-right-to-be-forgotten/>.

<sup>32</sup> Case C-131/12, paragraph 81.

Some of the first delisting cases illustrate these difficulties; for example, Google removed an article published by The Guardian about a now-retired football referee who had been accused of lying about why he granted a penalty kick. The newspaper complained and the link was reinstated. Peter Barron, Google's European communications director, admitted that the company has been forced to make "complicated decisions that would in the past have been extensively examined in the courts" and "are now being made by scores of lawyers and paralegal assistants"<sup>33</sup>. The de-listing process has placed Internet companies under increased pressure, and although smaller search engines have not experienced the same influx of requests, it remains to be seen how these operators without Google's legal resources would cope.

With no specific mention of whether the ruling should be applied globally, there has been vigorous debate about whether Google should remove links from search engines everywhere in the world and not just in Europe. Does the directive require links be removed from Google.com as well as from google.fr and google.cz? Europe is increasingly calling for global de-listing and for a worldwide homogenization of data protection regulation<sup>34</sup>. A decision made by a French court shows the entrenchment of the "right to be forgotten" in national courts. It ruled in September 2014 that Google's subsidiary in France was to pay a €1,000 fine per day for only removing links to defamatory articles on google.fr, instead of on a worldwide basis. But this stance is not universally accepted, especially not by the United States which has come out strongly against the exporting of European data protection standards. Google's Advisory Council, in its recent report on the "right to be forgotten", unsurprisingly supported limiting the scope for the "right to be forgotten" to the European Union:

Google has told us that over 95% of all queries originating in Europe are on local versions of the search engine. Given this background, we believe that delistings applied to the European versions of search will, as a general rule, protect the rights of the data subject adequately in the current state of affairs and technology<sup>35</sup>.

The failure of the European Union to define the right in more precise terms, therefore, has led to a "dramatic clash" between American and European ideals of the right to privacy and put into a motion a fragmentation of Internet standards worldwide (Rosen 2012).

Europe's stance on data protection is clearly rooted in its own twentieth-century history. With too many examples in the twentieth century of the potential catastrophe of widely circulating private information, pro-privacy attitudes on data protection have been favoured in Europe since the fall of the Berlin Wall. As Viktor Mayer-Schönberger explains (2009), totalitarian regimes on both the left and the right used surveillance and control of information as

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<sup>33</sup> Quoted in Julia Powles, "Google says it acknowledges some people want "right to be forgotten"", The Guardian, 19 February 2015, available <http://www.theguardian.com/technology/2015/feb/19/google-acknowledges-some-people-want-right-to-be-forgotten>.

<sup>34</sup> Article 29 Data Protection Working Party, an independent European advisory body, recommended in November 2014 that Google must remove links globally and not just on local European domains for the data subject's right to be fully effective. See 14/EN. Working Paper 225. Available [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf).

<sup>35</sup> Advisory Council to Google, *Report of the Advisory Council to Google on the Right to be Forgotten*, 6 February 2015, available <https://drive.google.com/file/d/0B1UgZshetMd4cEI3SjlvV0hNbDA/view>.

a central weapon in the consolidation of the regime. Knowledge over the individual equalled power in Hitler's Nazi Germany or in East Germany and extensive databases on all kinds of private information was collected for these regimes to exercise control and manipulation. In the 1930s, the Dutch government, democratic in nature, collected a population registry aimed at improving the welfare of citizens. This same registry was later used when the Nazis invaded the Netherlands to locate the country's Roma population and Jews. The potentially destructive nature of information, therefore, especially once it falls in the hands of a power hungry government, partly explains the desire of many Europeans to limit open access to private facts.

On the opposite side of the fence lie those who believe that the "right to be forgotten" will challenge in a positive way Internet's selective memory. Advocates for greater privacy point to the fact that the web creates information imbalances, certain facts relating to an individual's life are magnified whilst others completely neglected. One's single greatest achievement or moment of fame might be captured on the web, such as sporting achievement, a brush with a celebrity or the reception of an award, but equally one's greatest mistake may be the central component of our digital identity as viewed under Google. This external memory can cloud the judgement of friends, strangers or future employers and impose a one-sided version of the events through limited contextualisation. Without the "right to be forgotten", these mistakes are immortalised on the search engine and before the CJEU ruling, there was little opportunity for rectification of lawfully published information. It could therefore be argued that Google is rewriting our personal history, a sort of official digital history, which without the "right to be forgotten", we are powerless to modify.

Many different groups and NGOs who can make use of the new law have welcomed the decision by the CJEU, for example asylum seekers who do not wish their whereabouts to be common knowledge, those with spent convictions not needed to be disclosed publicly by law or victims of domestic abuse who do not want their name to be forever associated with violence they have suffered. Teenagers have also been highlighted as a potential group that will benefit from greater control over their digital identity since careless comments, videos or photos during adolescent years could have a potentially devastating effect on future education or employment opportunities<sup>36</sup>.

Another potential benefit of the "right to be forgotten" is its role in cementing private corporations responsibility for adherence to fundamental rights (Frantziou 2014). It signals a shift in the relationship between private entities and human rights, and sets the framework for a greater degree of liability for multi-nationals. Up until this point, Google and other search engines have treated personal names just as it would treat any other types of data, be it figures or graphs, without considering the individual ramifications of such processing. But although aligning corporate responsibility with adherence to fundamental rights is an important step forward, further steps need to be taken to clarify the exact responsibilities of both data subjects and websites owners.

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<sup>36</sup> European Commission, "Press Release: The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age". 22 January 2012. Available [http://europa.eu/rapid/press-release\\_SPEECH-12-26\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-12-26_en.htm).



## 6. Concluding remarks

Far from having his name buried in the past, Mr. Costeja González' name will forever be connected with the "right to be forgotten". The complaint filed by the Spanish citizen has brought to the fore an age-long controversy which moves beyond political lines and fundamentally questions how our societies view two interconnected, but often conflicting freedoms, the right to privacy versus the right to information. Internet is redefining boundaries between individual freedoms at a faster pace than national and European legislation can follow, and the CJEU ruling demonstrates Europe's effort to reconcile technology, private enterprise and fundamental rights. At this time, the balance in Europe has been tipped towards the right to privacy and data protection with regards to delisting, and this preference is likely to be further consolidated in the new Data Protection Regulation, likely to be approved in late 2015.

The CJEU's ruling in favour of the "right to be forgotten" is by no means perfect. It has left many questions unresolved such as where the boundary between these two rights should be situated, the extent of the European Commission's power to implement European rules and regulations to a worldwide web and how a private corporation can or should best achieve the balancing of fundamental rights. Ambiguity may be an effort to accommodate new technologies in the future<sup>37</sup>, but in the meantime it is creating a series of practical difficulties for users and search engine companies alike. But despite its many shortcomings, the case has a positive effect in unleashing a debate regarding the relationship of individuals with their digital identity, involving not only academics and legal specialists, but a much wider audience of NGOs, media outlets and ordinary citizens who have made use of their "right to be forgotten". The ruling has not been confined to the legal arena but has penetrated civil society as shown by the growth of de-listing requests and the widespread media debate concerning the issue, which in itself should be seen as a positive outcome for the shaping of future data protection regulation and standards which affect all European citizens.

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<sup>37</sup> Viviane Reding, the European Vice-Commissioner for Justice, Fundamental Rights and Citizenship, recognized the need to make the new Data Protection Regulation flexible precisely for this reason. See Jeffrey Rosen, "Symposium Issue: The 'right to be forgotten'", *Stanford Online Review*, vol. 64, no. 88, p. 92.

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